Western Division Housing Court
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Volume 21

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(*and certain older decisions*)

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ABOUT
This is an unofficial reporter for decisions issued by the Western Division Housing Court. The editors collect the decisions on an ongoing basis for publication in sequentially numbered volumes. Currently, this unofficial reporter is known as the "Western Division Housing Court Reporter." Inasmuch as the reader's audience is familiar with this unofficial reporter, the reader is invited to cite from these decisions by using the abbreviated reporter name "W.Div.H.Ct."

WHO WE ARE
This is a collaborative effort by and among several individuals representative of the Court, the local landlord bar, the local tenant bar, and government practice:

Hon. Jonathan Kane, First Justice, *Western Division Housing Court*
Hon. Robert Fields, Associate Justice, *Western Division Housing Court*
Hon. Michael Doherty, Clerk Magistrate, *Western Division Housing Court*
Aaron Dulles, Assistant Attorney General, *Massachusetts Attorney General's Office*
Raquel Manzanares, Esq., *Community Legal Aid*
Peter Vickery, Esq., *Bobrowski & Vickery, LLC*

Attorneys Dulles, Manzanares, and Vickery serve as co-editors for coordination and execution of this project.

OUR PROCESS
The Court sets aside copies of all its written decisions. Periodically, the editors collect and scan these decisions, employing commercial-grade "optical character recognition" software to create text-searchable PDF versions. On occasion, the editors also receive decisions directly from advocates to help ensure completeness. When sufficient material has been gathered to warrant publication, the editors compile the decisions, review the draft compilation with the Court for approval, and publish the new volume. Within each volume decisions are sorted chronologically. The primary index is chronological, and the secondary index is by judge. As of Volume 12, the stamped page numbers correspond to the PDF page numbers. The editors publish the volumes online and via an e-mail listserv. The Social Law Library receives a copy of each volume. Volumes are serially numbered and generally correspond to a stated time period. But, for several reasons, some volumes also include older decisions that had not been previously available.

EDITORIAL STANDARDS
In General. By default, decisions are *included* unless specific exclusion criteria are met. Exclusion criteria are intentionally limited, and the editors have designed them to minimize any suggestion of bias for or against any particular litigant, type of litigant, attorney, firm, type of case, judge, witness, *etc*. In certain circumstances, redactions may be used in lieu of exclusions.

Exclusion by the Court. The Court intends to provide the editors with all of its decisions except those from impounded cases and those involving highly sensitive issues relating to minors—the latter being a determination made by the Court in its sole discretion. The Court does not provide decisions issued by the Clerk Magistrate or any Assistant Clerk-Magistrate. Additionally, the Court does not ordinarily provide decisions issued as endorsements onto the face of motion papers. The Court retains inherent authority to withhold other decisions without notice.

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The exclusion criteria and the review criteria will undoubtedly grow, change, and evolve over time. The prefatory text of each volume will reflect the most recent version of the criteria.

Final Review. Prior to publication of any given volume, the editors will submit the draft volume to the Court for a final review to ensure that it meets the editorial standards.

PUBLICATION

Volumes are published in PDF format at www.masshousingcourtreports.org. We also have a listserv for those who wish to receive new volumes by e-mail when they are released. Those wishing to sign up for the listserv should e-mail Aaron Dulles (dulles@jd11.law.harvard.edu).

Starting with Volume 12, an additional **high quality version** of each volume is also posted on our website. These are not released via email because their file sizes are typically too large. High quality versions are marked as such on their title page (near the bottom left) and have their own digital signatures.

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The editors use GPG technology to protect against altered copies of the PDF volumes. Alongside each volume is another file with Aaron Dulles's digital signature of authentication. Readers may authenticate each volume using freely available GPG software. In addition to the PDF volume and its accompanying signature file, the reader will need Aaron Dulles's "public key," which can be found by searching his name on keyserver.pgp.com. The key is associated with the e-mail address dulles@jd11.law.harvard.edu, and it has the following "fingerprint" identifier:

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0C7A FBA2 099C 5300 3A25  9754 89A1 4D6A 4C45 AE3D
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CONTACT US

Comments, questions, and concerns may be raised to any person involved in this project. However, out of respect for the Court's time, please direct such communications at the first instance to either Aaron Dulles (dulles@jd11.law.harvard.edu), Raquel Manzanares (rmanzanares@cla-ma.org), or Peter Vickery (peter@petervickery.com).

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[1] The docket number shown in this decision has been confirmed as a typo.
[2] The date shown in this decision has been confirmed as a typo.
[3] The date shown in this decision has been confirmed as a typo.

SECONDARY INDEX — BY JUDGE

Hon. Jonathan Kane, First Justice

Hon. Robert Fields, Associate Justice

[4] The date shown in this decision has been confirmed as a typo.
[5] The date shown in this decision has been confirmed as a typo.

Hon. Jeffrey Winik, Associate Justice (Recall)

[6] The docket number shown in this decision has been confirmed as a typo.

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. 19H79SP004544 (Unit 10A)
NO. 19H79SP004537 (Unit 12A)

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF AMERIQUEST MORTGAGE SECURITIES INC., ASSET-BACKED PASS-THROUGH CERTIFICATES SERIES 2005-R1,

Plaintiff

VS.

THOMAS T. SUCHODOLSKI and BEATA W. SUCHODOLSKI,

Defendants

Memorandum of Decision on Plaintiff's Motion for Summary Judgment

Defendants Thomas T. Suchodolski And Beata W. Suchodolski are the former owners of the multi-unit residential property at 10-12 Pleasant Street, Ware, Massachusetts (collectively, the "property"). At issue in these summary process actions are plaintiff's claims for possession of two residential units at the property, Units 10A and 12A. The defendants are in possession of each unit.

On March 20, 2019 plaintiff Deutsche Bank National Trust Company, As Trustee of Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates Series 2005-R1 (hereinafter "Deutsche Bank") acquired title to the property (including Units 10A and 12A) as the high bidder at the February 21, 2019 foreclosure sale.

In August 2019 Deutsche Bank commenced these two summary process actions against the defendants seeking to recover possession of Units 10A and 12A. The complaints include an account annexed seeking damages for the fair rental value of the defendants' continued use of the units.

The defendants filed an amended answer to Deutsche Bank's complaint in each case that included affirmative defenses and two (2) counterclaims.

This matter came before the court on January 20, 2021 for hearing on Deutsche

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Bank's motion for summary judgment. The parties filed memoranda, affidavits and supporting documents.[1]

After reviewing the evidence set forth in the summary judgment record and considering the arguments of counsel, the court concludes as a matter of law based on the competent evidence and undisputed facts set forth in the summary judgment record that Deutsche Bank's motion for summary judgment shall be **ALLOWED**.

Undisputed Facts

The facts necessary to resolve the legal issues raised by the parties that I conclude are not in dispute are based on facts set forth in the summary judgment and facts derived from entries that appear in the court docket of this proceeding.

The two units at issue in this summary process action (Units 10A and 12A) are located in a multi-unit building located at 10-12 Pleasant Street, Ware, Massachusetts (the "property").

In December 2004 the defendants obtained a loan from Ameriquest Mortgage Company ("Ameriquest") in the amount of $165,000.00. On December 28, 2004 the defendants executed a promissory note to Ameriquest in the amount of $165,000.00. The loan proceeds were applied by the defendants towards their purchase of the property. The promissory note was secured by a first mortgage on the property granted to Ameriquest. The first mortgage was dated December 28, 2004 and executed by the defendants.[2]

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[1] In an oral order issued on March 1, 2021, I allowed Deutsche Bank's motion to strike those portions of Thomas Suchodolski's affidavit, dated January 5, 2021, that include statements and/or opinions rendered by Jean Mitchell. In his affidavit Suchodolski identifies Mitchell as "a Document Examiner and Digital Evidence Handling Expert." Suchodolski states that he hired Mitchell to assist him in his July 15, 2019 examination of the mortgage promissory note in Deutsche Bank's possession. At pages 11-13, ¶ 10(a – i) of his affidavit Suchodolski includes statements, observations and opinions made by Mitchell to Suchodolski and set forth in a "report." Mitchell's statements, observations and opinions as set forth by Suchodolski in his affidavit were all offered for the truth of Mitchell's assertions. I ruled that statements attributable to Mitchell are hearsay, and do not fall within any exception to the hearsay rule.

In a written order issued on March 31, 2021, I denied the defendants' motion for reconsideration of my March 1, 2021 order and denied the defendants' request that they be allowed to file Michell's report/affidavit late. In its opposition to the reconsideration motion Deutsche Bank moved that portions of Suchodolski's March 31, 2021 affidavit (that was filed in support of defendants' reconsideration motion) and Mitchells purported report/affidavit (attached to the defendants' reconsideration motion as Exhibit A) be stricken from the record. I ruled that, "For purposes of preserving an accurate procedural record only, I shall not strike Exhibit A (the Mitchell affidavit) nor shall I strike Suchodolski's March 31, 2021 affidavit; however, in light my denial of the defendants' motion for reconsideration, the proffered affidavit of Jean Mitchell and Suchodolski's March 31, 2021 affidavit shall not be added to or made a part of the substantive factual summary judgment record."

[2] The first mortgage was recorded on December 31, 2004 at the Hampshire District Registry of Deeds (hereinafter the "Registry of Deeds") at Book 19718, Pg. 236.

The adjustable-rate promissory note, dated December 28, 2004, is signed and initialed by the defendants. The last page of the note has one stamped and signed blank endorsement on page 4 (4 of 4). The blank endorsement is signed without recourse by Ameriquest's president/CEO (Wayne Lee) and C.F.O (Karen Christensen). The maturity date set forth in the promissory note and mortgage is January 1, 2035.

It is apparent from the written assignments set forth in the summary judgment record that Ameriquest intended to assign the defendants' mortgage to plaintiff Deutsche Bank (meaning Plaintiff "*Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1*"). However, the first two assignments contained partially incorrect assignee designations. Eventually the defendants' mortgage was properly assigned to plaintiff Deutsche Bank. The written and recorded assignments follow this trial:

1. On January 15, 2009 Ameriquest (by and through its attorney-in fact, Citi Residential Lending, Inc.) executed an assignment of the defendants' mortgage to "Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1 under the pooling and servicing agreement dated February 1, 2005."[3] However, as part of the Deutsche Bank assignee designation the assignment added the phrase "*under the pooling and servicing agreement dated February 1, 2005.*"
2. On July 13, 2009 (in an attempt to correct or clarify the January 15, 2009 assignee designation) "Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1 *under the pooling and servicing agreement dated February 1, 2005*" executed an assignment of the defendants' mortgage to "Deutsche Bank National Trust Company, as Trustee in trust for the benefit of the Certificateholders for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1."[4] As part of

[3] The January 15, 2009 assignment was recorded at the Registry of Deeds on February 17, 2009 at Book 09706, Page 151.

[4] The July 13, 2009 assignment was recorded at the Registry of Deeds on July 17, 2009 at Book 09898, Page 29.

the Deutsche Bank assignee designation this assignment added the phrase "*in trust for the benefit of the Certificateholders.*"

3. On June 9, 2013 (to correct or clarify the July 13, 2009 assignment) "Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1 *under the pooling and servicing agreement dated February 1, 2005*" executed an assignment of the defendants' mortgage to "Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1."[5] This assignment correctly identifies plaintiff Deutsche Bank as the assignee of the defendants' mortgage as of June 9, 2013.
4. And on February 11, 2016 "Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1 *under the pooling and servicing agreement dated February 1, 2005*" executed a confirmatory assignment of the defendants' mortgage to "Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1."[6] The confirmatory assignment sets forth that "The purpose of this corrective assignment of mortgage is to correct the assignee on the assignment recorded on 07/17/2009 in Book 09898 at Page 29 as instrument number 2009 00017307." This is a reference to the July 13, 2009 assignment.

Accordingly, the registry records establish that as of July 13, 2009 (and continuously thereafter) the defendants' mortgage was held by Plaintiff Deutsche Bank (meaning "*Deutsche Bank National Trust Company, as Trustee for Ameriquest Mortgage Securities Inc, Asset-Backed Pass-Through Certificates Series 2005-R1*").

The defendants fell behind on their mortgage loan payment obligations (principal, interest and monthly escrow payments) beginning in December 2012.

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[5] The June 9, 2013 assignment was recorded at the Registry of Deeds on June 13, 2013 at Book 11422, Page 8.

[6] The February 11, 2016 confirmatory assignment was recorded at the Registry of Deeds on February 18, 2016 at Book 12201, page 35.

Ocwen Loan Servicing, LLC ("Ocwen"), acting on behalf of Deutsche Bank, sent the defendants (by USPS certified mail) a *150 Day Right to Cure Your Mortgage Default* notice, dated February 24, 2014, setting forth that they were in default on their mortgage loan payment obligations and that she had a right to cure pursuant to G.L c. 244, § 35A.[7] The 90-Day Notice includes the "right to cure default" information required by G.L. c. 244, § 35A, and follows the template format set forth in the implementing regulations, 209 CMR §§ 56.03 and 56.04. The notice package included a one page "disclosure" that included the "right to bring a court action" notification required by ¶ 22 of the mortgage. Read together, the right to cure notice and the one-page disclosure strictly complied with the notice requirements of ¶ 22 of the mortgage. See, *Thompson v. JPMorgan Chase Bank, N.A.*, 486 Mass. 286 (2020).

The defendants did not cure their mortgage loan default prior to the February 21, 2019 foreclosure sale.

On April 14, 2016 Ocwen, acting on behalf of Deutsche Bank, executed an Affidavit Regarding Compliance with M.G.L. c. 244, sec. 35B (the affidavit certified that Section 35B did not apply to the defendants' mortgage).

On April 14, 2016, Ocwen, acting on behalf of Deutsche Bank, executed an Affidavit Regarding Note Secured by Foreclosed Mortgage in accordance with M.G.L. c. 244, sec. 35C, which certified the Deutsche Bank was the mortgagee and holder of the defendants' promissory note.[8]

On January 19, 2019 the defendants received by mail a G.L. c. 244, § 14 compliant Notice of Intention to Foreclose and of Deficiency After Foreclosure of Mortgage. The notice is dated January 18, 2019 and was prepared by Orlans PC, acting as Deutsche Bank's legal counsel. The notice stated that a public auction to sell the mortgaged property would take place at 10-12 Pleasant Street, Ware, Massachusetts on February 21, 2019 at 3:00 p.m. The notice was mailed to the defendants (and received by them) more than 30 days prior

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[7] Ocwen purchased Homeward Residential, which was the successor to American Home Mortgage Servicing, Inc ("AHMSI"). AHMSI had been the loan servicer of the defendants' mortgage loan. On June 1, 2019 PHH Mortgage Corporation ("PHH") became the successor by merger to Ocwen. PHH is a direct subsidiary of Ocwen Financial Corporation ("OFC"). As a result of the merger all of Ocwen's business records were incorporated into, merged with and maintained as part of PHH's business records, including the loan file for the defendants' mortgage loan. See Affidavit of Anel Hernandez, Sr. Loan Analyst for OFC, dated November 25, 2020.

[8] The 35B and 35C affidavits were recorded at the Registry of Deeds on April 21, 2016 at Book 12250, Page 166.

to the scheduled foreclosure sale.

Further, Deutsche Bank, through its legal counsel, had published in the Ware River News, a newspaper of general circulation in Ware, on three successive weeks (January 31, February 7 and 14, 2019) a G.L. c. 244, § 14 compliant notice that stated that the foreclosure sale would take place at the property on February 21, 2019, at 3 p.m. The first publication date was more than 21 days prior to the scheduled foreclosure sale.

On March 20, 2019 Samantha Court, Esq., Orlans PC, acting on behalf of Deutsche Bank, executed a G.L. c. 244, § 15 compliant Affidavit of Sale. As is set forth in the Affidavit of Sale, on February 21, 2019 at 1 p.m., a licensed auctioneer conducted a public foreclosure auction at the property. Deutsche Bank was the high bidder at the foreclosure auction (bidding $210,000.00). On March 20, 2019 Deutsche Bank executed and delivered a foreclosure deed that conveyed title to the property to Deutsche Bank for consideration paid of $210,000.00. The Foreclosure Deed and Affidavit of Sale were signed on behalf of Deutsche Bank by Samantha Court, Esq., Orlans PC, as attorney-in-fact, acting under a Power of Attorney executed on March 5, 2019 by Ocwen Loan Servicing LLC as attorney-fact for Deutsche Bank.[9]

On February 21, 2019, a Certificate of Entry was executed by two witnesses in the presence of a notary. The witnesses certified that on February 21, 2019 an agent of Orlan PC ("duly authorized by Deutsche Bank") made an open, peaceable and unopposed entry on the property.[10]

On March 10, 2019 Ocwen, acting on behalf of Deutsche Bank, executed an *Affidavit of Compliance with Mortgage Notice Provisions and Conditions Precedent to Acceleration and Sale* ("Pinti Affidavit"). The affidavit states that the notice of default was sent to the defendants on or before July 17, 2015.[11]

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[9] The Foreclosure Deed and Affidavit of Sale was recorded at the Registry of Deeds on March 21, 2019 at Book 13221, Page 43-44., and recorded at the Registry of Deeds on March 21, 2019 at Book 13221, Page 29.

Ocwen's authority to act as attorney-in-fact for Deutsche Bank flows from a Limited Power of Attorney executed by Deutsche Bank on December 11, 2018 and recorded at the Registry of Deeds (with the Foreclosure Deed and Affidavit of Sale) on March 21, 2019, at Book 13221, Page 30.

[10] The Certificate of Entry was recorded at the Registry of Deeds on March 21, 2019 at Book 13221, Page 41. I do not in this summary judgment decision address or decide the question of whether Deutsche Bank made entry in compliance with the statutory requirements set forth in G.L. c. 244, § 1.

[11] The affidavit was recorded at the Registry of Deeds on March 21, 2019 at Book 13221, Page 47.

On March 11, 2019 Ocwen, acting on behalf of Deutsche Bank, executed an *Affidavit Regarding Note Secured by Mortgage Being Foreclosed.* The affidavit affirms that with respect to the defendants' mortgage loan and first mortgage as of the date the notice of sale was mailed and published Deutsche Bank was "the holder of the promissory note secured by the above mortgage."[12]

The defendants have remained in possession of Unit 10A and 12A since the February 21, 2019 foreclosure sale. The defendants never entered into a tenancy with Deutsche Bank (or any other person) and have never paid Deutsche Bank any amount for their continued use and occupancy of the two units. The defendants remain in possession of the two units at the sufferance of Deutsche Bank.

The undisputed evidence in the summary judgment record (based on the information set forth in the defendants' interrogatory responses, November 25, 2020 Affidavit of Anel Hernandez, and Plaintiff Exhibits N and O is that the (1) Unit 10A and 12A each contain five rooms (including one bedroom and one bathroom), and (2) the fair rental value of each unit (based on HUD fair market rents set for Ware, Massachusetts is $831.00 per month.[13] Measured from March 20, 2019 (the date the Foreclosure Deed was executed) through March 31, 2021 (the date of the last summary judgment hearing) (1) the total rent due and unpaid for the defendants' continued use and occupancy of Unit 10A is $20,238.87, and (2) the total rent due and unpaid for the defendants' continued use and occupancy of Unit 12A is $20,238.87.[14]

On July 24, 2019 Deutsche Bank served the defendants with 72-hour notices to vacate Units 10A and 12A. In case No. 19H79SP004537 a separate notice was served to each defendant by a constable by leaving a copy at 10-12 Pleasant Street, Unit 10A, Ware, Massachusetts and mailing a copy by first class mail to the defendants at the same address. In case No. 19H79SP004544 a separate notice was served to each defendant by a constable by leaving a copy at 10-12 Pleasant Street, Unit 12A, Ware, Massachusetts and mailing a copy by first class mail to the defendants at the same address.

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[12] The affidavit was recorded at the Registry of Deeds on March 21, 2019 at Book 13221, Page 46.

[13] The defendants did not submit any evidence or affidavit testimony pertaining to the fair rental value of Units 10A or 12A.

[14] The total occupancy period through March 2021 is 24 months, 11 days.

On August 8, 2019 Deutsche Bank commenced two summary process actions (one for each unit) against the defendants in the East Hampshire Division of the District Court. A constable served the complaints upon each defendant by leaving a copy of the complaint for each defendant at 10-12 Pleasant Street, Unit 10A, Ware, Massachusetts and at 10-12 Pleasant Street, Unit 12A, Ware, Massachusetts, and mailing a copy by first class mail to each defendant at the same address.

On October 28, 2019 the defendants transferred both summary process cases to the Western Division of the Housing Court.

Discussion

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague and general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) ("[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment").

To prevail in a summary process action involving foreclosed property (where the validity of the foreclosure is challenged) the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. To prove this element of its claim for possession the post-foreclosure plaintiff must show "that the title was acquired strictly according to the power of sale

provided in the mortgage." *Wayne Inv. Corp. v. Abbott*, 350 Mass. 775, 775 (1966). See *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226 (2012); *Bank of New York v. Bailey, 460 Mass. 327* (2011).

Deutsche Bank argues that based on the undisputed evidence in the summary judgment record it has established that the February 21, 2019 foreclosure was valid, it acquired lawful title to the property on March 20, 2019, and that its rights to possession of the Unit 10A and Unit 12A are superior to any rights asserted by the defendants. Deutsche Bank further argues that it has established its claim for use and occupancy damages for the period March 20, 2019 to March 2021 in the amounts (1) $20,238.87 for Unit 10A, and (2) $20,238.87 for Unit 12A.

In their opposition to Deutsche Bank's motion for summary judgment the defendants allege that there exist disputed issues of fact as to whether Deutsche Bank acquired title to the property (including Units 10A and 12A) through foreclosure, and thus whether it has a superior right to possession of the property over the claim asserted by the defendants. The defendants challenge the sufficiency of Deutsche Bank's prima facie showing that it held the mortgage and note at the time it published notice of the foreclosure sale. Deutsche Banks evidence included affidavits identifying relevant business records of the lender, mortgagees and loan services, together with copies of documents recorded at the Registry of Deeds. They also challenge whether Deutsche Bank has made a sufficient showing that each assignment of the defendants' mortgage in the chain of assignments leading to Deutsche Bank were executed by the mortgage holder by person(s) authorized to act on behalf of the assigning mortgagee(s).

The defendants (in their answer and/or in their summary judgment statement of material facts and/or in their summary judgment affidavits) allege that the two summary process actions must be dismissed because (1) the notices to quit relied upon by Deutsche Bank were "void" because the foreclosure sale was invalid; (2) they did not receive the notices to quit; (3) they did not receive the summary process summonses/complaints; (4) the Housing Court does not have subject matter jurisdiction over Deutsche Bank's claim of superior title because all or a portion of the property is registered land governed by G.L. c. 185, § 1 (a1/2); and (5) the February 21, 2019 foreclosure sale was void *ab initio* because prior to the February 21, 2019 the defendants' mortgage was obsolete under the provisions

of G.L. c. 260, § 33 rendering the power of sale provisions unenforceable.[15]

I shall address each defense and argument raised by the defendants.

Whether Deutsche Bank Held the Defendants' Mortgage as the Mortgagee. The defendants allege that there exist disputed issues of fact regarding the validity of each mortgage assignment. The defendants challenge Deutsche Bank's right to rely on the signatures and representations set forth in the assignments and in the affidavit of sale. Their challenges are unavailing.

In *Strawbridge v. Bank of New York Mellon.*, 91 Mass. App. Ct. at p. 832 (2017), the Appeals Court held that the former owner was without standing to challenge an assignment where the purported defect would have rendered the assignment voidable, not void. See also, *Sullivan v. Kondaur Capital Corp.*, 85 Mass. App. Ct., 202, 205-206 (2014); *Culhane v. Aurora Loan Servs. of Neb.*, 708 F. 3d 282 (1st Cir. 2013).[16] Further, it is settled law that where "the record title holder of the mortgage satisfied the dictates of G.L. c. 183, § 54B, the homeowners have no basis for arguing that the assignment is void." *Bank of New York Mellon Corp. v. Wain*, 85 Mass. App. Ct. 498, 503 (2014).[17] "[W]here

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[15] The defendants have not raised these issues in their written opposition to summary judgment. However, I shall address them briefly since the defenses relate to the elements of Deutsche Bank's prima facie claim for possession.

[16] Under Massachusetts law, a "void" contract or agreement is one that is of no effect whatsoever; it is a mere nullity, and incapable of confirmation or ratification. *Allis v. Billings*, 47 Mass. 415, 417 (1843). A "voidable" contract or agreement is one that is "injurious to the rights of one party, which he may avoid at his election." *Ball v. Gilbert*, 53 Mass. 397, 404 (1847). If necessary, MERS had the power to exercise its option to ratify the action taken by its agent with respect to the assignment even if at the time of performance the agent's act was not in compliance with the corporate resolution. See, *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 637-643 (2007). Here, Rungu cannot argue that at the time of the assignment MERS in fact held the mortgage and that its interest in the mortgage was assignable.

[17] G.L. c. 183, § 54B. "Notwithstanding any law to the contrary, (1) a discharge of mortgage; (2) a release, partial release or assignment of mortgage; (3) an instrument of subordination, non-disturbance, recognition, or attornment by the holder of a mortgage; (4) any instrument for the purpose of foreclosing a mortgage and conveying the title resulting therefrom, including but not limited to notices, deeds, affidavits, certificates, votes, assignments of bids, confirmatory instruments and agreements of sale; or (5) a power of attorney given for that purpose or for the purpose of servicing a mortgage, and in either case, any instrument executed by the attorney-in-fact pursuant to such power, if executed before a notary public, justice of the peace or other officer entitled by law to acknowledge instruments, whether executed within or without the commonwealth, by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity, or acting under such power of attorney on behalf of such entity, acting in its own capacity or as a general partner or co-venturer of the entity holding such mortgage, shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording."

the foreclosing entity has established that it validly holds the mortgage, a mortgagor in default has no legally cognizable stake in whether there otherwise might be latent defects in the assignment process." Id.

The undisputed evidence in the summary judgment record establishes that Ameriquest was the original mortgagee and held the defendants' mortgage until it was assigned on February 11, 2009. The defendants have presented no evidence sufficient to raise a disputed issue of fact as to whether Citi Residential Lending Inc. was acting within its authority as attorney-in-fact for Ameriquest when it executed the first mortgage assignment to Deutsche Bank on February 11, 2009. While the assignee designation was imperfect (in a scrivener's sense) it is obvious that Ameriquest intended to assign the mortgage to Deutsche Bank. While the assignment may have been voidable at the election of Ameriquest (had Ameriquest not intended to assign the mortgage to Deutsche Bank) or Deutsche Bank (if it was not the intended assignee), it was not void. Similarly, the defendants have presented no evidence sufficient to raise a disputed issue of fact as to whether Linda Green was acting as an officer of Deutsche Bank when she executed the July 13, 2009 mortgage assignment to Deutsche Bank (that included a second scrivener's error). While the assignment may have been voidable (had Deutsche Bank not intended to clarify or correct the scrivener's error), it was not void. With respect to the third assignment dated June 9, 2013, the defendants have presented no evidence sufficient to raise a disputed issue of fact as to whether the signatory, Joel Pires, was acting as attorney-in-fact for Deutsche Bank. This assignment correctly identifies Deutsche Bank as the mortgagee. This assignment is neither void nor voidable. Finally, the defendants have presented no evidence sufficient to raise a disputed issue of fact as to whether Ocwen Loan Servicing, LLC was acting as attorney-in-fact for Deutsche Bank when it executed the February 11, 2016 "confirmatory" assignment confirming that Deutsche Bank was the assignee of the defendants' mortgage as of July 9, 2009.[18]

I rule that Deutsche Bank, in compliance with G.L. c.183, § 54B, provided undisputed evidence sufficient to establish that each of the four recorded mortgage assignments, referenced at pages 3 to 4, supra., was executed by an officer or authorized representative of the mortgagee at the time of the assignment (or by its attorney-in-fact),

[18] The February 11, 2016 confirmatory assignment references a May 1, 2015 power of attorney recorded in Book 11926, Page 287 as Instrument No. 2015 00007187.

before a notary public, and recorded at the registry of deeds. The defendants are without standing to challenge the validity of the assignments. Deutsche Bank may rely on the statements and notarized signatures set forth in the recorded assignments to establish the identity and authority of the signatory to act for the mortgagee/assignor. See *Haskins v. Deutsche Bank Natl. Trust Co.*, 86 Mass. App. Ct. 632, 642 ("[the mortgagor's] challenge to the validity of the signature on the mortgage assignment is precluded by the provisions of G.L. c. 183, § 54B"); see also *Wells Fargo Bank, N.A. v. Anderson*, 89 Mass. App. Ct. 369 (2016) (former mortgagor may not challenge the validity of an assignment that was purportedly "robo-signed').

Further, under G.L. c. 183, § 54B, and in the absence of specific evidence to the contrary (and a general denial is insufficient to constitute such specific evidence), a party may rely on the facts set forth in a G.L. c. 244, § 15 compliant affidavit of sale (executed and recorded for the purpose of confirming the steps taken to foreclose a mortgage and conveying title).

The defendants have not presented any credible or competent evidence to raise a disputed issue of fact as to the existence of any "off-record" assignments of the defendants' mortgage that would raise a question as to the validity of the recorded mortgages.

I find and rule that Deutsche Bank held the defendants' mortgage continuously from July 13, 2009 until the February 21, 2019 foreclosure sale.

Whether Deutsche Bank Held the Defendants' Note. The defendants do not deny that on December 28, 2004 they executed a promissory note to Ameriquest in the amount of $165,000.00, and that they received the proceeds of that loan. They do not deny that the promissory note was secured by a first mortgage on the property granted by them to Ameriquest. They do not deny that they defaulted on their payment obligations under the terms of the mortgage loan and mortgage. They do not deny that the promissory note Deutsche Bank provided in response to discovery and as part of their summary judgment filings is a copy of the promissory note they signed. In the course of the discovery phase of this case Deutsche Bank provided the defendants with copies of the December 28, 2004 promissory note. It is undisputed that Deutsche Bank also allowed the defendants to view what Deutsche Bank identified as the defendants' "wet-ink" note on July 15, 2019. See Affidavit of Thomas Suchodolski, page 12, dated January 5, 2021. While Suchodolski states at length the

problems he claims to have experienced when he appeared at counsel's office (with his purported expert) to view the note, he acknowledges that he viewed the note. Nowhere in his affidavit does he deny that the signatures on the note were his and his wife Beata Suchodolski.[19]

As best as I can understand, the defendants' only contention with respect to the note is that the evidence in the summary judgment record is insufficient to prove that Deutsche Bank held the original note the defendants' signed at the time of the foreclosure. The defendants have presented no evidence that someone other than Deutsche Bank held the defendants' original note at the time of foreclosure.

It is settled case law that ". . . a foreclosing mortgage holder . . . may establish that it either held the note or acted on behalf of the note holder at the time of the foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G.L. c. 183, § 54B." *Eaton v. Fannie Mae*, 462 Mass. 569. 589, n. 28 (2012); *Strawbridge v. Bank of N.Y. Mellon*, 991 Mass. App. Ct. 827, 830-831 (2017), appeal den'd. 478 Mass. 1105 (2017).

The summary judgment record includes a copy of the 2004 note endorsed in blank. The summary judgment record establishes that on April 14, 2016 Ocwen, acting on behalf of Deutsche Bank, executed an *Affidavit Regarding Note Secured by Foreclosed Mortgage in accordance with M.G.L. c. 244, sec. 35C*, which certified that Deutsche Bank was the mortgagee and holder of the defendants' promissory note. Further the record establishes that on March 11, 2019 Ocwen, acting on behalf of Deutsche Bank, executed an *Affidavit Regarding Note Secured by Mortgage Being Foreclosed.* The affidavit affirms that with respect to the defendants' mortgage loan that Deutsche Bank was "the holder of the promissory note secured by the above mortgage."

Contrary to the defendants' contention, Deutsche Bank was not required to attach supporting business records to these two affidavits. The affidavits included facts sufficient to constitute prima facie proof that Deutsche Bank held the defendants' promissory note at the time the notice of the foreclosure sale was published and at the time of the foreclosure sale. While the prima facie showing may be rebutted with competent evidence that raises

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[19] See Fn. 1, at page 2, supra, pertaining to my order dated March 31, 2021 in which I affirmed my March 1, 2021 striking certain hearsay statements set forth in Suchodolski's January 5, 2021 affidavit (and set forth in his March 31, 2021 affidavit) and denying the defendants' request to file late a "report/affidavit" prepared by Jean Mitchell, a purported document expert.

a disputed issue of fact as to one or more of the prima facie elements, the defendants have pointed to no such evidence in the summary judgment record.

Accordingly, in accordance with G.L. c. 183, § 54B, I rule that Deutsche Bank has met its burden of proof and has established as a matter of law that it held the defendants' promissory note at the time the notice of the foreclosure sale was published and at the time of the February 21, 2019 foreclosure sale.

Obsolete Mortgage Statute Defense. The defendants plead in Count II (declaratory judgment counterclaim) of their answer that the foreclosure sale occurred more than five years from the date in 2009 they state they were first notified by their mortgagee that they were in default and their promissory note was accelerated. For that reason the defendants contend that the first mortgage was rendered obsolete pursuant to G.L. c. 260, § 33, and the February 21, 2019 foreclosure sale was void ab initio. The defendants' argument is without merit.

The "obsolete mortgage" statute, G.L. c. 260, § 33 (as amended by St. 206, c. 63, § 6) states that "a power of sale in any mortgage . . . shall not be exercised . . . for foreclosure of any mortgage after the expiration of . . . 5 years from the expiration of the term or from the maturity date, unless an extension . . . is recorded before the expiration of such period."

The defendant's first mortgage has a stated expiration date (when the underlying mortgage loan debt must be paid in full) of January 1, 2035. Nonetheless, the defendants plead that the term or maturity date of their mortgage loan - as that term is used in G.L. c. 260, § 33 - was accelerated and became immediately due in 2009, when the mortgagee, by and through its loan servicer, sent the defendants a written notice that their first mortgage loan was in default.

The Supreme Judicial Court has stated with clarity that under G.L. c. 260, § 33 where the term or maturity date of the mortgage is stated (as is the case with the defendants' mortgage), "[t]he limitations period for stated term mortgages is five years after expiration of the term or maturity date . . ." *Deutsche Bank National Trust Company, Trustee v. Fitchburg Capital, LLC*, 471 Mass. 248, 252 (2015). That statutory date does not magically change whenever a mortgagor defaults on his loan obligations and the mortgagee exercises its rights under the statutory power of sale. See, *Harry v. Countrywide Home Loans, Inc.*, 902 F.3d. 16, 19, (1st. Cir. 2018) ("[T]here is no suggestion in either [G.L. c. 260, § 33] or . . . in [Fitchburg Capital, supra.] that the acceleration of a note has any impact on the

limitations period for a mortgagee's right to foreclose"). More recently, in *Nims v Bank of New York Mellon*, 97 Mass. App, Ct. 123 (2020), further appellate review denied, 485 Mass. 123 (2020), the appeals court stated that "[t]he statute is designed to create a definite point in time at which an old mortgage will be deemed discharged by operation of law; nothing suggests that the statute is designed to shorten the period during which a mortgage is enforceable. In this way, it serves to quiet title with respect to old mortgages, without shortening the period of enforceability of mortgages before their term or maturity date has been reached."[20]

The express stated term or maturity date set forth in the defendants' promissory note and mortgage was January 1, 2035. With respect to the defendants' mortgage, the five-year limitation period set forth in the "obsolete mortgage" statute would not begin to run until after that date.

Validity of 2019 Foreclosure. To properly exercise the power of sale to foreclose on a mortgage in accordance with G.L. c. 183, §21 and G.L. c 244, §11-17 the mortgage must either hold the mortgage note or be authorized to act as the authorized agent of the note holder. *Eaton v. Federal National Mortgage Association*, 462 Mass. 569, 589 (2012) (Fn. 28 states that the mortgagee "may establish [its note holder status] at the time of the foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G. L. c. 183, § 54B"). See also, *Strawbridge v. Bank of N.Y. Mellon*, 91 Mass. App. Ct. 827, 830-831 (2017). In response to *Eaton*, the legislature enacted G.L. c. 244, § 35C. Section 35C provides that "a creditor shall not cause publication of a notice of foreclosure, as required under Section 14, when the creditor knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder." Section 35C requires that "prior to publishing a notice of a foreclosure sale, as required by section 14, the . . . duly authorized agent of the creditor, shall certify compliance with this subsection in an affidavit based upon a review of the creditor's business records."

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[20] The appeals court in *Nims* concluded by stating, "[a]lthough we recognize that the Supreme Judicial Court, in Fitchburg Capital, 471 Mass. at 254, stated in dicta that 'a mortgage does not mature distinctly from the debts or obligations that it secures,' and that a mortgage 'does not generally have a binding effect that survives its underlying obligation,' that case did not involve the acceleration of a note; nor did it involve shortening the maturity date of the mortgage as the plaintiffs seek here. Moreover, the court relied on those principles only as part of its analysis leading to the conclusion that where a mortgage does not state its maturity date, but refers to the terms of the note it secures, then the maturity date of the note is to be considered the maturity date of the mortgage. Id. at 253-255. As noted above, we apply that holding here to conclude that the mortgage's maturity date is August 1, 2035, the same as for the note."

The Housing Court has subject matter jurisdiction to adjudicate the validity of a foreclosure sale in the context of an G.L. c. 239 eviction action where the former owner has challenged the validity of the foreclosure as a defense to the claim of possession (whether a post-foreclosure owner has a superior right to possession to the right asserted by the former owner). *Bank of N.Y. v. Bailey*, 460 Mass. 327, 332-334 (2011); *Bank of Am., N.A. v. Rosa*, 466 Mass. 613, 621 (2013); *Federal Nat'l Mtge. Ass'n v. Rego*, 474 Mass. 329, 338 (2016). To the extent that the property includes registered land, the provisions of G. L. c. 185, § 1 (a1/2) do not deprive the Housing Court of subject matter jurisdiction over the eviction action, and to adjudicate the validity of a foreclosure sale. The statute states that "[t]he land court department shall have exclusive original jurisdiction of the following matters . . . [c]omplaints affecting title to registered land . . ." In other words, the land court has exclusive jurisdiction over complaints seeking to quiet title to registered land. However, Deutsche Bank's complaints in these two summary process actions do not seek to quiet title to registered land. The complaints seek, pursuant to G.L. c 239, to recover possession of two residential units located on property (that includes registered land) owned by Deutsche Bank. The defendants' challenge to the validity of the foreclosure sale is asserted as a defense/counterclaim to the Deutsche Bank's claim for possession. The defendants' defense/counterclaim does not seek to quiet title to the property; it simply seeks to defeat Deutsche Bank's claim for possession. The fact that the property includes registered land does not deprive Housing Court of subject matter jurisdiction under G.L. c. 239 to determine who has the superior right to possession of the property.[21]

I rule that the right to cure/default notice sent to the defendants complied strictly with the mortgage. It also complied with the provisions of G.L. c. 244, § 35A. The defendants have presented no competent evidence to challenge the legal sufficiency of the right to cure/default notice under the terms of mortgage and the statutory power of sale.

I rule that on January 19, 2019 Deutsche Bank, through its legal counsel, prepared and sent a written Notice of Intention to Foreclose and of Deficiency After Foreclosure

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[21] Had the defendants chosen to bring an affirmative action seeking to quiet title to the property (based upon a challenge to the validity of the foreclosure) the Land Court would have exclusive jurisdiction over that claim to the extent that the property includes registered land. However, the defendants have chosen to assert their challenge to the validity of the foreclosure as a defense/declaratory judgment claim in the context of a G.L. c. 239 summary process action.

of Mortgage that complied strictly with the provisions of G.L. c. 244, § 14. The Notice of Sale was addressed to the defendants and mailed by certified mail at least 30 days prior to the scheduled date of the foreclosure sale. The defendants has presented no evidence sufficient to raise a disputed issue of fact as to the legal sufficiency of the notice of sale.

From the date the notice of intent to sell was sent to the defendants (January 19, 2019) and continuing to the date of the foreclosure sale on February 21, 2019 the evidence in the summary judgment record establishes that Deutsche Bank was the holder of the defendants' promissory note and mortgage.

In a summary process action, the introduction in evidence of certified copies of the foreclosure deed and the affidavit of sale (in statutory form or that meets the particular requirements of G.L. c. 244, § 15) are sufficient to establish the plaintiff's ownership of the property based upon a prima facie showing that the foreclosure sale was valid. *Federal National Mortgage Association v. Hendricks*, 463 Mass. 635, 642 (2012), citing to *Bank of N.Y. v. Bailey*, 460 Mass. 327, 334 (2011) and *Deutsche Bank Nat'l Trust Co. v. Gabriel*, 81 Mass. App. Ct. 564, 568-570 (2012). "If a plaintiff makes a prima facie case, it is incumbent on a defendant to counter with his own affidavit or acceptable alternative demonstrating at least the existence of a genuine issue of material fact to avoid summary judgment." *Hendricks*, at 642.

The defendants have not pointed to any evidence in the summary judgment record sufficient to raise a genuine disputed issue of material fact regarding Deutsche Bank's prima facie showing that it complied with the statutory power of sale and the terms of the mortgage when it conducted the February 21, 2019 foreclosure sale of the property.

Based upon the undisputed facts set forth in the summary judgment record I rule as a matter of law that (1) the defendants' were in default on their mortgage loan obligations continuously since December 2012; (2) at the time of the foreclosure sale Deutsche Bank was the mortgagee of the defendants' mortgage and held the defendants' promissory note; (3) on February 21, 2019 Deutsche Bank foreclosed on the defendants' interest in the property in strict compliance with the provisions of G.L. c. 244, §§ 11-15. See *Bank of New York v. Bailey, 460 Mass. 327* (2011); *Eaton v. Federal National Mortgage* Association, supra.; Federal *National Mortgage Association v. Hendricks*, supra. and *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass, 226 (2015); (4) Deutsche Bank was the high bidder at the February 21, 2019 foreclosure sale; (5) the February 21, 2019 foreclosure sale

extinguished the defendants' equity of redemption and thus extinguished their legal and equitable interest in the property; (6) the Affidavit of Sale executed on March 20, 2019 complies with the provisions of G.L. c. 244, § 15.[22] See, *Federal National Mortgage Association v. Hendricks*, supra.; (7) on March 20, 2019 Deutsche Bank conveyed the property to Deutsche Bank by means of a foreclosure deed; and (8) Deutsche Bank has been a lawful owner of property continuously since March 20, 2019.

Deutsche Bank's Claim for Possession. Based upon the undisputed facts set forth in the summary judgment record I rule as a matter of law that (1) the defendants never entered into a residential tenancy with Deutsche Bank (or any other person with an interest in the property) with respect to any units at the property before or after Deutsche Bank acquired title to the. property on March 20, 2019; and (2) defendants have remained in possession of Units 10A and 12A as sufferance occupants.

I further find and rule that on July 24, 2019 Deutsche Bank served each defendant with legally sufficient 72-hour notices to vacate Unit 10A and Unit 10B. In case No. 19H79SP004537 a separate notice was served to each defendant by a constable by leaving a copy at 10-12 Pleasant Street, Unit 10A, Ware, Massachusetts and mailing a copy by first class mail to the defendants at the same address. In case No. 19H79SP004544 a separate notice was served to each defendant by a constable by leaving a copy at 10-12 Pleasant Street, Unit 12A, Ware, Massachusetts and mailing a copy by first class mail to the defendants at the same address. The fact that the defendants denied that they received the notices, standing alone, is insufficient to raise a disputed issue of fact in light of the prima facie effect of the constable's returns of service. See c. 41, § 94.

On August 8, 2019 Deutsche Bank commenced two summary process actions (one for each unit) against the defendants in the East Hampshire Division of the District Court. A constable served the complaints upon each defendant by leaving a copy of the complaint for each defendant at 10-12 Pleasant Street, Unit 10A, Ware, Massachusetts and at 10-

[22] On March 20, 2019 Samantha Court, Esq., Orlans PC, acting on behalf of Deutsche Bank, executed a G.L. c. 244, § 15 compliant Affidavit of Sale. As is set forth in the Affidavit of Sale, on February 21, 2019 at 1 p.m., a licensed auctioneer conducted a public foreclosure auction at the property. Deutsche Bank was the high bidder at the foreclosure auction (bidding $210,000.00). On March 20, 2019 Deutsche Bank executed and delivered a foreclosure deed that conveyed title to the property to Deutsche Bank for consideration paid of $210,000.00. The Foreclosure Deed and Affidavit of Sale were signed on behalf of Deutsche Bank by Samantha Court, Esq., Orlans PC, as attorney-in-fact, acting under a Power of Attorney executed on March 5, 2019 by Ocwen Loan Servicing LLC as attorney-fact for Deutsche Bank

12 Pleasant Street, Unit 12A, Ware, Massachusetts, and mailing a copy by first class mail to each defendant at the same address. The complaints were served "at the address indicated on the Summary Process Summons and Complaint" in compliance with Rule 2(b) of the Uniform Rules of Summary Process. The fact that the defendants denied that they received the summons and complaints, standing alone, is insufficient to raise a disputed issue of fact in light of the prima facie effect of the constable's returns of service. See c. 41, § 94. [23]

The defendants have failed to vacate and surrender possession of Unit 10A and Unit 12A as of the date of the last summary judgment hearing,

I find and rule that Deutsche Bank's right to possession of Unit 10A and Unit 12 is superior to any possessory interest that defendants currently have as sufferance occupants of the two units.

Accordingly, I rule as a matter of law that Deutsche Bank is entitled to recover possession of Unit 10A and Unit 12A from the defendants. Summary judgment shall enter in favor of Deutsche Bank on its claim for possession against the defendants in case No. 19H79SP004537 (Unit 10A) and in case No. 19H79SP004544 (Unit 12A).

Deutsche Bank's Claim for Use and Occupancy Damages. A sufferance occupant is liable to pay rent for such time as he remains in possession of the property. G.L. c. 186, § 3.

The defendants have remained in possession of Unit 10A and 10B continuously since March 20, 2019 at the sufferance of Deutsche Bank, the lawful owner of the property. The defendants have never paid Deutsche Bank any rent for their continued use and occupancy of the property from March 20, 2019 to March 31, 2021.

The undisputed evidence in the summary judgment record establishes that (1) Unit 10A and Unit 12A each contain five rooms (including one bedroom and one bathroom), and (2) the fair rental value of each unit (based on HUD fair market rents set for Ware, Massachusetts is $831.00 per month. Measured from March 20, 2019 (the date the Foreclosure Deed was executed) through March 31, 2021 (the date of the last summary judgment hearing), (1) the total rent due and unpaid for the defendants' continued use and

[23] On October 28, 2019 the defendants transferred both summary process cases to the Western Division of the Housing Court.

occupancy of Unit 10A is $20,238.87, and (2) the total rent due and unpaid for the defendants' continued use and occupancy of Unit 12A is $20,238.87.

Accordingly, I rule as a matter of law that (1) in case No. 19H79SP004537 (Unit 12A) Deutsche Bank is entitled to recover use and occupancy damages from the defendants in the amount of $20,238.87, and (2) in case No. 19H79SP004544 (Unit 10A) Deutsche Bank is entitled to recover use and occupancy damages from the defendants in the amount of $20,238.87.

Defendants' Counterclaims. Since I have ruled as a matter of law that the February 21, 2019 foreclosure sale was valid and that Deutsche Bank holds title to the property, summary judgment shall enter in favor of Deutsche Bank dismissing with prejudice the defendants' counterclaims.

ORDER FOR ENTRY OF JUDGMENT CONSISTENT WITH HOUSING COURT DEPARTMENT STANDING ORDER 5-20

Based upon all the credible evidence submitted as part of the summary judgment record in light of the governing law, it is **ORDERED** that:

1. **No. 19H79SP004537**:
    - **a.** Judgment shall enter (in accordance with ¶3 of this order) for Plaintiff Deutsche Bank National Trust Company, As Trustee of Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates Series 2005-R1 against Defendants Thomas T. Suchodolski and Beata W. Suchodolski on the Plaintiff's claim for possession of 10-12 Pleasant Street, Unit 12A, Ware, Massachusetts, and Plaintiff's claim for use and occupancy damages in the amount of $20,238.87;
    - **b.** Judgement shall enter for Plaintiff dismissing with prejudice the defendants' counterclaims.

2. **No. 19H79SP004544**:

   a. Judgment shall enter (in accordance with ¶3 of this order) for Plaintiff Deutsche Bank National Trust Company, As Trustee of Ameriquest Mortgage Securities Inc., Asset-Backed Pass-Through Certificates Series 2005-R1 against Defendants Thomas T. Suchodolski and Beata W. Suchodolski on the Plaintiff's claim for possession of 10-12 Pleasant Street, Unit 10A, Ware, Massachusetts, and Plaintiff's claim for use and occupancy damages in the amount of $20,238.87;

   b. Judgement shall enter for Plaintiff dismissing with prejudice the defendants' counterclaims.

3. Execution for possession and damages shall issue in each case on June 15, 2021; however the plaintiff shall not levy on the execution for possession prior to July 1, 2021 or on the day next after the date on which any applicable eviction moratorium order/regulation expires or is rescinded, **WHICHEVER IS LATER**.

SO ORDERED.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

April 20, 2021

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. **19H79SP005472**

TOWD POINT MORTGAGE TRUST ASSET-BACKED SECURITIES SERIES 2016-2, U.S. BANK NATIONAL A SSOCIATION AS INDENTURED TRUSTEE,

Plaintiff

VS.

EDWARD CRUZ and EDITH B. CRUZ,

Defendants

Post-Judgment Order on Plaintiff's Motion for Reconsideration

The plaintiff commenced this summary process action seeking possession of the residential property after it acquired title as the high bidder at a foreclosure sale. In a Memorandum of Decision dated March 10, 2021, I ruled in favor of the defendants on the plaintiff's Motion for Summary Judgment. I ruled as a matter of law that (1) the April 23, 2019 foreclosure sale was void *ab initio* because the right to cure default notice relied upon by Towd Point failed to comply strictly with ¶ 22 of the mortgage in that material information about the mortgagors' rights was not set forth in the "hybrid" notice in a manner reasonably calculated to be read and understood by the mortgagor (specifically, information that the mortgagors had a "*right to bring a court action to assert the non-existence of a default or any other defense of BORROWER to acceleration and sale*"), and (2) because the foreclosure sale had been rendered void *ab initio,* Towd Point does not have a superior right to possession of the property over the right to possession asserted by Cruz. Judgment entered in favor of the defendants on the plaintiff's claim for possession.

The plaintiff filed a Motion for Reconsideration. The plaintiff argues that my ruling that the plaintiff's "hybrid" right to cure default notice failed to strictly comply with ¶ 22 of the mortgage is legally erroneous. Towd Point contends that I failed to consider and properly apply the legal principles set forth in the recent Supreme Judicial Court decision of *Thompson v.*

JPMorgan Chase Bank, N.A., 486 Mass. 286, 287 (2020).

In *Thompson* the court addressed how to reconcile the statutory right to cure default notice requirements set forth in G.L. c. 244, § 35A (and the Division of Bank's implementing regulation, 209 CMR 56.04), with the contractual right to cure default notice requirements set forth in the mortgagors' GSE uniform mortgage (the same standard mortgage at issue in this action).

In *Thompson* the court recognized that to send a notice to cure default that complied with G. L. c. 244, § 35A a mortgagee must without alteration use the scripted language set forth in the Division of Banks regulations implementing § 35A; and to establish the sufficiency of the statutory notice the mortgagee must only show that it substantially complied with § 35A. The court recognized further that a mortgagee is required to comply strictly with the right cure default and notice provisions of the GSE uniform mortgage (§ 19 and § 22). The court ruled that a mortgagee could use one "hybrid notice" to comply with the statutory notice requirement set forth in G. L. c. 244, § 35A and those of ¶ 22 of the GSE uniform mortgage. "The possibility of such a so-called 'hybrid notice' is explicitly contemplated by paragraph 15 of the GSE Uniform Mortgage itself." Id. at 292-293; see 294. "Moreover, as a practical matter, the consumer protection aims of both the statutory scheme and paragraphs 19 and 22 of the GSE Uniform Mortgage are better served by a single accurate notice rather than two potentially conflicting communications." Id. at 294.

However, the court cautioned that "Massachusetts law under [*Pinti v. Emigrant Mtge. Co.*, 472 Mass. 226, 235, 240 (2015)], requires that any notice given pursuant to paragraph 22 of the GSE Uniform Mortgage, regardless of whether hybrid, must be accurate and not deceptive."

Towd Point's loan servicer, SPS, sent the mortgagors (defendants) a statutory 90-Day Right to Cure Your Default notice that complies with the provisions of G.L. 35A. The statutory notice also includes most, but not all, of information required to be provided pursuant to ¶ 22 of the mortgage. The statutory notice does not include the "right to bring a court action" notice required by ¶ 22 of the mortgage. Strict compliance with the notice requirements of ¶ 22 is a pre-condition to the exercise of the statutory power of sale. *Pinti, supra.* In the same envelope SPS included a four-page letter addressed to the mortgagors.[1] Towd Point contends that this letter supplements the statutory notice and together constitute one "hybrid" right to cure default notice. The letter does not include a heading. The information set forth in pages 1 and 2 of the letter are

[1] The documents were submitted by Towd Point as a summary judgment exhibit. The statutory notice is appended to this order as Addendum A-1 and the letter as Addendum A-2).

unrelated to any of the ¶ 22 required mortgage-based notifications. The "right to bring a court action" notification required by ¶ 22 of the mortgage appears towards the bottom of page 3 of the letter. Towd Point contends that this "hybrid" right to cure default notice complies with the provisions of G.L. c. 35A and complies strictly with ¶ 22 of the mortgage.

In my summary judgment memorandum, consistent with *Thompson*, I agreed that Towd Point could use one "hybrid" right to cure default notice to inform the mortgagors of their statutory and contractual rights (the statutory 35A notice together with a supplement appended to the notice that sets forth the additional GSE uniform mortgage rights set forth in ¶ 22 not otherwise included in the statutory notice). And consistent with the legal principles set forth in *Thompson* and *Pinti* I stated that to strictly comply with ¶ 22 of the GSE uniform mortgage, the "right to bring a court action" information may be set forth in a supplement to the statutory notice provided it was done in a manner that was not potentially deceptive (meaning that a mortgagor of average intelligence would be reasonably likely to read the "right to bring a court action" language and understand that this mortgage- based right set forth in the supplement and the rights set forth in the statutory notice were intended to be read as part of one notice – what *Thompson* describes as a "hybrid" notice).

Applying those legal principles to the Towd Point notice and letter, I found and ruled that the statutory right to cure default notice and the letter relied upon by Towd Point could not be read to constitute one "hybrid" right to cure default notice. I reached this decision because I considered the organization and wording of the letter to be potentially deceptive. See *Pinti*, 472 Mass. at 235, 340. I determined that a mortgagor of average intelligence would be unlikely to actually read and understand that the ¶ 22 mortgage-required "right to bring a court action" notification – set forth as it was at the bottom of the third page of the letter - included important information regarding a mortgage-based right that was to be read together with the other mortgage-based and statutory rights set forth in the Section 35A right to cure default notice. I ruled that this potentially deceptive method of notification was insufficient to constitute strict compliance with the terms of the mortgage as required by *Pinti*.

The plaintiff argues that my legal analysis and ruling was erroneous. I disagree.

The *Thompson* case did not involve a question as to whether the hybrid right to cure default notice complied strictly with the requirements of ¶ 22 of the mortgage, specifically the "right to bring a court action" provision. Rather, the decision focused on whether the mortgagee failed to comply strictly with the right to cure deadline provision set forth in ¶ 19 of the mortgage. In

response to a question certified by the First Circuit Court of Appeals, the Supreme Judicial Court addressed whether "the statement in the August 16, 2016 default and acceleration notice that 'you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place' render the notice inaccurate or deceptive in a manner that renders the subsequent foreclosure sale void under Massachusetts law." The court answered the question "No."

The *Thompson* "hybrid" right to cure default notice consists of the statutory Section 35A notice together with a one page supplement that is attached to the notice.[2] The right to cure language in the Section 35A notice tracks the required language set forth in Section 35A and 209 CMR 56.04 ("*you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place*"). This language affords the mortgagor with more generous protection than the contractual right to cure provision set forth in ¶ 19 of the mortgage (that the mortgagee had until "*five days before sale of the Property*" to avoid foreclosure by paying all past due amounts).[3] The court held that under ¶ 16 of the mortgage the contractual rights are subject to any requirements and limitations of state law. And since the payment/cure deadline set forth in the statute (Section 35A) is more generous than the payment/cure deadline set forth in ¶ 19 of the mortgage, the statutory payment/cure deadline supersedes the shorter contractual payment/cure deadline.[4] Accordingly, the notice sent by the mortgagee was neither deceptive nor misleading, and in substance complied strictly with the terms of the mortgage.[5]

Appended to the *Thompson* statutory notice is a one page supplement (the last page of Addendum B). At the top of the page the supplement includes the following heading in bold print:

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[2] The *Thompson* "hybrid" notice was not part of the summary judgment record when I issued my summary judgment memorandum and order.

Towd Point attached the *Thompson* Section 35A notice and supplement page as an exhibit to its motion for reconsideration. The statutory notice and attached supplement is appended to this order as Addendum B.

I have been assigned to hear numerous other post-foreclosure cases that included "hybrid" notices similar to the *Thompson* notice/supplement; however I cannot reference or rely on those notices for any evidentiary purposes since they are not part of the summary judgment record. My observations and analysis are thus limited to a comparison of the *Thompson* and Towd Point documents.

[3] The GSE uniform mortgage does not include a provision that requires the mortgagee to include in the notice of default written notification of this ¶ 19 right.

[4] The court did not address the hypothetical question whether the mortgagors' mortgage-based contractual rights would similarly be subject to any requirements and limitations of state law if the statutory payment/cure deadline was shorter (less generous) than the deadline set forth in the mortgage.

[5] The court cited to *Pinti*, 472 Mass. at 235 for the proposition that "strict compliance does not require a mortgagee to 'demonstrate punctilious performance of every single mortgage term."

"ADDITIONAL IMPORTANT INFORMATION" The third paragraph includes the ¶ 22 required language that "[y]ou have the right . . . to bring a court action to assert the nonexistence of a default, or any other defense to acceleration, foreclosure, and sale." The court in *Thompson* did not explicitly rule that the supplement and the statutory notice read together strictly complied with ¶ 22 of the mortgage. However, a reasonable inference may be drawn that in answering the question from the First Circuit "No" while stating that a "hybrid" notice must strictly comply with the mortgage-based notice requirements, the *Thompson* court considered the statutory notice and one page supplement in that case to be a single "hybrid" notice that strictly complied with the GSE uniform mortgage.

The contrast between the organization and clarity of the *Thompson* "hybrid" notice/one-page supplement (Addendum B) and the Towd Point statutory notice (Addendum A-1) and four-page letter (Addemdi, A-2) is stark.

The heading of the supplemental page of the *Thompson* notice is set in BOLD print and its meaning is clear. The heading incorporates in substantial part the language from the last paragraph of the statutory notice ("there may be *additional important disclosures* that relate to applicable laws and requirements"). The ¶ 22 mortgage-required "right to bring a court action" notification is positioned prominently in the upper third of the one-page supplement. The supplemental page is set out in a manner that enhances the likelihood that the mortgagors would actually read the ¶ 22 mortgage-language and understand that it articulated a right that was in addition and equal in importance to the rights set forth in the statutory notice of their right to cure default. The *Thompson* Section 35A notice read together with the one-page supplement is a "hybrid" notice that strictly complies with the terms of the mortgage under the principles set forth in *Pinti* and *Thompson*.

The four-page letter relied upon by Towd Point (prepared by its loan servicer, SPS) is addressed to the mortgagors, giving the appearance of a writing separate and distinct from the statutory notice. Unlike the *Thompson* supplement, the Towd Point letter does not have a heading that would clearly connect the letter to the statutory notice. The first line of the letter states only that the letter is being sent "to provide information regarding the lien on the real property referenced above." The letter does not mention until the second paragraph that it was intended to "complement" the statutory notice. The word "complement" does not convey the same meaning as the phrase "additional important disclosures" that appears in the last paragraph of the Section 35A notice. The letter does not state anywhere that it includes "additional important disclosures"

that include rights intended to be in addition to the rights set forth in the statutory notice. In fact the letter would likely lead a careful reader to believe that any notice of "rights" contained in the letter are subordinate to the rights set forth in the statutory notice. The second paragraph of the letter tells the reader that "[i]n the event of any conflict between the terms of this letter and those contained in the 90 Day Notice, the terms of the 90 Day Notice will control." Unlike the *Thompson* supplement, in the Towd Point letter the ¶ 22 mortgage-required "right to bring a court action" notification is buried at the bottom of page 3.

As I stated in my summary judgement memorandum describing the Towd Point notice: "While I accept that a statutory Chapter 35A default/right to cure notice may incorporate information set forth in a carefully prepared supplemental letter, concepts of strict compliance and fairness require that the supplemental letter be structured so that a mortgagor of average intellect would recognize and understand that important information about their mortgage default is being provided that is part of the default/right to cure notice. The Letter sent to Cruz falls far short of meeting that standard. There is nothing in the summary judgment record to explain or justify the choice made by SPS with respect to where it placed the ¶ 22 required information in the Letter. The Letter contains multiple single-spaced paragraphs over four pages. The "right to bring a court action" language appears in the next to last paragraph on page three. To draw on a baseball metaphor the critical language is effectively seated in the upper reaches of the bleachers. Further, the Letter, reasonably construed, does not contain any language that would allow a mortgagor of average intellect to understand that the "right to bring a court action" language was intended to be read as a provision of the 90-Day Notice. There is nothing in the Letter that informs the mortgagor that the "right to bring a court action" provision is a mortgage-based right that carries the same importance as the rights set forth in the statutory-based 90-Day Notice."

All of these factors considered together lead me to conclude that the Towd Point letter – to the extent it was intended to notify the mortgagors of important additional rights that were to be read as an integral part of one "hybrid" notice of right to cure default – has the potential to be deceptive, and for that reason the notice falls short of the strict compliance with the mortgage required by *Pinti*.

Towd Point has not pointed to any legal principle or reasoning flowing from *Thompson* that would lead me to conclude that my analysis of the relationship between the Towd Point statutory notice and the four-page letter was flawed and legally incorrect.

Upon reconsideration, I conclude now as I did in my summary judgment memorandum/order that Towd Point did not comply strictly with the default/right to cure notice requirements set forth in ¶ 22 of the defendants' mortgage prior to acceleration and foreclosure, and therefore Towd Point did not conduct the foreclose sale of the 35 Dwight Road property in strict compliance with the statutory power of sale. Therefore, the April 23, 2019 foreclosure sale of the 35 Dwight Road property was void *ab initio*.

Accordingly, Towd Point's motion for reconsideration is **DENIED**.

SO ORDERED.

JEFFREY M. WINIK
FIRST JUSTICE

May 18, 2021

COMMONWEALTH OF MASSACHU.S.ETTS

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. 19H79SP004457

U.S. BANK NATIONAL ASSOCIATION, LEGAL TITLE TRUSTEE FOR TRUMAN 2016 SC6 TITLE TRUST,

Plaintiff

VS.

STEPHANIE JOHNSON, a/k/a STEPHANIE E. WRIGHT, a/k/a STEPHANIE WRIGHT JOHNSON, and KAYLA BE WRIGHT,

Defendants

Memorandum of Decision on Plaintiff's Motion for Summary Judgment

Defendant Stephanie Johnson ("Johnson") is the former owner of the single-family residential property at 72 Gilbert Avenue, Springfield, Massachusetts.[1] On June 14, 2019 plaintiff U.S. Bank National Association, Legal Title Trustee For Truman 2016 SC6 Title Trust ("U.S. Bank National") acquired title to the property as the high bidder at the May 20, 2019 foreclosure sale.

In September 2019 U.S. Bank National commenced this summary process action in the Springfield Division of the District Court (No. 1923SU236) against Johnson (and others) seeking to recover possession of the property and damages for unpaid rent (for use and occupancy).[2]

Johnson filed an answer to U.S. Bank National's complaint. As defenses/counterclaims Johnson pleaded that the foreclosure was void *ab initio* alleging that (1) U.S. Bank National did not comply with the default/right to cure notice

[1] The complaint additionally identifies Johnson as Stephanie E. Wright and Stephanie Wright Johnson. The defendant identifies herself as Stephanie Johnson, and that is the name that appears as the borrower on the promissory note and the mortgagor on the mortgage.

[2] Elijah Isales, Donna Louise Bliesener, Joanna May Patterson and Kayla Be Wright were dismissed as party defendants in this action.

requirements set forth in ¶ 22 of the mortgage, (2) U.S. Bank National was not mortgagee at the time of the foreclosure (she alleges that BAC Home Loan Servicing was the mortgagee), and (3) that the "foreclosure and the events preceding it were so fundamentally unfair that the sale should be set aside in equity." Johnson's answer also includes a G.L. c. 93A counterclaim alleging the U.S. Bank National did not take adequate steps at the foreclosure sale to "ensure the property sold for the highest price the market would bear."

On October 11, 2019 Johnson filed a notice of transfer whereupon the summary process action were transferred to the Western Division of the Housing Court Department. The case was assigned a new docket number, No. 19H79SP004457.

In February 2020 U.S. Bank National filed a motion for summary judgment together with affidavits and supporting documents. Johnson filed a written opposition to the summary judgment motion.

Because of the moratorium that required the postponement or delay in hearing a range of matters, the summary judgment motion did not come before the court for hearing until April 15, 2021.

After reviewing the evidence set forth in the summary judgment record and considering the arguments, I conclude that there exist disputed issues of fact material to the issues regarding the validity of the foreclosure sale (and therefore whether the plaintiff has a superior right to possession of the property) that must be decided at trial. Accordingly, U.S. Bank National's motion for summary judgment shall be **DENIED**.

Undisputed and Disputed Facts

The single-family residential property at issue in this summary process action is located at 72 Gilbert Avenue, Springfield, Massachusetts (the "property").

In August 2007 Johnson obtained a loan from Countrywide Home Loans, Inc. d/b/a American's Wholesale Lender ("Countrywide") in the amount of $148,500.00. On August 8, 2007 Johnson executed a promissory note to Countrywide in the amount of $148,500.00. The promissory note was secured by a first mortgage on the property granted to Mortgage Electronic Registration Systems, Inc. ("MERS"), solely as nominee for Countrywide. The first mortgage was dated August 8, 2007 and executed by Johnson.[3] The promissory note

[3] The first mortgage was recorded on August 8, 2007 at the Hampden County Registry of Deeds (hereinafter the "Registry of Deeds") at Book 16857, Pg. 549.

is endorsed in blank.

Johnson fell behind on her mortgage loan payment obligations beginning in September 2013.

On July 9, 2011 MERS, solely as nominee for Countrywide, executed a written assignment of the Johnson mortgage to BAC Home Loans Servicing, LP FKA Countrywide Home Loan Servicing, LP ("BAC").[4] The assignment states that MERS conveyed to BAC only an "equitable" interest in the mortgage.

At some unidentified point in time BAC merged into Bank of America, N.A. ("BoA"), and BoA became the holder of the Johnson mortgage as successor to BAC.

In April 2015 Fay Servicing, LLC (Fay Servicing) was the loan servicer acting on behalf of Christiana Trust, a division of Wilmington Savings Fund Society, FSB ("Christiana Trust"), purportedly the mortgagee holding the Johnson mortgage. However, as is set forth in detail at pages 9-11 of this memorandum, the assignment of the Johnson mortgage from MERS to Christiana Trust was a nullity. And there is no evidence in the summary judgment record that in 2015 Fay Servicing was acting on behalf of the actual mortgagee, BAC/BoA.

In April 2015 Fay Servicing, acting on behalf of Christiana Trust, sent Johnson a *150-Day Right to Cure Your Mortgage Default* notice (with additional mortgage disclosures), dated April 16, 2015, setting forth that Johnson was in default on her mortgage loan payment obligations and that she had a right to cure pursuant to G.L c. 244, § 35A and ¶ 22 of the mortgage. The notice states in two places at page 2 that the mortgage loan amount past due totaled $12,702.00. However, the notice at page 3 states that the amount past due totaled $46,344.03. Fay Servicing also sent Johnson a *Right to Request a Modified Mortgage Loan* letter dated April, 16, 2015.

There is no evidence in the summary judgment record that at the time the default/right to cure notice and loan modification letter were prepared and sent in April 2015 Christiana Trust and Fay Servicing were acting on behalf of the actual mortgagee, BAC/BoA or that Fay Servicing was authorized to accept payments or modify Johnson's mortgage loan on behalf of BAC/BoA.

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[4] The July 9, 2011 assignment was recorded at the Registry of Deeds on July 14, 2011 at Book 18841, Pg. 92.

There is no evidence in the summary judgment record that Johnson cured her default by making payments to Christiana Trust (or Fay Servicing) within the time period set forth in default/right to cure notice, or that she requested a loan modification from Christiana Trust or Fay Servicing.

On December 11, 2018 BoA (as successor by merger to BAC) executed a written assignment of the Johnson mortgage to U.S. Bank National.[5] Again, the assignment states that BoA assigned only an "equitable" interest in the mortgage.

On February 5, 2019 Fay Servicing, then acting as the loan servicer on behalf of U.S. Bank National, executed an *Affidavit Pursuant to M.G.L. c. 244, §§ 35B and 35C* (which certified the U.S. Bank National was the mortgagee and holder of Johnson's promissory note and had complied with the requirements of § 35B).[6] However, there is no evidence in the summary judgment record that the actual mortgagee at the time the § 35B letter was sent to Johnson in 2015 (BAC/BoA) complied with the requirements of G.L. c. 244, § 35B.

On March 28, 2019 U.S. Bank National, through its attorney, sent Johnson a notice (via certified and first class mail) of the mortgagee's intent to sell the property in the exercise of the power of sale contained in the Johnson mortgage. The notice was published in The Republican, a newspaper of general circulation in Springfield, on April 9, 16 and 23, 2019. The sale was scheduled for May 3, 2019, but was postponed by public proclamation to May 20, 2019 at 12:00 p.m.

As is set forth in the *Affidavit of Sale* (dated and signed on May 30, 2019), on May 20, 2019 at 12 p.m., a licensed auctioneer conducted a public foreclosure auction at the property. U.S. Bank National was the high bidder at the foreclosure auction (bidding $125,000.00). On June 14, 2019 U.S. Bank National executed and delivered a foreclosure deed that conveyed title to the property to U.S. Bank National for consideration paid of $125,000.00.[7]

On June 18, 2019, a representative of U.S. Bank National executed a *Post-*

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[5] The December 11, 2018 assignment was recorded at the Registry of Deeds on December 18, 2018 at Book 22488, Pg. 523.

[6] The affidavit was recorded at the Registry of Deeds on February 15, 2019 at Book 22557, Page 357.

[7] The Foreclosure Deed and Affidavit of Sale were recorded at the Registry of Deeds on June 21, 2019 at Book 22720, Pgs. 96-99.

Foreclosure Affidavit Regarding Note and Affidavit of Compliance with Condition Precedent to Acceleration and Sale. The affidavit states that U.S. Bank National was the holder of promissory note secured by the Johnson mortgage, and that all notices, requirements and conditions precedent to exercising the power of sale were satisfied in strict compliance with the terms of the mortgage. Specifically at ¶ 4 of the affidavit the affiant states that U.S. Bank was not required to comply strictly with then "Notice(s) of Default to Mortgagor(s)" set forth in the mortgage (¶ 22) because the notice was sent to Johnson prior to July 17, 2015 (the date of the *Pinti* decision).[8]

On June 4, 2020, MERS, solely as nominee for Countrywide, executed a *Confirmatory Assignment of Mortgage* that confirmed the July 9, 2011 assignment to BAC and "does hereby grant, assign, transfer and convey . . . all its right, title and interest in and to [the Johnson mortgage] . . ." to BoA.[9]

Johnson has remained in possession of the property since June 14, 2019, and has not made any rent payments to U.S. Bank National for her continued use and occupancy of the property.

The undisputed evidence in the summary judgment record (set forth in an affidavit from Ronald Riopel, a licensed real estate broker) is sufficient to establish that the fair rental value of the property (a three bedroom, one bathroom, single-family dwelling built in 1988) is between $1,500.00 to $1,800.00 per month (with the occupant paying for her own utilities).

On June 28, 2019 U.S. Bank National served Johnson with a 72-hour notice to vacate the property.

In September 2019 U.S. Bank National commenced this summary process action against Johnson.

Discussion

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty*

[8] The affidavit was recorded at the Registry of Deeds on June 21, 2019 at Book 22720, Pg. 102.

[9] The June 4, 2020 assignment was recorded at the Registry of Deeds on June 11, 2020 at Book 23255, Pg. 288.

Mut. Ins. Co., 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party mU.S.t demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences mU.S.t be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague and general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) ("[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment").

The Housing Court has subject matter jurisdiction to adjudicate the validity of a foreclosure sale in the context of an G.L. c. 239 eviction action where the former owner has challenged the validity of the foreclosure as a defense to the claim of possession (whether a post-foreclosure owner has a superior right to possession to the right asserted by the former owner). *Bank of N.Y. v. Bailey*, 460 Mass. 327, 332-334 (2011); *Bank of Am., N.A. v. Rosa*, 466 Mass. 613, 621 (2013); *Federal Nat'l Mtge. Ass'n v. Rego*, 474 Mass. 329, 338 (2016).

To prevail in a summary process action involving foreclosed property (where the validity of the foreclosure is challenged) the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. The introduction in evidence of certified copies of the foreclosure deed and the affidavit of sale (in statutory form or that meets the particular requirements of G.L. c. 244, § 15) are sufficient to establish that portion of the plaintiff's prima facie case pertaining to ownership of the property based upon its exercise of the statutory power of sale. *Federal National Mortgage Association v. Hendricks*, 463 Mass. 635, 642 (2012), citing to *Bank of N.Y. v. Bailey*, 460 Mass. 327, 334 (2011) and *Deutsche Bank Nat'l Trust Co. v. Gabriel*, 81 Mass. App. Ct. 564, 568-570 (2012). However, where there is evidence

in the summary judgment record that creates material disputed issues as to whether the facts set forth in the affidavit of sale are accurate the plaintiff's reliance solely on the facts set forth in the post-foreclosure affidavit of sale is no longer sufficient to meet its burden of proof. The plaintiff must produce additional evidence to address the disputed issues of fact (and law) sufficient to establish that it foreclosed on the property in compliance with the statutory power of sale and mortgage, and thus holds title to the property.

With respect to the specific facts involving the Johnson mortgage foreclosure sale a critical element that must be addressed in determining whether U.S. Bank National acquired title to the property upon foreclosure is whether it can rely on the April 16, 2015 default/right to cure notice.

Since the "provisions of paragraph 22 constitute 'terms of the mortgage' governing the power of sale, in order to conduct a valid foreclosure [the mortgagee] was obligated to comply strictly with paragraph 22's notice of default provisions. And failure to comply strictly will render the foreclosure void. *Pinti v. Emigrant Mortg. Co., Inc.,* 472 Mass. 226, 243 (2015). The *Pinti* holding was made prospective only as of the date of the decision, July 17, 2015. Accordingly, a post-foreclosure plaintiff must show - with respect to a notice of default/right to cure required by the mortgage that was (or could only have been) sent after July 17, 2015 - that the title was acquired strictly according to the power of sale provided in the mortgage, including ¶ 22 of the mortgage. *Pinti*, supra.; *Bank of New York v. Bailey, 460 Mass. 327* (2011).

Where the default/right to cure notice was sent prior to July 17, 2015, the plaintiff remains obligated to comply strictly with the default notice provisions set forth in the mortgage and to comply substantially with the notice requirements of G.L. c. 244, § 35A. *Pinti v. Emigrant Mortg. Co., Inc.*, supra; however, its failure to do so renders the foreclosure voidable, not void. Accordingly, where prior to July 17, 2015 the mortgagee failed to strictly comply with the default/right to cure provision of the mortgage or substantially failed to comply with the notice requirement of G.L. c. 244, § 35A, the former owner/defendant must prove that such failure to comply with the foreclosure process rendered the foreclosure so fundamentally unfair that the former owner/defendant is entitled to affirmative equitable relief, specifically the setting aside of the foreclosure sale "for reasons other than failure to comply strictly with the power of sale provided in the mortgage." *U.S. Bank Nat'l Ass'n v. Schumacher*, 467 Mass. 421, 430, 432-433 (2014).

This assumes, however, that the actual mortgagee (or someone authorized to act for the mortgagee) sent a default/right to cure notice in some form to the mortgagor. However, where prior to July 17, 2015 a § 35A and/or mortgage-based default/right to cure notice (or a § 35B loan modification rights notice) was sent to the mortgagor, not by the actual mortgagee (or someone authorized to act for the mortgagee), but rather by some other entity (that was not authorized to act on behalf of the actual mortgagee at that time) a serious question arises as to whether the plaintiff can rely on that notice. And to the extent the plaintiff seeks to rely on the unauthorized third-party default notice and/or § 35B loan modification rights letter (without evidence that the third-party was acting on behalf of the actual mortgagee), the defendant should be afforded an opportunity to prove that such reliance rendered the foreclosure process fundamentally unfair per se or based upon evidence of prejudice or harm because the mortgagor never had an opportunity (1) to cure the default by making payment to the actual mortgagee (or loan servicer acting on behalf of the actual mortgagee) before the mortgage loan was purportedly accelerated or (2) seek a loan modification from the mortgagee/lender with authority to modify the loan terms.[10] Id.

U.S. Bank National argues that based on the undisputed evidence in the summary judgment record it has made a prima facie showing that the May 20, 2019 foreclosure sale was conducted in strict compliance with the mortgage and statutory power of sale, and that it acquired lawful title to the property on June 14, 2019 upon delivery of the foreclosure deed, and that its right to possession of the property is superior to any right asserted by the defendants.

Johnson, who is self-represented, filed a written answer/counterclaims and a written opposition to U.S. Bank National's summary judgment motion. Johnson (1) challenges the sufficiency of U.S. Bank National's compliance with the notice requirements set forth in ¶ 22 of the mortgage and c. 244, § 35A, (2) challenges the validity of the mortgage assignments, (3) claims that based upon errors in the mortgage assignments and 2015 default/right cure notice (and by inference, the 2015 right to request a loan modification

[10] G.L. c. 244, § 35B provides that a mortgagee shall not proceed to publish a notice of a foreclosure sale, as required by section 14, unless it has first taken reasonable steps and made a good faith effort to avoid foreclosure be giving the mortgagor an opportunity to request a mortgage loan modification that the mortgagee shall evaluate in accordance with the statute.

letter) "the foreclosure and the events preceding it were so fundamentally unfair that the sale should be set aside in equity," and (4) claims that the foreclosure sale was not conducted in a commercially reasonably manner.[11]

U.S. Bank National's Status as Mortgagee/Note Holder Prior to Foreclosure.

In *Strawbridge v. Bank of New York Mellon.*, 91 Mass. App. Ct. at p. 832 (2017), the Appeals Court held that the former owner was without standing to challenge an assignment where the purported defect would have rendered the assignment voidable, not void. See also, *Sullivan v. Kondaur Capital Corp.*, 85 Mass. App. Ct., 202, 205-206 (2014); *Culhane v. Aurora Loan Servs. of Neb.*, 708 F. 3d 282 (1st Cir. 2013).[12] Further, it is settled law that where "the record title holder of the mortgage satisfied the dictates of G.L. c. 183, § 54B, the homeowners have no basis for arguing that the assignment is void." *Bank of New York Mellon Corp. v. Wain*, 85 Mass. App. Ct. 498, 503 (2014).[13] "[W]here the foreclosing entity has established that it validly holds the mortgage, a mortgagor in default has no legally cognizable stake in whether there otherwise might be latent defects in the assignment process." Id.

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[11] Aside from the question of whether the foreclosure sale should be set aside for reasons of failure to foreclose in strict compliance with the statutory power of sale or based upon fundamental unfairness, there is no evidence in the summary judgment record sufficient to raise a disputed issue of fact as to whether the foreclosure sale was conducted in a commercially unreasonable manner.

[12] Under Massachusetts law, a "void" contract or agreement is one that is of no effect whatsoever; it is a mere nullity, and incapable of confirmation or ratification. *Allis v. Billings,* 47 Mass. 415, 417 (1843). A "voidable" contract or agreement is one that is "injurious to the rights of one party, which he may avoid at his election." *Ball v. Gilbert,* 53 Mass. 397, 404 (1847). If necessary, MERS had the power to exercise its option to ratify the action taken by its agent with respect to the assignment even if at the time of performance the agent's act was not in compliance with the corporate resolution. See, *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 637-643 (2007). Here, Rungu cannot argue that at the time of the assignment MERS in fact held the mortgage and that its interest in the mortgage was assignable.

[13] G.L. c. 183, § 54B. "Notwithstanding any law to the contrary, (1) a discharge of mortgage; (2) a release, partial release or assignment of mortgage; (3) an instrument of subordination, non-disturbance, recognition, or attornment by the holder of a mortgage; (4) any instrument for the purpose of foreclosing a mortgage and conveying the title resulting therefrom, including but not limited to notices, deeds, affidavits, certificates, votes, assignments of bids, confirmatory instruments and agreements of sale; or (5) a power of attorney given for that purpose or for the purpose of servicing a mortgage, and in either case, any instrument executed by the attorney-in-fact pursuant to such power, if executed before a notary public, justice of the peace or other officer entitled by law to acknowledge instruments, whether executed within or without the commonwealth, by a person purporting to hold the position of president, vice president, treasurer, clerk, secretary, cashier, loan representative, principal, investment, mortgage or other officer, agent, asset manager, or other similar office or position, including assistant to any such office or position, of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity, or acting under such power of attorney on behalf of such entity, acting in its own capacity or as a general partner or co-venturer of the entity holding such mortgage, shall be binding upon such entity and shall be entitled to be recorded, and no vote of the entity affirming such authority shall be required to permit recording."

The trail of recorded mortgages in this summary judgment record has the feel of a slow moving train wreck. Over a span of nine years the Johnson mortgage was assigned six times, with two confirmatory assignments adding to the confusion. Some of the written assignments did not correctly identify the mortgagee at the time of the assignment, rendering the mortgage assignments ineffective to convey any interest in the mortgage. Some of the assignments were executed by purported holders of the mortgage whose status as mortgagee was derived from earlier ineffective assignments. And until a 2020 confirmatory assignment (recorded almost a year after the foreclosure) corrected a defect that appeared in the original mortgage assignment (and each succeeding assignment), the assignments inexplicably conveyed only an "equitable" interest in the Johnson mortgage that the mortgagee did not hold.[14]

Working through the trail of recorded mortgages, the Johnson mortgage was assigned (validly in some instances and invalidly in other instances) as follows:

1. On July 9, 2011 **MERS**, solely as nominee for **Countrywide**, executed a written assignment of the Johnson mortgage to **BAC Home Loans Servicing, LP FKA Countrywide Home Loan Servicing, LP ("BAC").**[15] *At some unidentified point in time **BAC merged into Bank of America, N.A. ("BoA"),** and BoA became the successor to BAC, and therefore the holder of the Johnson mortgage. However, the assignment purported to convey to BAC only an "equitable" interest in the mortgage.*
2. On January 15, 2015, **MERS**, as nominee for **Countrywide**, executed a written

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[14] As Judge Kass succinctly explains in *Maglione v. BancBoston Mortgage Corp.*, 29 Mass. App. Ct. 88, 90 (1990),

> The mortgage splits the title into two parts: the legal title, which becomes the mortgagee's, and the equitable title, which the mortgagor retains . . . The purpose of vesting legal title in the mortgagee is to secure the debt owed by the mortgagor. *Krikorian v. Grafton Co-op Bank*, 312 Mass. 272, 274 (1942) . . . Although a mortgage vests title, that title is defeasible and is an off-shoot of the underlying debt. "The debt," as the venerable maxim puts it, "is the principal and the mortgage is the incident . . ." *Morris v. Bacon*, 123 Mass. 58, 59 (1877) . . . So it is that the mortgagor retains an equity of redemption . . . and upon payment of the note by the mortgagor or upon performance of any other obligation specified in the mortgage instrument, the mortgagee's interest in the real property comes to an end . . . These principles are enshrined in the mortgage condition described in G.L. c. 183, § 20, as the "Statutory Condition." Under the Statutory Condition, "if the mortgagor . . . shall pay unto the mortgagee . . . the principal and interest secured by the mortgage . . . then the mortgage deed, as also the mortgage note or notes, shall be void . . . "

[15] See fn. 5, supra.

assignment of the Johnson mortgage to Ocwen Loan Servicing, LLC. ("**Ocwen**").[16] *However, as of that date BAC (or BoA) held the mortgage and MERS had no authority to assign the mortgage to Ocwen. Accordingly, the January 15, 2015 assignment was a nullity.*

3. On January 15, 2015 **Ocwen** executed a written assignment of the Johnson mortgage to **Christiana Trust**, a division of Wilmington Savings Fund Society, FSB ("Christiana Trust").[17] *However, because BAC (or BoA) held the mortgage on that date, Ocwen had no authority to assign the mortgage. Accordingly, the January 15, 2015 assignment to Christiana Trust was a nullity.*
4. On March 12, 2015 **MERS**, as nominee for **Countrywide**, executed a ***Corrective Assignment of Mortgage*** that purportedly corrected the January 15, 2015 assignment of the Johnson mortgage to **Ocwen**.[18] *However, because BAC (or BoA) was the actual mortgagee on January 15 and March 12, 2015, the March 12, 2015 corrective assignment from MERS to Ocwen was a nullity and had no effect.*
5. On June 2, 2016 **Christiana Trust** executed an assignment of the Johnson mortgage to Wilmington Trust National Association, as Trustee of ARLP Securitization Trust, Series 2015-1 ("**Wilmington**").[19] *However, because BAC (or BoA) held the Johnson mortgage on that date Christiana Trust had no authority to assign the mortgage. Accordingly, June 2, 2016 assignment to Wilmington was a nullity.*
6. On June 28, 2017 **Wilmington** executed a written assignment of the Johnson mortgage to **U.S. Bank National.**[20] *However, because BAC (or BoA) held the Johnson mortgage on that date Wilmington had no authority to assign*

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[16] The January 15, 2015 assignment was recorded at the Registry of Deeds on January 22, 2015 at Book 20573, Pg. 384.

[17] The January 15, 2015 assignment was recorded at the Registry of Deeds on January 22, 2015 at Book 20573, Pg. 385.

[18] The March 12, 2015 assignment was recorded at the Registry of Deeds on March 20, 2015 at Book 20573, Pg. 385.

[19] The June 2, 2016 assignment was recorded at the Registry of Deeds on June 13, 2016 at Book 21216, Pg. 110.

[20] The June 28, 2017 assignment was recorded at the Registry of Deeds on July 17, 2017 at Book 21768, Pg. 258.

the mortgage. Accordingly, the June 28, 2017 assignment to U.S. Bank National was a nullity.

7. On December 11, 2018 **BoA (as successor by merger to BAC)** executed a written assignment of the Johnson mortgage to **U.S. Bank National.**[21] *Because BoA held the mortgage on that date the assignment to U.S. Bank National was valid. However, the assignment conveyed to BAC only an "equitable" interest in the mortgage.*

8. Finally, on June 4, 2020, **MERS**, solely as nominee for **Countrywide**, executed a ***Confirmatory Assignment of Mortgage*** that confirmed the July 9, 2011 assignment to BAC and "does hereby grant, assign, transfer and convey . . . all its right, title and interest in and to [the Johnson mortgage] . . ." to BoA.[22] *This corrected, nunc pro tunc to July 9, 2011, a technical defect in the July 9, 2011 assignment (the 2011 assignment states that it assigned the "equitable" interest in the mortgage).*

Since the 2015, 2016 and 2017 assignments were void *ab initio* (and conveyed no interest in the Johnson mortgage to Ocwen, Christiana Trust, Wilmington or U.S. Bank National) Johnson has standing under G.L. c. 183, § 54B to challenge the validity of those assignments insofar as they relate to the authority of those entities to act as the mortgagee, to assign the Johnson mortgage, or take action (such as sending notices) required as a pre-condition to the exercise the statutory power of sale set forth in the mortgage.

However, I rule as a matter of law that the July 9, 2011 assignment from MERS to BAC was valid. I rule as matter of law that BAC (and then BoA as successor to BAC by merger) held the Johnson mortgage continuously from July 9, 2011 until December 11, 2018. And I rule as a matter of law that the December 11, 2018 assignment of the Johnson mortgage from BoA to U.S. Bank National was valid, and that U.S. Bank National held the Johnson mortgage and note at the time of the May 20, 2019 foreclosure sale.

Finally, with respect to assignments it is the intent of the assignor and assignee that governs. " . . . where an earlier assignment . . . bears some defect, a written assignment

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[21] See Fn. 6, supra.

[22] See Fn. 10, supra.

executed after foreclosure that confirms the earlier assignment may be properly recorded." *United States Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 654 (2011); *Kaufman v. Federal Natl Bank*, 287 Mass. 97, (101 (1934) ("general intent to convey overrides the use of an ineffective form"); *Scaplen v. Blanchard*, 187 Mass. 73, 76 (1904) (confirmatory assignment replaces the original assignment, and is evidence of the making of the former assignment as of the time when it was made).

I rule as a matter of law that any defect in the July 9, 2011 assignment to BAC (that the assignor was assigning only an "equitable" interest in the mortgage) was corrected *nunc pro tunc* to July 9, 2011 by the June 4, 2020 corrective assignment from MERS to BAC. The corrective assignment clarified and confirmed that it was MERS' intent on July 9, 2011 to assign to BAC its legal title and interest in the Johnson mortgage.

Whether Prior to Foreclosure the Johnson Mortgage Loan Had Been Accelerated After Notice, and Whether U.S. Bank National Foreclosed in Compliance with the Statutory Power of Sale and Terms of the Mortgage.

I have ruled as a matter of law that the assignments of the Johnson mortgage to Ocwen and Christiana Trust in 2015, to Wilmington in 2016 and to U.S. Bank National in 2017 were void *ab initio*. At all times between July 9, 2011 and December 11, 2018 BAC/BoA was the mortgagee.

It is clear from the summary judgment record that in support of its claim that the foreclosure sale was valid U.S. Bank National is relying on the *150 Day Right to Cure Your Mortgage Default* notice (the § 35A notice and the appended additional ¶ 22 mortgage disclosure) and the Right to Request a Modified Mortgage Loan letter (pursuant to § 35B), both dated April 16, 2015, and sent to Johnson by Fay Servicing on behalf of Christiana Trust. The notice and letter identified Christiana Trust as the mortgagee and current lender, and the notice states that Johnson may be evicted from her home after a foreclosure sale if she did not pay Christiana Trust the total past due amount (stated to be $12,702.00 on one page and $46,344.03 on another page) by September 14, 2015. However, Christiana Trust did not actually hold the mortgage at that time and thus did not have the authority to default Johnson and accelerate the loan if she failed to pay the total past due amount on her mortgage loan (or for that matter even accept mortgage payments from Johnson or agree to modify her mortgage loan). Further, there is no evidence in the summary judgment record that Fay Servicing had any authority to send the default/right to cure notice or accept payments from Johnson on behalf of the actual mortgagee at that time, BAC/BoA.

At some point carelessness and inattention over time on the part of lenders, mortgagees (and purported-mortgagees) and loan servicers with respect to the assignment of mortgages and mortgage loans and their authority to commence the non-judicial foreclosure process mortgage loan and mortgage (and a foreclosing mortgagee's reliance on the unauthorized actions of its purported predecessors) can result in a process that is so fundamentally unfair to the mortgagor facing foreclosure that she is entitled to seek an equitable remedy in the form of an order setting aside the foreclosure sale. *U.S. Bank Nat'l Ass'n v. Schumacher*, supra.

Paragraph 22 of the Johnson mortgage states in relevant part, "Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement in this Security Instrument . . ."[23] There is no evidence in the summary judgment record that BAC/BoA or ever sent Johnson a default/right to cure notice (or § 35B notice) prior to December 11, 2018 or that U.S. Bank National sent Johnson a default/right to cure notice (or § 35B notice) after December 11, 2018. Therefore, under *Pinti* if U.S Bank cannot establish that it properly relied on the April 16, 2015 default/right to cure notice sent by Christiana Trust (who was never the mortgagee holding Johnson's mortgage) U.S. Bank could not prove Johnson was sent a default/right to cure notice after July 17, 2015 that complied strictly with ¶ 22 of the mortgage. And its failure to do so would render void the May 20, 2019 foreclosure sale.

Applying the principles set forth in *Schumacher* and *Pinti* I conclude that there exist material disputed questions of fact (and a mixed questions of law) as to whether U.S. Bank National could rely on the April 16, 2015 default/right to cure notice and § 35B loan modification letter (sent on behalf of Christiana Trust, an entity not the mortgagee, in 2015)

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[23] Paragraph 22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower's breach or agreement in this Security Instrument . . . The notice shall specify: a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to the Borrower, by which the default must ¶be cured; and (d) that failure to cure the default on before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale. If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law. . .

for purposes of establishing (1) that the mortgagee in 2015 complied with the default notice requirements of ¶ 22 of the mortgage and § 35A, (2) that Johnson's mortgage loan had been accelerated as of September 14, 2015 (the cure deadline set forth in the default notice) because Johnson failed to make payments to Christiana Trust sufficient to cure the default and (3) that U.S. Bank National had complied (or was not required to comply) with the conditions precedent to Acceleration and Sale (as set forth in U.S. Bank National's post-foreclosure affidavit of compliance dated June 18, 2019).

If U.S. Bank National cannot rely on the default notice sent by Fay Servicing on behalf of Christiana Trust, then it will be unable to prove at trial that it conducted the foreclosure sale in strict compliance with the statutory power of sale, G.L. c. 183, §21 and G.L. c 244, §11-17, and with the terms of the mortgage, specifically ¶ 22. *Pinti v. Emigrant Mortg. Co., Inc., supra.*

If U.S. Bank National can rely on the notices sent by Fay Servicing on behalf of Christiana Trust then Johnson is entitled to present evidence at trial in an effort to prove (1) that the 2015 notice stating that she faced foreclosure unless she cured her mortgage default by making payment (in two differing amounts) to an entity who was incorrectly identified as the mortgagee/lender (or someone acting on its behalf) and was not authorized to act on behalf of the mortgagee, and (2) that because the 2015 letter stating that she had the right to seek a loan modification was sent by the same entity incorrectly identified as the mortgagee/lender (or someone acting on its behalf), she was offered only illusory options to avoid foreclosure. If Johnson can prove these facts a fact finder could conclude that such pre-foreclosure conduct rendered the 2019 foreclosure sale so fundamentally unfair that Johnson would be entitled to affirmative equitable relief, specifically the setting aside of the foreclosure sale "for reasons other than failure to comply strictly with the power of sale provided in the mortgage." *U.S. Bank Nat'l Ass'n v. Schumacher*, supra.

Conclusion

For these reasons, the plaintiff's Motion for Summary Judgment is **DENIED**. The clerk is directed to schedule this case for trial.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

June 8, 2021

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
CIVIL ACTYION
NO. 21H79CV000198

PYNCHON TOWNHOMES LLC,

Plaintiff

VS.

SHERIE A. FINLAY,

Defendants

FINDINGS OF FACT, RULINGS OF LAW AND ORDER OF JUDGMENT

This is a civil action in which the plaintiff is seeking a declaratory judgment and injunction that would require the defendant to remove a dog from the residential premises she occupies as a tenant.

Based upon all the credible testimony and evidence presented at trial (conducted using Zoom technology), and the reasonable inferences drawn therefrom, the Court finds as follows:

The plaintiff, Pynchon Townhomes LLC, owns and manages the 250 unit subsidized housing development in Springfield, Massachusetts, called Pynchon Townhomes (the "development"). The defendant, Sherrie A. Finlay, resides as a tenant in a two-story townhouse at 22 Newland Street, Springfield (the "townhouse"). The townhouse is located in the development. The defendant has occupied the townhouse with her six children since 2017 subject to the terms of a written lease. Under the terms of the lease (¶ F.11) the defendant is not allowed to keep a pet without the written permission of the landlord unless otherwise permitted by ¶ G.14 (allowed under terms of an applicable subsidy program) or ¶ G.15 of the lease (allowed as a reasonable accommodation to a resident with a disability). The plaintiff has never given the defendant oral or written permission to keep dog in her townhouse.

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The defendant keeps a 120 pound bit bull dog in her townhouse as a pet. The defendant testified that she had been the victim of domestic violence while living in New York, and keeps the dog to provide security for her family. She testified that she is aware that her lease does not allow her to keep a pet without the landlord's permission and acknowledged that her landlord had never given her permission to keep her dog. There is no evidence that Bennett has a right to keep her dog under the terms of the rent subsidy program that applies to her tenancy.

Shakira Bennett ("Bennett" testified credibly at trial. In July 2020 Bennett's brother was the defendant's boyfriend. On July 18, 2020, Bennett and her brother went to the defendant's townhouse to participate in a birthday party for the defendant's son. Bennett and her brother entered the defendant's townhouse and proceeded up the stairs to a second floor bedroom (where the defendant and other family members were present). Bennett's brother opened the bedroom door. The defendant's dog reacted suddenly, moved towards Bennett and bit her left arm, piercing her skin and drawing blood. Bennett had not said or done anything to provoke the dog. Bennett's brother took her to the hospital emergency room. The doctors treated and dressed Bennett's injured arm, and closed the wound using stitches. At trial Bennett showed the court her left arm where she had been bitten. There was a noticeable scar.[1]

The plaintiff's manager received notice of the dog bit incident and that the defendant was keeping a dog in her townhouse. On July 21, 2020 the plaintiff's manager sent the defendant a letter demanding that she remove the dog from her townhouse.

In response to the July 21 letter the defendant met with the plaintiff's manager. The defendant told the manager why she need her dog. In response the manager gave the defendant an opportunity to request a reasonable accommodation. The defendant submitted a reasonable accommodation request form; however, the defendant never provided any of the requested documentation necessary to show that she had a disability and as a reasonable accommodation she needed to keep her dog (as a support animal). Further, the defendant never responded to the plaintiff's written invitation to attend a meeting with the manager to discuss her request for a reasonable accommodation. On October 15, 2020 the plaintiff's manager closed the defendant's reasonable accommodation request file based upon the defendant's inaction.

[1] The trial was conducted virtually on Zoom. The court was unable to have a picture taken of Bennett's arm.

On November 25, 2020 the plaintiff sent the defendant a second letter demanding that she remove her dog from her townhouse.

On February 16, 2020 the plaintiff sent the defendant a final letter demanding that she remove her dog from her townhouse.

The defendant has continued to keep her dog in her townhouse. She testified that she has been looking for someone to adopt her dog rather than deliver it to an animal shelter (where she believes the dog would be euthanized it a new home for the dog could not be found). So far her efforts have been unsuccessful.

The plaintiff's manager told the defendant that she would be allowed to keep a dog as a reasonable accommodation; however the plaintiff would not allow her to keep the pit bull that had attacked Bennett. The plaintiff's manager reiterated this position at trial.

I find that the plaintiff has established that it has a legitimate concern that the continued presence of the defendant's 120 pound pit bull at the townhouse and development would pose a serious and unacceptable threat to the health and safety of other residents and staff. For that reason I rule that the specific accommodation that the defendant requested (that she be allowed to keep her 120 pound pit bull that attacked Bennett) is not reasonable.

Based upon these facts, I declare the rights of the parties as follows: (1) under the terms of her lease (¶ F.11) the defendant does not have the right to keep her dog at her townhouse as a pet without the plaintiff's written consent or establishing a right to keep her dog as a reasonable accommodation (¶ G.15); (2) the plaintiff has never given its written consent for the defendant to keep her dog at the townhouse; and (3) the defendant's request that she be allowed to keep her 120 pound bit bull as a reasonable accommodation pursuant to state/federal law and ¶ G.15 of her lease is unreasonable as a matter of fact and law because the dog attacked and bit a guest without provocation causing serious injury to the guest, and for that reason the continued presence of the dog at the development poses a serious and unacceptable threat to the health and safety of the other residents and maintenance personnel.

With respect to the plaintiff's request for injunctive relief I find as matter of fact and law that the continued presence of the 120 pound pit bull in the defendant's townhouse and on the development grounds constitutes a breach of ¶ F.11 of her lease. There is no adequate remedy at law available (other than terminating the defendant's tenancy and commencing a summary process action - a path the plaintiff does not wish to take given the adverse impact such action would have

on the defendant and her six children who live in a rent-subsidized townhouse). Injunctive relief is necessary and reasonable given that the continued presence of the 120 pound pit bull at the defendant's townhouse and on the development grounds poses a serious and unacceptable threat to the health and safety of the other residents and maintenance personnel. Finally, the grant of injunctive relief would not be unfairly prejudicial to the defendant given that it is a narrowly tailored remedy that preserves the defendant's subsidized tenancy.

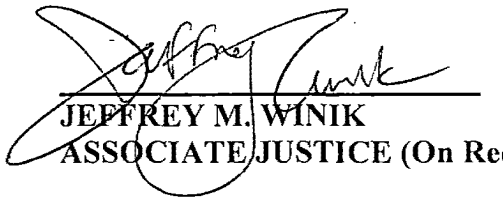
Accordingly, a permanent injunction shall enter enjoining the defendant from keeping her 120 pound pit bull in her townhouse or on the grounds of the Pynchon Townhomes subsidized housing development. This injunction shall be stayed until 12:00 noon on July 15, 2021. Until the stay is lifted the defendant must continue to comply with this court's April 16, 2021 interim injunctive order that requires the defendant to keep her dog leashed and muzzled in her townhouse when guests or maintenance personnel are present and on the grounds of the Pynchon Townhomes subsidized housing development.

ORDER FOR JUDGMENT

Based upon all the credible testimony and evidence presented at trial in light of the governing law, it is **ORDERED** that:

1. Judgment enters for the plaintiff on its claim for a declaratory judgment and injunctive relief.
2. Declaratory Judgment. The court declares the rights of the parties as follows: (1) under the terms of her lease the defendant does not have the right to keep any dog at her townhouse as a pet or service animal without the plaintiff's written consent; (2) the plaintiff has never given its written consent for the defendant to keep a dog at the townhouse; and (3) the defendant's request that she be allowed to keep her 120 pound bit bull law as a reasonable accommodation is unreasonable as a matter of fact and law because the dog bit a guest without provocation causing serious injury to the guest, and for that reason the continued presence of the dog poses a serious threat to the health and safety of the other residents and maintenance personnel.
3. Injunctive Relief. A permanent injunction shall enter enjoining the defendant from keeping her 120 pound pit bull in her townhouse or on the grounds of the Pynchon Townhomes subsidized housing development. **This injunction shall be stayed until 12:00 noon on July 15, 2021.** Until the stay is lifted the defendant must continue comply with this court's April 16, 2021 interim injunctive order that requires the defendant to keep her dog leashed and muzzled in her townhouse when guests or

maintenance personnel are present and on the grounds of the Pynchon Townhomes subsidized housing development.



JEFFREY M. WINIK
ASSOCIATE JUSTICE (On Recall)

June 14, 2021

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 20H79CV000460

DAVID WARD & CYNTHIA WARD,
LAWRENCE ESTHER RICH,
FRANK KAPSIA

Plaintiffs

v.

MONSON ZONING BOARD OF APPEALS, DAVID BEAUDOIN, DAVID JARVIS, RON FUSSELL, TERESA SOBANSKA-HYNKIW, THERESA MARTIN, PETER LLOYD, BONNIE LLOYD and NORTHERN CONSTRUCTION SERVICES, LLC

Defendants

Memorandum of Decision and Order on Defendant Northern Construction Services, LLC's Motion to Dismiss; and Defendant Northern Construction's Motion to Strike Plaintiffs' Expert Witnesses and Reports

Introduction

The plaintiffs are homeowners who occupy properties on Stafford Road in the Town of Monson, Massachusetts. This case involves the plaintiffs' appeal from Defendant Town of Monson Zoning Board of Appeal's ("Board") grant of a special permit to Defendant Northern Construction Services, LLC ("Northern Construction") authorizing its use of the subject property on Stafford Road for the open storage and transport of construction equipment and materials as an extension of an existing non-conforming use (gravel extraction/stone crushing) of the subject property.[1]

1 Defendants David Beaudoin, David Jarvis, Ron Fussell, Teresa Sobanska-Hynkiw and Theresa Martin Are Members of The Monson Zoning Board of Appeals. Defendants Peter Lloyd, Bonnie Lloyd own the subject property.

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After the parties conducted discovery (including depositions), Northern Construction filed a *Motion to Dismiss Pursuant to Mass.R.Civ.P. 12(b)(1)*. Northern Construction also filed a *Motion to Strike Expert Testimony and Reports*.[2]

The plaintiffs contend that the Board committed legal error in granting the special permit to Northern Construction for the proposed extension of the existing non-conforming use at the subject property. The plaintiffs claim that they are entitled to a presumption of standing as parties in interest under G.L. c. 40A, § 11.

Northern Construction argues in its motion to dismiss that the Court need not reach the merits of the plaintiffs' judicial appeal because the plaintiffs are not "persons aggrieved" and do not have standing to challenge the Board's decision granting the special permit.

Facts

The property at issue in this zoning appeal is located at 368 Stafford Road, in the Town of Monson, Massachusetts (the "Lloyd property"). The current owners of the property are Peter and Bonnie Lloyd. They purchased the property in 2001.

Under the provisions of the Town of Monson Zoning Code the Lloyd property is situated in the Rural Residential zone.

In the early 1970s the Town of Monson created the current zoning districts set forth in the zoning code, including the Rural Residential zone. At that time the Rural Residential Zone was created the Lloyd property was used as a commercial gravel pit, including sand and gravel processing, stone crushing, material bulk storage and transportation of gravel. The existing use included using trucks to transport sand and gravel from the Lloyd property. Equipment and vehicles related to the use were stored on the Lloyd property. Since the existing use was not an allowed use in the Rural Residential zone when the zoning district was created, the use was grandfathered (and thus permitted) under the zoning code as a pre-existing nonconforming use.

From 2001 to 2017 Peter Lloyd ("Lloyd") used the Lloyd property to operate a gravel extraction, processing, stone crushing and gravel delivery business. Since Lloyd's use of the Lloyd property for gravel extraction, processing, stone crushing, gravel delivery, and the storage of machinery and vehicles related to his business operation, did not differ significantly from the

2 See the court's rulings on the motion that are set forth in footnotes 6, 7 and 8.

prior owner's pre-existing nonconforming use, Lloyd's use was permitted as a continuance of the grandfathered pre-existing nonconforming use.

There is an open gravel pit on a portion of the Lloyd property. On the property Lloyd kept two gravel crushers, a tractor, two bulldozers, one six-foot loader, one three-foot loader, a ten-wheeler off-road dump truck, a screener and two excavators. During a typical workday Lloyd would be on the property between 7:30 a.m. and 5:00 p.m. Lloyd would use his tractor and/or bulldozers to haul gravel from the gravel pit to the crusher, use machinery to feed gravel into the crusher, crush the gravel, and load the gravel onto the dump truck for delivery to his customers. He would operate his gravel crusher for an entire day approximately every other week during his busy seasons. The gravel crusher generated a significant amount of noise. Lloyd made approximately seven to ten vehicle trips to and from the property per day using his ten-wheeler dump truck to transport the crushed gravel off the property. The vehicles and machinery used diesel fuel. During the years that Lloyd operated his gravel extraction business Lloyd was not made aware of any complaints from his neighbors (or town officials) about noise from the operation of his machinery or vehicles on the property.[3]

The amount of time Lloyd performed work at the property varied depending on how busy his business was. The work was often seasonal.

During the years that Lloyd operated his gravel extraction business there is no evidence (or claim) that the vehicles he used were involved in in any accidents while entering or exiting the property or otherwise created traffic hazards.

In 2020 Northern Construction entered into an agreement to buy the Lloyd property. While it is not clear from the record, it appears that the agreement was conditioned upon Northern Construction receiving the necessary zoning and permit approvals from the Town of Monson.

Northern Construction intends to use the Lloyd property to store construction materials and bulk material including gravel, topsoil and sand/stone. It intends to store between 10-20 pieces of equipment and vehicles, including a skid steer, excavator, front end loader, backhoe, crane and various trucks (ranging in size from one-ton to tractor trailers). Northern

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3 From 2017 to 2019 Lloyd leased the property to a logging company. The logging company stored logs on the property. The company loaded logs onto their 55-foot flatbed trucks and would make approximately ten vehicle trips to transport the logs off the property.

Construction's use of the property will be limited to loading the stored construction materials on vehicles and transporting the materials from the property to its construction sites and back as needed. Northern Construction intends to operate its storage/loading/transport use at the property year-round, but it is typically busier during the warmer months and less busy during the colder months. Northern Construction intends to operate its storage/loading/transport use at the property between 7:00 a.m. and 7:00 p.m. Monday to Friday, and between 7:00 a.m. and 12:00 noon on Saturday.[4] Northern Construction estimates that it would use its trucks to make an average of eight to ten roundtrips from the property per day. It will not keep its truck and equipment motors running overnight. It does not plan to install lights on the property. Northern Construction will not extract gravel stone from the property and will not crush stone on the property. All of Lloyd's equipment, including the stone crushers, will be removed from the property upon completion of the sale.

Northern Construction's proposed use is not a permitted use in the Rural Residential zone under the zoning code. Because Lloyd's gravel excavation/stone crushing use was a pre-existing nonconforming use, Northern Construction filed an application with the Board for a special permit to extend the pre-existing nonconforming use under Section 3.3.2 of the zoning code.

Section 3.3.2 of the zoning code provides:

> **Nonconforming Uses**. The Board of Appeals may issue a special permit to change a nonconforming use in accordance with this section only if it determines that such change or extension shall not be substantially more detrimental than the existing nonconforming use to the neighborhood. The following types of changes to nonconforming uses may be considered by the Board of Appeals.
>
> 1. Change or extension of the use;
> 2. Change from a nonconforming use to another, less detrimental, nonconforming use.

The Board held hearings on Northern Construction's special permit application on June 25 and July 23, 2020. A representative from Northern Construction presented its proposal. Residents stated their concerns about the proposed use including concerns about increased noise, increased truck traffic to and from the property, the suitability of the driveway on the property, traffic

4 Northern Construction acknowledges that under the conditions set forth in the special permit the ZBA retains the authority to require it to push back its Saturday start time to 8:00 a.m. if the ZBA determines there are consistent credible noise complaints from the neighbors.

safety concerns based upon the load size of the trucks that will be used to transport the building materials, maintenance of the property, and the adverse impact on wetlands.

After closing the hearing, the Board voted unanimously (4-0) to grant a special permit to Northern Construction with conditions. In its written decision, filed with the town clerk on August 4, 2020, the Board stated as its reason for granting the special permit that "[i]t is the consensus of the voting members that the proposal meets the criteria using the Powers Test to be considered an extension of an existing, non-confirming use."[5] The Board set the following conditions:

> 1. Hours of Operation will be 7 A.M. to 7 P.M. Monday through Friday and 7 A.M. to 12 P.M. Saturday. Saturday hours carry the stipulation that if there are consistent complaints with the 7 A.M. start up, it will be changed to 8 A.M. For emergency situations that require work outside these hours, Northern Construction will provide notification and documentation of the emergency situation to the Building Department/Zoning Enforcement.
>
> 2. Northern Construction will file with the Conservation Commission.
>
> 3. An acceptable vegetative buffer will be provided for areas that do not have at least 50 feet of existing buffer to abutters.
>
> 4. Proof that the driveway has been accepted and permitted by Mass DOT.
>
> 5. A sani-can will be required on site.

On August 19, 2020 plaintiffs David and Cynthia Ward, Lawrence and Esther Rich, and Frank Kapsia filed a complaint in the Housing Court against the Board (naming the individual board members) and Northern Construction. The complaint is a judicial appeal pursuant to G.L. c. 40A, § 17 and seeks an order annulling the Board's decision to issue the special permit to Northern Construction.

The plaintiffs are residential property owners in the Town of Monson. David and Cynthia Ward reside at 376 Stafford Road, Monson. Their property abuts the Lloyd property. Plaintiffs Lawrence and Esther Rich reside at 375 Stafford Road, Monson. Their property is

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5 See *Powers v. Building Inspector of Barnstable*, 363 Mass. 648, 662-223 (1973). The three prong analysis set forth in *Powers* to evaluate a proposed expansion of a pre-existing non-conforming use asks (1) whether the proposed use reflects the nature and purpose of the non-conforming use when the zoning code amendment took effect; **or** (2) whether there is a difference in quality or character, as well a degree, of the proposed use; **or** (3) whether the proposed use is different in kind in its effect on the neighborhood.

located across the public road from the Lloyd property. Plaintiff Frank Kapsia resides at 359 Stafford Road, Monson. His property is located across the public road from the Lloyd property.

Legal Standards

In reviewing a motion to dismiss for lack of subject matter jurisdiction pursuant to Mass.R.Civ.P. 12(b)(1), the court accepts as true the factual allegations in the complaint, as well as any favorable inferences reasonably drawn from them. *Ginther v. Comm'r of Ins.*, 427 Mass. 319, 322 (1998). In considering subject matter jurisdiction under this rule in the context of a zoning appeal, the court may consider facts or evidence outside the four corners of the complaint which may support the parties' competing contentions regarding whether the plaintiffs are aggrieved persons who can show injury or harm sufficient to establish standing to challenge the zoning decision.

"Under the Zoning Act, G. L. c. 40A, only a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012). "A 'person aggrieved' is one who 'suffers some infringement of his legal rights.'" Id., quoting *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 722 (1996).

G.L. 40A, § 11 defines "parties in interest" as "the petitioner, abutters, owners of land directly opposite on any public or private street or way, and abutters to the abutters within three hundred feet of the property line of the petitioner . . ." Parties in interest "are entitled to a rebuttable presumption that they are 'aggrieved' persons under the Zoning Act and, therefore, have standing to challenge a decision of a zoning board of appeals." *81 Spooner Rd., LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 700. Although an abutter enjoys a presumption of aggrievement, a plaintiff claiming aggrieved person status "always bears the burden of proving aggrievement necessary to confer standing." Id. at 701, citing *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. 20, 34-35 (2006).

"A defendant can rebut the presumption of standing by coming forward with credible affirmative evidence that refutes the presumption." *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702. "[T]hat is, evidence that warrant[s] a finding contrary to the presumed fact of aggrievement, or by showing that the plaintiff has no reasonable expectation of proving a cognizable harm." *Picard v. Zoning Bd. of Appeals of Westminster*, supra, 474 Mass. at 573. Rather than providing its own evidence, the defendant may also rely on

the plaintiff's lack of evidence, obtained through discovery, to rebut a claimed basis for standing. See *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. at 35. Alternatively, a defendant may rebut this presumption "by showing that, as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act is intended to protect." *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702; see also *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. 570, 573 (2016).

If a defendant fails to offer sufficient evidence to rebut the plaintiff's presumption of standing, the abutter "is deemed to have standing, and the case proceeds on the merits." *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 701.

If a defendant successfully rebuts the presumption, the burden shifts to the plaintiff, with no benefit from the presumption, "to prove standing by putting forth credible evidence to substantiate the allegations." *Murrow v. Emery*, 93 Mass. App. Ct. 1119 (2018), quoting *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. at 573. Although the term "person aggrieved" should not be construed narrowly, the plaintiff must "establish by direct facts and not by speculative personal opinion that his injury is special and different from the concerns of the rest of the community." Id.; see also *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. at 33; *Marashlian*, 421 Mass. at 721; *Marotta v. Bd. of Appeals of Revere*, 336 Mass. 199, 204 (1957); *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass. App. Ct. 129, 132 (1992). Subjective and unspecific fears that injury might result are insufficient to demonstrate aggrievement. *See Barvenik*, 33 Mass. App. Ct. at 133.

Furthermore, "[a]ggrievement requires a showing of more than a minimal or slightly appreciable harm. The adverse effect on a plaintiff must be substantial enough to constitute actual aggrievement such that there can be no question that the plaintiff should be afforded the opportunity to seek a remedy. Put slightly differently, the analysis is whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by proposed changes to an abutting property, not whether they simply will be 'impacted' by such changes." *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 122-23 (2011).

Nonetheless, to establish standing to pursue his or her claims "a plaintiff is not required to prove by a preponderance of the evidence that his or her claims of particularized or special injury are true. 'Rather, the plaintiff must put forth credible evidence to substantiate his

allegations.'" *Butler v. City of Waltham*, 63 Mass.App.Ct. 435, 441 (2005), quoting *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. at 722. This "credible evidence" standard has both qualitative and quantitative components: "[q]uantitatively, the evidence must provide specific factual support for each of the claims of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the claimed injury likely will flow from the board's action." *Butler v. City of Waltham*, 63 Mass. App. Ct. at 441 (internal citation omitted). The facts offered by the plaintiff must be more than merely speculative. *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 549, 543 (2008).

An abutter, or an owner of property directly opposite the subject property (or an abutter to an abutter within three hundred feet of the subject property), in seeking to establish aggrievement, may not rely on an injury to his or her property interests that is not protected by the zoning act or the local bylaw. There is no aggrievement where "as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act is intended to protect." *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702, citing *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. at 120. For example, changes to the aesthetic character or "feeling" of a neighborhood are not legally cognizable grounds for standing. See *Harvard Square Def. Fund, Inc. v. Planning Bd. of Ca*mbridge, 27 Mass. App. Ct. 491, 493 (1989) ("diminished enjoyment of the 'village feeling' of Harvard Square essentially involv[es] the expression of aesthetic views and speculative opinions"); *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass. App. Ct. at 132-133 ("Subjective and unspecific fears about the possible impairment of aesthetics or neighborhood appearance, incompatible architectural styles, the diminishment of close neighborhood feeling, or the loss of open or natural space are all considered insufficient bases for aggrievement under Massachusetts law.").

A plausible claim of diminution of property value, if supported by credible evidence, can provide a basis for aggrievement that confers standing so long as the claim is related to cognizable interests protected by the applicable zoning scheme. *See Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. at 31-32.

Discussion

Northern Construction moved to dismiss the complaint pursuant to M.R.Civ.P. 12(b)(1). It contends that the plaintiffs are not 'aggrieved' persons and are without standing to challenge the Board's special permit decision. Northern Construction contends that the plaintiffs cannot show that they will suffer particularized or special injury or harm from the proposed changes in the use of the Lloyd property.

The plaintiffs argue in opposition to the motion that they are entitled to a presumption of standing; and even if Northern Construction rebuts the presumption, the plaintiffs argue that they have presented credible evidence supporting their claims that they will suffer injury or harm sufficient to establish they are persons aggrieved with standing to challenge the Board's decision.

Presumption of Standing. Northern Construction acknowledges that plaintiffs David and Cynthia Ward's property abuts the Lloyd property and are entitled to a rebuttable presumption that they are 'aggrieved' persons under the Zoning Act. Plaintiffs Lawrence and Esther Rich and plaintiff Frank Kapsia each own a parcel of land that is located across from the Lloyd property separated by a public street (Stafford Road). It is not clear from the evidence in the record whether either parcel is "directly opposite" the Lloyd property. However, for purposes of ruling on Northern Construction's motion to dismiss I shall assume (without deciding) that the Rich and Kapsia parcels are "directly opposite on any public or private street or way" as set forth in G.L. c. 40A, § 11, and that Rich and Kapsia are "parties in interest" entitled to a rebuttable presumption that they are aggrieved persons.

I will address whether Northern Construction has rebutted the presumption with respect to each claim of injury or harm asserted by the plaintiffs. And if it has, I will address, with respect to the preliminary issue of whether the plaintiffs' have standing to challenge the Board's decision, whether the plaintiffs have put forth credible evidence to show that they will be injured or harmed by the proposed extension of the non-conforming use of the Lloyd property.

Plaintiffs' Claims of Particularized or Special Injury or Harm. The plaintiffs allege that Northern Constriction's proposed use of the Lloyd property would cause them particularized or special injury or harm (1) from increased noise from the operation of a "full time construction yard;" (2) from increased traffic and traffic hazards on Stafford Road from "oversize trucks" using the existing driveway; (3) from their loss of quiet enjoyment resulting from a change in the residential character of the neighborhood, and (4) that the proposed use would diminish the fair market value of their properties.

Noise. The plaintiffs testified that the potential increase in the level of noise from Northern Construction's proposed use would adversely impact their use of their properties.

David Ward testified at his deposition that the pre-existing gravel extraction use created noise, primarily when the gravel crusher was used that was "so loud it's – hard to describe" and that "the other annoying noise is when he's running his excavators, the engines are always blowing up and down; and basically that is very unique and annoying signature, revving up and down, especially when they're turbo engines." Cynthia Ward testified that "[b]asically, the noise that really bothers me was the crushing noise, like a crusher. It's a horrible, horrible noise. It's very loud, very high pitched, very irritating to the ears. That – that bothered me." Frank Kapsia testified that when Lloyd was working at the property Kapsia could hear noise from the gravel crusher and the bucket loader. He further testified that he could hear noise when the saws were being used by the commercial logging tenant. Lawrence Rich and Esther Rich testified that they heard loud noise whenever Lloyd operated his loader and gravel crusher.

It is undisputed that freight trains travel on train tracks that run along the Lloyd property, and that the plaintiffs can hear the trains passing by and can hear the train horns. There is no evidence that Northern Construction's proposed use will result in an increase in the train traffic or horn noise.

The plaintiffs testified that they were concerned that Northern Construction's potential use of the property would create increased noise, and because Northern Construction's might use the property in "emergency" situations the plaintiffs were concerned they would be exposed noise that "could be 24/7."

The relevant factual issue with respect to noise is whether the projected noise levels generated from Northern Construction's proposed storage/transportation of construction material use will be greater than the noise levels generated from the pre-existing gravel extraction/stone crushing use conducted on the Lloyd property. If the answer to that question is yes, the relevant legal issue is whether noise from Northern Construction's proposed use of the Lloyd property will be substantially more detrimental to the plaintiffs than the noise that was generated by the nonconforming gravel extraction/stone crushing/transport use.

Northern Construction retained a acoustic engineering expert, Douglas L. Sheadel, CCM, who conducted and prepared an environmental sound study. The sound study, dated April 5, 2021, is appended as Exhibit 1 to Sheadel's affidavit dated April 16, 2021. Sheadel analyzed the

sound at the Lloyd property that would be generated by equipment used to extract and crush gravel on the property (that could be expected to be heard and in the surrounding area and from the plaintiffs' properties) and compared those sound levels with the sound levels that would likely result from Northern Construction's proposed storage/loading/transport use.

Sheadel concluded that the "proposed construction storage site will represent a reduction in sound from the existing sand and gravel use."

Sheadel identified two existing sound sources (that existed when Lloyd operated his gravel extraction/stone crushing use and exist currently) that "have the potential to affect all land uses in the project area" and which "are not expected to change significantly as a result of the site use" proposed by Northern Construction. He identified the two existing sound sources as traffic traveling along Stafford Road (Route 32) and trains running along the existing railroad tracks. Sheadel opined, using a worst-case scenario pertaining to sound from Northern Construction's proposed use after its equipment is relocated to the property, that the proposed use will result in less noise than that generated by the pre-existing gravel extraction/crushing use and the passage of trains over the existing tracks (including train horns blown at the above-grade crossing). Sheadel stated that his sound study concluded that those collective noise sources "introduce a routine source in the low 60's dBA (decibels) and an occasional source between 70 and 88 dBA." The sound study further concluded that when "the existing daytime sand and gravel operation is active it produced a sound level as high as 69 dBA at the nearest residence." Sheadel opined that in comparison to the pre-existing sound sources Northern Construction's proposed construction equipment and material storage use would result in a lower sound level of 65 dBA at the nearest residence; and using a more typical scenario (involving the movements of one or more vehicles on the property at a time) the sound level generated from Northern Construction's proposed use would be in the low 50s dBA at the nearest residence.

With respect to the frequency of "emergency" operation at the Lloyd property during hours that extended beyond the permitted hours of operation set forth in the Board's conditions, John Eric Rhakonen, Northern Construction's manager, states in his affidavit dated April 16, 2021 that emergency usage of a storage property by Northern Construction is rare and limited to unanticipated problems at one of their construction sites, such as a inclement weather causing a broken water main and the need to restore access to potable drinking water.

I find and rule that Northern Construction has presented credible affirmative evidence sufficient to rebut the presumption of standing with respect to the plaintiffs' allegations of particularized or special harm arising from anticipated noise from Northern Construction's proposed use of the property. See *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702; *Picard v. Zoning Bd. of Appeals of Westminster*, supra, 474 Mass. at 573.

Accordingly, the burden shifts to the plaintiffs, with no benefit from the presumption, "to 'prove standing by putting forth credible evidence to substantiate the allegations'" pertaining to noise. *Murrow v. Emery*, 93 Mass. App. Ct. 1119 (2018), quoting *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. at 573.

Standing alone, the plaintiffs' testimony regarding their concerns about increased noise that may result from Northern Construction's proposed use of the property (and the adverse impact such noise may have on their use of their homes) constitute speculative personal opinion insufficient to constitute credible evidence of harm.

The plaintiffs rely on the report and testimony of their acoustic engineering expert, Herb Singleton, president of Cross-Spectrum Acoustics.[6] Singleton's report, dated June 15, 2021, is appended to Singleton's affidavit, dated July 9, 2021, as Exhibit B. In his report Singleton acknowledges that Northern Construction's expert acoustic engineer compared the noise expected to be generated by Northern Construction's proposed storage use with the pre-existing uses, including grave extraction and crushing, truck noise and freight train noise. However, Singleton states that "in the context of Monson zoning bylaws and Mass DEP requirements, these comparisons are irrelevant." He states the "Town and Mass DEP are not looking at a comparison of maximum project levels with maximum existing levels. So that comparison in that report is not relevant to determining compliance with those Town and State limits."

The only expert opinion that Singleton provided is that the Northern Construction acoustic report and analysis "does not adequately address the requirements of Town of Monson and Mass DEP noise policies."

Singleton misunderstands the relevant consideration when evaluating noise in the context of whether to grant a special permit to extend a pre-existing nonconforming use.

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6 Northern Construction's motion to strike the expert testimony and report of Herb Singleton is **DENIED**. Under Mass. G. Evid. § 702 I conclude that Northern Construction's argument goes to the weight the court should afford Singleton's testimony rather than its admissibility.

Singleton never rendered an expert acoustical engineering opinion addressing the one material factual issue pertaining to noise in the context of the grant of a special permit to extend a pre-existing nonconforming use; to wit, whether noise from Northern Construction's proposed use will be greater than noise that had been generated by the pre-existing nonconforming gravel extraction/stone crushing/transport use. And the plaintiffs' acoustic expert never evaluated or rendered an expert opinion as to whether noise from Northern Construction's proposed use will be substantially more harmful to the plaintiffs than the noise that had been generated by the pre-existing use.

The plaintiffs have not presented any credible evidence to show that noise from Northern Construction's proposed use will be greater and more detrimental than noise from the preexisting use of the Lloyd property.

Accordingly, I rule as a matter of fact and law that the plaintiffs failed to present credible evidence to substantiate their allegations' that noise from Northern Construction's proposed use will cause them particularized or special injury or harm.

Increased Traffic and Traffic Hazards. The plaintiffs' testified that they would suffer injury or harm from increased traffic and traffic hazards resulting from Northern Construction's use of "oversize trucks" that will enter and exit the existing driveway on the Lloyd property.

The relevant factual issue with respect to increased traffic and traffic hazards is whether the projected traffic generated from Northern Construction's proposed storage/equipment and material transport use conducted on the Lloyd property will be greater than the traffic generated by the pre-existing use and whether such traffic will pose a greater traffic safety hazard than the traffic safety hazard posed by the pre-existing gravel extraction/stone crushing use conducted on the Lloyd property. If the answer to that question is yes, the relevant legal issue is whether the traffic related risks from Northern Construction's proposed use of the Lloyd property will be substantially more detrimental to the plaintiffs than the traffic related risks from the pre-existing gravel extraction/stone crushing/transport use.

Northern Construction retained a traffic and transportation expert, Jeffrey S. Dick, a civil engineer who conducted a transportation assessment to determine the potential impacts on the transportation infrastructure associated with Northern Construction's proposed use of the Lloyd property. The written report, dated April 12, 2021, is appended as Exhibit B to Dick's affidavit dated April 15, 2021.

Dick performed a traffic analysis. He accepted the reported information that (1) Lloyd's use of the property to fill sand and gravel orders generated approximately 7 to 10 vehicle trips per day when in operation, (2) Northern Construction's proposed use would involve staging and storing 10 to 20 pieces of equipment, and the bulk storage of construction materials, (3) Northern Construction's proposed use would generate approximately 7 to 10 vehicle trips per day, (4) the property will not be open to the public, (5) traffic associated with the Northern Constructions use of the property will involve the transportation of the construction equipment and materials between the property and construction sites operated by Northern Construction, and (6) once the equipment and materials are delivered, the level of activity and associated traffic at the property will be minimal.

Dick concluded that the traffic expected from Northern Construction's "proposed use of the site is similar to the level of activity that is associated with the current use of the property and will not result in an impact that would increase motorist delays or vehicle queuing, or impede emergency access. The expected level of traffic (approximately 7-10 vehicle trips per day) is similar to that of a single-family home. Dick rendered his opinion that the proposed use "will not result in an intensification of the historic use of the Property to the extent that there would be a material increase in traffic . . . a review of the MassDOT High Crash Location database indicates that there are no high crash locations along Route 32 or intersecting roadways within the Town. As such, it is apparent that the Project can be accommodated within the confines of the existing transportation infrastructure without creating an adverse impact to the movement of vehicles, pedestrians or bicyclists."

I find and rule that Northern Construction has presented credible affirmative evidence sufficient to rebut the presumption of standing with respect to the plaintiffs' allegations of injury or harm arising from increased traffic and traffic hazards from Northern Construction's proposed use of the property. See *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. at 702; *Picard v. Zoning Bd. of Appeals of Westminster*, supra, 474 Mass. at 573.

Accordingly, the burden shifts to the plaintiffs, with no benefit from the presumption, "to 'prove standing by putting forth credible evidence to substantiate the allegations'" pertaining to increased traffic and traffic hazards. *Murrow v. Emery*, 93 Mass. App. Ct. 1119 (2018), quoting *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. at 573.

Standing alone, the plaintiffs' testimony regarding their concerns about increased traffic and traffic hazards that may result from Northern Construction's proposed use of the Lloyd property constitute speculative personal opinion insufficient to constitute credible evidence of harm.

The plaintiffs rely on the report and testimony of their civil engineering expert, Ali Khorasami. Khorasami prepared a written assessment dated June 10, 2021 that is appended to his July 9, 2021 affidavit as Exhibit B.

In his deposition Khorasami testified that he did not have any data to contradict the findings presented by Northern Construction's traffic expert in his April 12, 2021 transportation impact assessment report. Khorasami testified that he was not retained to conduct a traffic impact study of Northern Construction's proposed use of the Lloyd property. Instead, Khorasami was retained to assess potential safety issues pertaining to trucks entering and exiting the existing driveway on the Lloyd property and to make certain safety recommendations. His recommendations are set forth in his written assessment.[7]

Each of Khorasami's recommendations falls within the purview of the Massachusetts Department of Transportation ("MassDOT") in the context of their review and permitting authority regarding modifications and improvements to the driveway on the Lloyd property as a condition of Northern Construction's proposed use of the driveway. Khorasami testified that he was not aware that the Board had conditioned its approval of the special permit application upon Northern Construction obtaining a permit from MassDOT approving any necessary modifications and improvements to the driveway. The plaintiff's expert, Jeffrey Dirk, testified that he agreed that Khorasami's recommendations would improve the driveway.

The fourth condition set forth in the Board approval is that Northern Construction provide the Board with "[p]roof that the driveway has been accepted and permitted by Mass DOT." Khorasami agreed that so long as Northern Construction complies with all conditions required by MassDOT the driveway would be safer than the existing driveway.

The plaintiffs' traffic expert never rendered an expert opinion on the one of the material factual issue pertaining to traffic in the context of the grant of a special permit to extend a pre-

7 Northern Construction's motion to strike the expert testimony and report of Ali Khorasami is **DENIED**. Under Mass. G. Evid. § 702 I conclude that Northern Construction's argument goes to the weight the court should afford Khorasami's testimony rather than its admissibility.

existing nonconforming use; to wit, whether the level of activity that is associated with Northern Construction's proposed use of the Lloyd property will result in an impact that would increase motorist delays or vehicle queuing, or impede emergency access; and if yes, whether the impact resulting from such increase would be more detrimental than the traffic-related impact from the pre-existing gravel extraction/stone crushing use. To the extent that the plaintiff's traffic expert did render an opinion regarding traffic safety, he agreed with the opinion rendered by Northern Construction's expert that with the required MassDOT review and compliance with any MassDOT mandated modifications to the existing driveway, the driveway would be safer than the existing driveway. And the plaintiff's traffic expert never rendered an opinion as to whether traffic generated by Northern Construction's proposed use would create an increased risk of particularized or special injury or harm to any of the plaintiffs.

Accordingly, I rule as a matter of fact and law that the plaintiffs have failed to present credible evidence to substantiate their allegations' that increased traffic and traffic hazards would result from Northern Construction's use of its trucks to enter and exit the driveway on the Lloyd property, and that such use of the driveway would expose them to an increased risk of particularized or special injury or harm.

Change in Neighborhood Character. The plaintiffs allege that Northern Construction's proposed use of the Lloyd property would change the residential character of their neighborhood causing harm to their quiet enjoyment of their homes.

Subjective and nonspecific concerns about changes to the aesthetic character or "feeling" of a neighborhood are not legally cognizable aggrievements sufficient to constitute grounds for standing. See *Harvard Square Def. Fund, Inc. v. Planning Bd. of Ca*mbridge, 27 Mass. App. Ct. at 493 (1989); *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass. App. Ct. at 132-133.

Accordingly, I rule as a matter of fact and law that the plaintiffs cannot show legally cognizable aggrievement sufficient to establish their standing to challenge the Board's decision based upon their claims of injury or harm relating to a change in the residential character of their neighborhood.

Property Value. The plaintiffs allege that the opinions rendered by their purported property valuation expert, Harold Murphy, are sufficient to constitute credible evidence sufficient to substantiate their allegations' that Northern Construction's proposed use will cause them particularized or special injury or harm in the form of diminished market value of their

properties. Northern Construction contends that that the plaintiffs have not presented any competent credible evidence sufficient to show that the proposed use would diminish the fair market value of any of their properties.

A plausible claim of diminution of property value, if supported by credible evidence, can provide a basis for aggrievement that confers standing so long as the claim is related to cognizable interests protected by the applicable zoning scheme. *See Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. at 31-32.

Northern Construction may also rely on the plaintiffs' lack of evidence to rebut a claimed basis for standing. See *Standerwick v. Zoning Bd. of Appeals of Andover*, 447 Mass. at 35.

Harold Murphy is a licensed Massachusetts real estate broker. Murphy prepared what purports to be a valuation report at the plaintiffs' request. The report, in letter form, is dated June 14, 2021 and is appended to Murphy's July 12, 2021 affidavit as Exhibit A. Murphy also gave deposition testimony.[8]

Even if Murphy's testimony and letter remain a part of the record, I conclude that his opinion is not entitled to be afforded any weight.

Murphy states in his letter that Northern Construction's proposed use of the Lloyd property "will cause projected monetary losses in value estimated to exceed Forty Percent (40%) for the abutting and adjacent properties." He states that Northern Construction's proposed use "will cause the roadway to be dramatically widened for a considerable distance from the proposed entrance in both directions. This will bring increased speeds, larger vehicles, more particulate matter in exhaust fumes, noise levels will rise greatly for a much longer portion of each day. In Monson bylaws the gravel crusher can only run eight weeks a year while the proposed activities will cause constant traffic." He further states that "if I were to list these properties, I would have to take the proposed use of the [the Lloyd property], and its change to the character of the neighborhood into consideration in valuing the properties . . . Experience tells me, families do not wish to purchase near large commercial properties, like the proposed

8 Northern Construction's motion to strike the expert testimony, affidavit and letter of Harold Murphy is **ALLOWED**. Applying the admissibility requirements set forth in Mass. G. Evid. § 702 to Murphy's deposition testimony and report, Murphy's opinions are not based on sufficient facts or data [§ 702(b)], and is not the product of reliable valuation principles or methods applied to the facts of this case [§ 702(c) and (d)]. See, *Commonwealth v Lanigan*, 419 Mass. 15, 25-26 (1994). However, to avoid unnecessary delay should this ruling be determined to be incorrect, I have addressed in this memorandum/order whether Murphy's testimony and opinions are entitled to be afforded any evidentiary weight.

use and would have to adjust the listing price accordingly." Finally, Murphy states that the pre-existing gravel extraction/stone crushing use of the property (together with the train noise) did not adversely affect the plaintiffs' property values because "most enjoy the trains as well as the former gravel pit usage being akin to a neighborhood working farm. They add a spark, something that connects people with each other."

In his letter, Murphy did not identify what established industry standard valuation principles and methods he used, if any, to reach his diminished market valuation estimate. Further he did not provide any facts, or reference any facts in the record or existing expert reports, that support his factual assumptions regarding increased traffic, road expansion, noise or exhaust fumes. Finally, his subjective observations regarding the potential "change to the character of the neighborhood," and its impact on the valuation of properties, are insufficient bases for aggrievement under Massachusetts zoning law. *Barvenik v. Bd. of Aldermen of Newton*, 33 Mass. App. Ct. at 132-133.

The significant deficiencies in Murphy's purported opinions and the absence of any factual support for the factual assumptions underlying those opinions become apparent upon review of his deposition testimony.

Murphy is not a real estate appraiser. He did not conduct a study or prepare a written property valuation report based upon industry recognized valuation principles and methods used by professional appraisers to identify how the value of each plaintiff's property would be adversely impacted by Northern Construction's proposed use. He did not review the Board's special permit decision, or the conditions made a part of the permit. He could not point to any evidence or facts (including any facts set forth in the Khorasami traffic report or the Singleton acoustic report) that would support his factual assumptions that Northern Construction's proposed use (when compared to the pre-existing gravel extraction/stone crushing use) would result in increased traffic, would create increased traffic hazards, would require the widening of Stafford Road, would result in increased exhaust fumes from equipment and trucks, or would result in increased noise. Murphy was unaware that because Lloyd's gravel extraction business was a pre-existing nonconforming use, it was not subject to the Monson zoning bylaw provision that limits use of a gravel crusher to only eight weeks a year (and there is no evidence that Lloyd ran his gravel crushers for only eight weeks a year). With respect to the plaintiffs' concerns about increased traffic and noise, Murphy stated that "fear of unknown" and "fear of unknown

unknowns" was part of his evaluation of the impact that Northern Construction's proposed use would have on the plaintiffs' property values. This amounts to little more than speculation. Such speculation is insufficient to form the factual basis of an opinion pertaining to property value. Murphy acknowledged that he considered his (and the plaintiffs') subjective concerns about a change in the general character of the neighborhood in arriving at his valuation estimate, concerns that are not protected under the Monson zoning bylaw.

I rule that Murphy's opinions set forth in his letter and his deposition testimony are not based upon or supported by any competent admissible facts or evidence set forth in the affidavits, reports or deposition testimony contained in the record. Murphy's opinions amount to nothing more than unreliable speculation pertaining to the impact that Northern Construction's proposed use will have on the plaintiffs' property values. His opinions are not entitled to be afforded any evidentiary weight.

Accordingly, I rule as a matter of fact and law that Northern Construction has rebutted the plaintiffs' presumption of standing with respect to their claim of injury or harm in the form of diminished property values; and that the plaintiffs have failed to present credible evidence sufficient to demonstrate that they have a plausible claim that Northern Construction's proposed use will cause them particularized or special injury or harm in the form of diminished property values.

Conclusion

Northern Construction has rebutted the plaintiffs' presumption of standing with respect to the plaintiffs' allegations of particularized or special injury or harm. Without the benefit of the presumption of aggrievement, the plaintiffs have failed to present credible evidence sufficient to demonstrate that there has been some infringement of their legal rights and that they have a plausible claim of particularized or special injury or harm. *See Marashlian*, 421 Mass. at 721.

Therefore, the Court rules as a matter of law that the plaintiffs are not "persons aggrieved," and are without standing to challenge the Board's decision to grant Northern Construction a special permit to the Lloyd property for storage/transport of construction equipment and materials as an extension of a pre-existing non-conforming use under Section 3.3.2 of the Town of Monson Zoning Code. *See Standerwick*, 447 Mass. at 33.

For the foregoing reasons, Defendant Northern Construction Services, LLC's *Motion to Dismiss Pursuant to Mass.R.Civ.P. 12(b)(1)* is **ALLOWED.**

It is **ORDERED** that judgment enter for the defendants dismissing the plaintiffs' complaint based upon lack of jurisdiction over the subject matter.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

November 17th 2021

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
CENTRAL DIVISION
SUMMARY PROCESS
NO. 21H79SP000637

GRAHAM'S CONSTRUCTION INC.,
ALSTON GRAHAM and ELAINE GRAHAM,

Plaintiffs

VS.

ENA SALOME GRAHAM,

Defendant

Memorandum of Decision on Cross-Motions for Summary Judgment

Procedural History

The plaintiffs commenced this summary process action in February 2021 seeking to recover possession of a single-family dwelling located at 141 Elaine Circle, Springfield Massachusetts, currently occupied by the defendant.[1] The plaintiffs' complaint does not allege that the defendant breached any term or condition of her occupancy agreement and does not include an account annexed for rent.

In February 2021 the defendant filed a written answer in which see asserts as a defense that she did not breach the agreement under which she occupied the premise. Her answer included counterclaims for Count I: breach of contract (pertaining to her right to occupy the premises) against Graham's Construction Inc.; Count 1I: breach of contract against Alston Graham (pertaining to defendant's right to occupy the premises); Count III: violation of G.L. c. 93A against Graham's Construction Inc. (pertaining to purported deceptive promises relating to transfer of title to the premises); Count IV: claim for declaratory judgment against Graham's Construction Inc. (pertaining to purported promises relating to transfer of title to the premises); Count V: claim of fraud against Alston

[1] The complaint does include an account annexed seeking damages for the fair rental value of the defendants' continued use of the property.

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Graham (pertaining to purported promises relating to transfer of title to the premises); and Count VI: claim for specific performance of the purported promise against all defendants. The answer included a demand for a jury trial. In September 2021 the defendant amended her answer to include an affirmative defense of waiver/promissory estoppel.

This matter came before the court for hearing on the parties' cross-motions for summary judgment.[2] The parties filed memoranda, affidavits and supporting documents.

After reviewing the evidence set forth in the summary judgment record and considering the arguments presented by the parties, the court concludes as a matter of law based on the competent evidence and undisputed facts set forth in the summary judgment record that:

1. the plaintiffs' motion for summary judgment on the defendants' counterclaims is **ALLOWED** with respect to Counts III and V of the defendant's counterclaims, but is **DENIED** with respect to the plaintiff's claim for possession and with respect to Counts I, II, IV and VI of the defendant's counterclaims; and
2. the defendant's motion to dismiss/motion for summary judgment is **DENIED**.

Undisputed Facts

I conclude that the following facts set forth in the summary judgment record are not in dispute, and in accordance with M.R.Civ.P. 56(d) these facts shall be deemed established.

Plaintiff Graham's Construction, Inc. ("Graham's Construction") is a family-run corporation that owns the single-family dwelling located at 141 Elaine Circle, Springfield Massachusetts (the "Elaine Circle house"). Plaintiff Alston Graham ("Alston") is the president of Graham's Construction. Plaintiff Elaine Graham ("Elaine") is married to Alston. Alston and Elaine act as the property managers for Graham's Construction. Defendant Ena Salome ("Ena") is Alston's mother. Ena is 78 years old.

In July 2006 Ena purchased a two-family dwelling located at 141 Oak Street, Springfield, Massachusetts (the "Oak Street property"). She paid $135,000.00 for the

[2] The defendant initially filed a motion to dismiss. Since the parties submitted evidence outside the initial pleadings, I shall consider the defendant's motion as a motion for summary judgment. See M.R.Civ.P. 56(b).

property.[3]

In October 2016 Graham's Construction purchased a parcel of land in Springfield, Massachusetts with the intent to subdivide the property and build single-family homes on each lot. In May or June 2020 Graham's Construction completed construction of the Elaine Circle house.

In 2020 Alston believed that Ena was experiencing financial difficulties related to the Oak Street property. He believed she was having difficulties maintaining the property, making her mortgage payments and collecting rent from her tenant.

Alston contends that in May 2020 he told Ena that she should sell the Oak Street property and that she could live in the Elaine Circle house. He denies that he ever told Ena that he would deed the Elaine Circle house to her as a gift (or without consideration). Ena contends that Alston told her that if she sold the Oak Street property, she could move into the Elaine Circle dwelling and that Alston would "give me a deed to the house."

In May 2020 Alston showed Ena the Elaine Circle house that was then under construction.

The parties agree that there is no written agreement, contract or other writing memorializing Ena's contention that Alston promised to convey the Elaine Circle house to her in fee without consideration or to grant Ena a life estate. Graham's Construction never executed a deed conveying the Elaine Circle dwelling to Ena.

There is only one written agreement between Alston and Ena pertaining to the Elaine Circle house. In June 2020 (one month after the purported oral promise was made, and two months before Ena completed the sale of the Oak Street property) Alston, Elaine and Ena signed a document entitled "Agreement." The written agreement provides in relevant part that (1) Ena could use and occupy the Elaine Circle house as her residence; and (2) Ena was responsible for payment of "all bills for water, sewer, real estate taxes, gas, electric, heat, telephone, cable and internet, etc;" and Ena was also responsible for lawn maintenance and removal of snow and ice from walkways. The agreement does not require Ena to pay any rent directly to Alston or Elaine (or Graham's Construction) for her use of the Elaine Circle house. The agreement does not set forth a specific date on which the agreement would expire or terminate, nor did it set forth whether or how either party

[3] It appears that Ena used the proceeds from a loan secured by a mortgage to purchase the property.

could terminate the agreement.[4] Specifically, the agreement does not state whether the plaintiffs had to allege good cause to terminate the agreement. The agreement provides that Ena cannot record the agreement at the registry of deeds.

On July 14, 2020 Ena signed a purchase and sale agreement to sell the Oak Street property to the buyers for $200,000.00.

On August 13, 2020 Ena closed on the sale the Oak Street property and executed and delivered a deed to the buyers upon receipt of payment in the amount of $200,000.00. Ena was represented by an attorney on this property sale transaction.

Sometime during the summer of 2020 (prior to August 13 closing, and possibly prior to the July 14 offer to purchase) Graham's Construction made repairs to the Oak Street dwelling to prepare the property for sale. Graham's Construction's invoice for labor and material expenditures totaled $18,635.67.

At the August 13 closing on the sale of the Oak Street property, Ena signed a written authorization stating that from the proceeds of the property sale $8,635.67 would be paid over to Graham's Construction as reimbursement for the repair work it performed. Graham's Construction received the $8,635.67 payment. Alston waived the remaining $10,000.00 Graham's Construction had expended. Ena retained the net proceeds from the sale of the Oak Street property in the amount of $17,161.38.[5]

Prior the closing on the Oak Street property, Ena (and her daughter) moved into the Elaine Circle house. They continue to occupy the house.

According to Alston, shortly after Ena moved into the Elaine Circle house his relationship with Ena deteriorated, and he decided to terminate the occupancy agreement. On October 22, 2020 the plaintiffs served Ena with a 90-Day Notice to Quit. In February 2021 the plaintiffs commenced this summary process action in the Western Housing Court.

Discussion

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty*

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[4] I shall assume that Alston was authorized to act on behalf of Graham Construction when he signed the agreement.

[5] Ena paid off a first mortgage in the amount of $121,226.12 (held by Mr. Cooper) and a second mortgage in the amount of $38,613.00 (held by Wayfinders).

Mut. Ins. Co., 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague ad general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) ("[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment").

I shall address whether either party is entitled to judgment as a matter of law with respect to each claim, counterclaim and defense.

Defendant's Breach of Contract Counterclaims (Counts I and II), Declaratory Judgment Counterclaim (Count V) and Specific Performance Counterclaim (Count VI). Ena contends that Alston's purported oral promise to convey the Elaine Circle house to her constitutes a binding contract, and that in breach of that contract the plaintiffs have failed to execute a deed conveying title to the Elaine Circle dwelling to her.

A contract requires an offer, acceptance of the offer, and consideration. Normally, a contract or agreement unsupported by consideration is not enforceable. See *Quinn v. State Ethics Comm'n*, 301 Mass. 210, 216 (1987). And a contract involving the transfer of real property normally is unenforceable without a writing memorializing the agreement. There are exceptions to both rules.

G.L. c. 259, § 1 (the statute of frauds) states that "no action shall be brought upon a contract for the sale of lands unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith."

However, "[a] contract for the transfer of an interest in land may be specifically enforced notwithstanding failure to comply with the Statute of Frauds if it is established

that the party seeking enforcement, in reasonable reliance on the contract and on the continuing assent of the party against whom enforcement is sought, has so changed his position that injustice can be avoided only by specific enforcement." *Barber v. Fox*, 36 Mass.App.Ct. 525, 530 (1994), citing to Restatement (Second) of Contracts § 129 (1979), quoted in *Hickey v. Green*, 14 Mass.App.Ct. 671, 673 (1982). Such proof would be sufficient to waive the consideration element of the contract claim under a theory of detrimental reliance sufficient to support the remedy of promissory estoppel.

In essence Ena's contract claims and her promissory estoppel defense are based on the same purported promise to deed the property to Ena, and Ena's purported actions in reliance on that promise. Where the elements of promissory estoppel are established, the promisor is estopped from denying the enforceability the promise based upon the lack of traditional consideration.

To support her claim/defense of promissory estoppel, the promisee (Ena) must establish that "(1) a promisor made a promise which he should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, (2) the promise does induce such action or forbearance by the promisee, and (3) injustice can be avoided only by enforcement of the promise." *Loranger Const. Co. v. E.F. Houserman*, 6 Mass.App.Ct. 152, 154 (1978). The promisee's reliance on the promise must be shown to be reasonable. *Rhode Island Hospital v. Varadian*, 419 Mass 841, 850 (1995). If the promisee establishes the elements of promissory estoppel "the remedy granted for breach may be limited as justice requires." *Restatement (Second) of Contracts, § 90(I)*.

Under a promissory estoppel theory, the absence of consideration from the promisee flowing to the promisor does not preclude the promisee from seeking to enforce the oral promise where she has so changed her position (in other words that she suffered some significant adverse consequence by taking action or refraining from taking action in reliance upon the promise) that injustice can be avoided only by specific enforcement of the promise (or some other remedy that is just and reasonable). However, the absence of any consideration flowing to the promisor is a factor, together with other factors, that may be considered in determining whether the promisee's reliance on the purported promise was reasonable.

With respect to Ena's claims based upon promissory estoppel, the fact finder will have to determine in the first instance the substance of the promise Alston made to Ena.

Even if the fact finder determines that Alston did not promise to deed the Elaine Circle house to Ena, the fact finder will need to determine what exactly Alston promised in May 2020 when he told Ena that she could live in the Elaine Circle house (in other words, reasonably construed, did Alston promise Ena nothing more than a month to month tenancy, or did Alston promise Ena some type of security of possession that extend beyond a mere tenancy at will). The fact finder will then have to determine whether Ena's execution of the June 2020 written agreement, the only writing executed by the parties pertaining to the Elaine Circle house, superseded any prior oral promise Alston may have made to Ena.[6] The fact finder will be required to determine whether the written agreement was intended by the parties as a statement of their complete agreement with respect to the Elaine Circle house. If the answer to that question is "yes", then the doctrine of promissory estoppel does not apply, and the oral promise is not enforceable. If the answer to that question is "no", the fact finder will have to consider whether Ena's reliance on the purported earlier oral promise was reasonable under the circumstances (including the fact that she signed the June 2020 agreement). Finally, the fact finder will have to determine whether Ena's sale of the Oak Street property, an action taken in reliance on Alston's promise (whatever the fact finder determines the promise was), was so unjust to Ena (even though she sold the property for significantly more money than she paid for it, and did pay Alston any of the net gain from the sale) that the injustice caused by such determinantal reliance on the promise can be avoided only by requiring the plaintiffs to deed the Elaine Circle house to Ena without requiring Ena to make any payment to Graham's Construction based upon the expenses incurred by Graham's Construction to purchase and develop the property or the fair market value of the property.[7] These are all disputed mixed questions

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[6] There is no evidence in the summary judgment record that Alston made any promise to convey the Elaine Circle house to Ena *after* the June 2020 agreement was executed.

[7] Were Ena to prevail on her contract/promissory estoppel claim at trial, conveyance of the Elaine Circle house to Ena is but one possible remedy subject to reasonable limiting conditions as justice requires. Other possible remedies as justice requires, depending on what the fact finder determines to have been the substance of the oral promise, could be (1) transfer of the property conditioned upon Ena making a payment to Graham's Construction based upon the expenses incurred by Graham's Construction to purchase and develop the property or the fair market value of the property (or some other just amount); (2) establishment of a life estate, or (3) establishment of a fixed term tenancy – each potential life estate or tenancy remedy based upon just, fair and reasonable terms including the duration of estate or tenancy, limitations on the use of the property (and compliance with reasonable maintenance and behavior-based provisions), and rent for continued use and occupation during the life estate or tenancy term.

of fact and law that must be decided by the fact finder based upon the evidence presented at trial.

While it is a close call, I conclude that there exist disputed issues of material fact with respect to (1) the substance/material terms of the oral promise Alston made to Ena prior to her sale of the Oak Street property; (2) whether the execution of the June 2020 written agreement superseded any prior oral promise; (3) if the answer to #2 is "no", whether Ena sold the Oak Street property in reliance to her detriment on the prior oral promise; (4) if the answer to #3 is "yes", whether Ena's reliance was reasonable under the specific circumstances of this case, (5) if the answer to #4 is "yes", what, if any, harm, detriment and injustice Ena suffered; and (6) if the answer to #3 and 4 are "yes", and taking in the answer to #5, what remedy, if any, would be just, fair and reasonable under the specific circumstances of this case.

These mixed factual and legal issues must be decided at trial. Ena is also entitled to have the rights of the parties with respect to these factual and legal issues declared in accordance with M.G.L. c. 231A.

Accordingly, the plaintiffs are not entitled to summary judgment on the defendant's breach of contract counterclaims (Counts I and II), declaratory judgment counterclaim (Count IV) and specific performance counterclaim (Count VI).

Defendant's Consumer Protection Act Counterclaim (Count III). Ena contends that Graham's Construction's refusal to honor the oral promise made by Alston to convey the Elaine Circle house to her constitutes an unfair or deceptive trade or practice in violation of G.L. c. 93A.

The term "trade or commerce" as used in c. 93A is intended to refer to individuals acting in a business context. It does not extend to private transactions. *Befelfer v. Najarian*, 381 Mass. 177 (1980); *Lantner v Carson*, 374 Mass. 606 (1978).[8]

Ena's allegations, even if true, involve an oral promise made by her son to "deed"

[8] G.L. c. 93A, § 1(b) states "[t]rade" and "commerce" shall include the advertising, the offering for sale, rent or lease, the sale, rent, lease or distribution of any services and any property, tangible or intangible, real, personal or mixed, any security as defined in subparagraph (k) of section four hundred and one of chapter one hundred and ten A and any contract of sale of a commodity for future delivery, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth.

her the Elaine Circle house without having to pay any consideration. The evidence in the summary judgment record establishes that Ena retained the net proceeds from her sale of the Oak Street property. There is no allegation made (and no evidence in the summary judgment record) that Alston (or Graham Construction) made any promise to Ena in a business context or that Alston (or Graham Construction) would benefit from, profit from or gain any business advantage from Ena's act of selling the Oak Street property and moving to the Elaine Circle house. Viewed in the light most favorable to Ena, the purported promise made by Alston was one made by her son in the context of a private family relationship.

I rule as a matter of law that neither Alston not Graham Construction engaged in the conduct of trade or commerce with respect to Ena's sale of the Oak Street property or her occupancy of the Elaine Circle house.

Accordingly, the plaintiffs are entitled to summary judgment dismissing the defendant's G.L. c. 93A counterclaim (Count III).

Defendant's Fraud Counterclaim. Ena's fraud counterclaim is essentially based on a theory of fraudulent inducement, which requires evidence of "misrepresentation of a material fact, made to induce action, and reasonable reliance on the false statement to the detriment of the person relying." *Commerce Bank & Trust v. Hayeck*, 46 Mass.App.Ct. 687, 692 (1999), quoting from *Hogan v. Riemer*, 35 Mass.App.Ct. 360, 365 (1993). See, *Okali v. Okali*, 81 Mass.App.Ct. 381 (2012). I rule as a matter of law that there is no evidence in the summary judgment record sufficient to create a disputed issue of fact as to whether Alston acted with fraudulent intent. There is no evidence that Alston said anything to induce Ena to act in a manner adverse to her interests that would provide any financial or other benefit to Alston or Graham's Construction.

Accordingly, the plaintiffs are entitled to summary judgment dismissing Ena's fraud counterclaim (Count V).

Plaintiff's Claim for Possession. The plaintiffs seek to recover possession of the single-family dwelling at the Elaine Circle property occupied by Ena.

I rule as a matter of law that the June 2020 agreement constituted a written lease agreement in the nature of a tenancy at will. The agreement identifies the property to be occupied, the parties to the agreement, that Ena has the right to occupy the Elaine Circle house as her residence, that Ena may not make alterations to the house, that Ena will pay

for her utilities and the assessed real estate taxes and water/sewer charges (this is a form of rent though not directly payable to the landlord), that Ena will maintain the exterior of the house (lawn care, snow removal, etc.), and that the agreement will not be recorded in the registry of deeds. Since the agreement did not provide for monthly rent payments, I further rule that the 90-day termination notice constituted a legally sufficient notice to quit pursuant to G.L. c. 186, § 12. A tenancy at will may be terminated by either party for any reason or no reason. Under the terms of the agreement the plaintiffs were not obligated to allege breach of the agreement or other cause to terminate Ena's tenancy.

I rule that the plaintiffs' have presented the facts necessary to establish their prima facie case to recover possession of the Elaine Circle house from Ena based upon the June 2020 agreement. However, I have determined that disputed issues of material fact exist on Eno's claims/affirmative defense with respect to whether Alston made an oral promise to deed the Elaine Circle house to her, and whether, if made, that oral promise is enforceable (and what if any remedy pertaining to Ena's possession of the Claire Circle house would be fair and just). Since these issues must be determined by the fact finder at trial, it is premature to rule on whether the plaintiffs are entitled to judgment as a matter of law on their claim for possession.

Accordingly, the plaintiffs' motion for summary judgment on their claim for possession is **DENIED**. However, if Ena does not prevail on her promissory estoppel-based affirmative defense and counterclaims, the plaintiffs will be entitled to entry of judgment on their claim for possession.

Right to Jury. Either party has a right to a jury trial on the claim for possession and on counterclaims that are not wholly equitable in nature. It is within the discretion of the judge whether the claims based upon promissory estoppel (which involve the application of contract and equitable principles) should be decided by a jury. See *Rhode Island Hospital Trust National Bank v. Varadian*, 419 Mass. 841, 842 (1995). The judge may choose to have the jury decide the factual issues through the use of special questions, but reserve the issue of an equitable remedy, if one is required, to the judge. I believe it is best that the judge assigned to preside at the trial decide these issues.

Conclusion

For these reason, the plaintiffs' Motion for Summary Judgment is **ALLOWED** with respect to Count III (Chapter 93) of the defendant's amended complaint but is

otherwise **DENIED**. The defendant's Motion to Dismiss/Motion for Summary Judgment is **DENIED**.[9]

SO ORDERED this 18th day November 2021.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

[9] The clerk SHALL NOT enter a separate judgment dismissing the Chapter 93A counterclaim. Judgment shall enter after all of the remaining claims are decided at trial.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. **20H79SP000866**

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE FOR HOME EQUITY MORTGAGE LOAN ASSET-BACKED TRUST SERIES INABS 2007-AT,

Plaintiff

v.

CAROL BENSON and JONATHAN BENSON,

Defendants

Post-Judgment Order

The parties appeared in court (via Zoom session) on December 6, 2021, for hearing on the plaintiff's *Motion to Issue Execution*. The motion was filed on November 17, 2021.

On March 8, 2021 the court entered summary judgment in favor of the plaintiff on its claim for possession in this post-foreclosure eviction. The court granted the defendants a stay of execution until July 1, 2021 (defendant Carol Benson is 74 years old).

On August 5, 2021 the court issued the execution for possession. Ordinarily an execution for possession cannot be used more than three months from the date it is issued. In calculating that three-month period, any stays mandated by governmental order or regulation (such as federal or state eviction moratoriums), or by order of the court or by agreement of the parties filed with the court are excluded. *See* G.L. c. 235, § 23. The court has authority to reissue an execution if the request is made by motion within the three-month time period (even if the motion is heard after the three-month period has passed).

The CDC eviction moratorium expired on July 31, 2021; however, the CDC issued a new eviction moratorium order on August 2, 2021. On August 26, 2021 the Supreme Court issued an order that invalidated the latest CDC moratorium order. In accordance with G.L. c. 235, § 23 the three-month levy period set forth in the August 5, 2021 execution was tolled for 21 days due to the second CDC moratorium. Therefore, the plaintiff had to use the execution within three months

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from November 27, 2021 unless the plaintiff filed a motion for a new execution prior to that date. The plaintiff's motion to issue a new execution was timely because it was filed on November 17, 2021, which was within the three-month period.

After considering the position of each party the plaintiff's *Motion to Issue Execution* is **ALLOWED**.

In the exercise of my discretion under G.L. c. 239, §§ 9 and 10, I shall stay issuance of the new execution for possession until March 15, 2022. However, the plaintiff shall not levy on the execution until on or after April 1, 2022.

As a condition of this stay, commencing in January 2022 the defendants shall be required to pay the plaintiff $1,000.00 by the tenth (10th) day of each month for their continued use and occupancy of the premises. The defendants shall make payment by personal check, money order or bank check made payable to OCWEN LOAN SERVICING, and delivered to:

ORLANS PC
1650 WEST BIG RIVER ROAD,
TROY, MI 48084

ATT: SOGOL PLAGANY, ESQ. [FILE # [redacted]]

SO ORDERED.

JEFFREY M. WINIK
ASSOCIATE JUSTICE (Recall Appt.)

December 6, 2021

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. 19H79SP004544 (Unit 10A)
NO. 19H79SP004537 (Unit 12A)

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE OF AMERIQUEST
MORTGAGE SECURITIES INC., ASSET-BACKED
PASS-THROUGH CERTIFICATES SERIES 2005-RI,
Plaintiff

VS.

THOMAS T. SUCHODOLSKI and BEATA W. SUCHODOLSKI,
Defendants

Order on Plaintiff's Motion to Set Appeal Bond and
Defendants' Motion to Waive Appeal Bond

This matter came before the Court for hearing on the plaintiff's motion to set an appeal bond (and an order for payment of monthly use and occupancy payments) and defendants' motion to waive the appeal bond based upon indigency.[1] This case involves two post-foreclosure evictions. On April 22, 2021 judgments for possession and $20,238.87 damages (unpaid rent for use and occupation) plus interest and costs entered for the plaintiffs and against the defendants in (1) 19H79SP004544 (10-12 Pleasant Street, Unit 10A, Ware, Massachusetts – hereinafter "Unit 10A"), and (2) 19H79SP004537(10-12 Pleasant Street, Unit 12A, Ware, Massachusetts – hereinafter "Unit 12A"). The facts and legal rulings are set forth in the Court's *Memorandum of Decision on the Plaintiff's Motion for Summary Judgment*, Winik, J., dated April 20, 2021

[1] The defendants had been represented by Attorney Glenn F. Russell. At the December 20, 2021 bond hearing, Attorney Russell notified the Court that his clients had discharged him, and he made an oral motion to withdraw his appearance. The plaintiff's attorney did not object to the motion. Defendant Thomas T. Suchodolski, who was present at the Zoom hearing, confirmed that he and his wife had discharged Attorney Russell and assented to his motion to withdraw his appearance. The Court allowed the oral motion, and Defendant Suchodolski said he was prepared to argue the cross-motions pertaining to the appeal bond.

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(docketed on April 22, 2021). On May 3, 2021 the defendants timely filed a *Motion to Alter or Amend Judgment (in each case)*; and in and order dated June 24, 2021 (docketed on June 25, 2021, the Court denied the defendants' *motion* (in each case). On July 6, 2021 the defendant timely filed a *Notice of Appeal* in each case.[2]

On December 8, 2021 the plaintiffs filed in each case a *Motion to Set Appeal Bond and For Use and Occupancy Payments Pending Appeal*. On December 14, 2021 the defendants filed in each case a *Motion to Waive the Appeal Bond and Other Costs* together with an Affidavit of Indigency signed by defendant Thomas Suchodolski.[3]

As preliminary matter the defendants argue that the Court should not set an appeal bond because the plaintiff failed to file its motion to set the appeal bond in a timely manner. Uniform Summary Process Rules, Rule 12 states only that "[u]pon receipt of notice of appeal and request for setting of bond within the time period prescribed by G.L. c. 239, § 5, the clerk shall forthwith schedule a hearing before the court on whether an appeal bond shall be required . . . and the amount of the appeal bond." The statutory bond provisions applicable to post-foreclosure eviction actions, G.L. c. 239, §§ 5 and 6, do not set forth any time period by which either party was required to file a motion to either set the bond or waive the bond. The defendants have not demonstrated that they have suffered or will suffer any prejudice resulting from the plaintiff's delay in filing its motion to set the appeal bond. Accordingly, the Court will consider the two motions on their merits.

The defendants are the former owners of Unit 10A and 12A. Because this is a post-foreclosure eviction in which the plaintiff has obtained a judgment to recover possession of the foreclosed condominium units, the conditions that attach to the appeal bond are governed by G.L. c. 239, § 5 and G.L. c. 239, § 6. The two sections of the appeal bond statute must be read together. *Bank of New York Mellon v. King*, 485 Mass. 37 (2020).

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[2] The defendants filed a second *Notice of Appeal* in each case on September 8, 2021. Apparently, the defendants believed that these cases were subject to an automatic stay as of June 24, 2021 based upon their filing of pro se Suggestions of Stay (not related to a bankruptcy proceeding) dated June 24, 2021. From a review of the dockets these cases were not subject to automatic stays, and it is the July 6, 2021 *Notice of Appeal* filed in each case that applies to that case. For purposes of ruling on this motion I shall consider the appeals to be timely whether notices were filed on July 6 or September 8, 2021.

[3] At the December 20, 2021 hearing, Thomas Suchodolski stated that his wife was employed. The Court gave the defendants until December 22, 2021 to have co-defendant Beata Suchodolski prepare, sign and file her Affidavit of Indigency. Beata Suchodolski filed her affidavit with the Court on December 22, 2021.

With respect to setting an appeal bond, G.L. c. 239, § 6 provides in relevant part that "[i]f the action is for possession of land *after foreclosure of a mortgage* thereon, *the condition of the bond shall be for* the entry of the action and payment to the plaintiff, if final judgment is in his favor, of all costs and *a reasonable amount as rent of the land from the day when the mortgage was foreclosed until possession of the land is obtained by the plaintiff* . . . Upon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond" (emphasis added). Under the provisions of G.L. c. 239, § 5 the Court shall waive the appeal bond if it is satisfied that the defendant has a defense which is not frivolous and that he is indigent. See, *Tamber v. Desrochers*, 45 Mass. App. Ct. 234 (1998).[4]

A post-foreclosure former owner/defendant who continues in possession of the property is a tenant at sufferance and may be ordered to make use and occupancy payments "as rent" as a condition of entering and prosecuting his pending appeal. *Bank of New York Mellon v. King*, supra., at p. 50. This is true even if the appeal bond is waived based upon indigency. The fact that the defendant "brought title into question" does not excuse him from compliance with this post-judgment statutory use and occupancy requirement.

The provision of a bond order (or bond waiver order) directing the defendants to pay ongoing monthly use and occupancy as a condition of entering and pursuing their appeal, issued pursuant to G.L. c. 239, §§ 5 and 6, does not constitute "fees and costs" as that term is used in G.L. c. 261, § 27D, and is therefore not subject to the provisions of G.L. 261, § 27D, including the provision pertaining to single justice appellate review. See e.g., Appeals Court single justice order dated September 23, 2021 in *Silva v. Stanley*, (Lemire, J.) No. 2021-J-0443 (determining that, in the context of an order requiring the defendant to make interim use and occupancy payments during the pendency of a summary process action, such interim payments did not constitute "extra fees and costs" within the meaning of G.L. c. 261, § 27A, and was not subject to single justice appellate review pursuant to G.L. c. 261, § 27D)."

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[4] The hurdle that the defendants must clear, as illuminated by the Appeals Court, is not particularly daunting. "Defenses are frivolous if there is no reasonable expectation of proving the defenses alleged [citation omitted]. The idea of frivolousness is something beyond simply lacking merit; it imports futility, not 'a prayer of a chance," [citation omitted], or – as another formulation of the same idea – an egregious lack of merit. [citations omitted]." *Tamber v. Desrochers, at 237.*

Based upon the information set forth in the defendants' affidavits of indigency I find that the defendants are indigent as that term is defined in G.L. c 261, §§ 21A.[5] Further, while I have ruled as a matter of fact and law that the defenses asserted by the defendants in this summary process action are not supported by competent evidence and fail as a matter of law, I conclude that the issues the defendants state they intend to assert on appeal pass the *Tamber v. Desrochers* threshold and are not frivolous.

Accordingly, the defendants' *Motion to Waive the Appeal Bond* is **ALLOWED** and the plaintiffs' *Motion to Set Appeal Bond* is **DENIED** in part and **ALLOWED** in part.

The defendants' obligation to post an appeal bond is waived (representing unpaid use and occupancy for the period from the date of the foreclosure sale through December 2021). However, that part of the plaintiff's *Motion to Set Appeal Bond* that seeks an order requiring the defendants to pay the plaintiff for their continued monthly use and occupancy of the two condominium units (Unit 10A and Unit 12A) during the pendency of the appeal is **ALLOWED**.

Based upon the facts set forth in the summary judgment order, and the facts presented at the motion hearing, I make the following findings pertaining to setting a reasonable amount for ongoing use and occupancy for each condominium unit:

The defendants' primary residence is 162 Wildflower Drive, Amherst, Massachusetts (they own the property subject to a mortgage securing a loan). They do not reside at either of the two condominium units at issue in these summary process cases (10-12 Pleasant Street, Unit 10A and Unit 12B, Ware, Massachusetts). Thomas Suchodolski testified that he and his wife keep personal property in the two condominium units, and therefore have maintained possession and control of the two units from February 21, 2019 (the date of the foreclosure sale) to the bond hearing date (December 20, 2021). The defendants have not made any payments to the plaintiff for their continued use of the two units. The plaintiff is responsible for payment of condominium fees, taxes and water charges for both units. Because the defendants have refused to surrender possession, the plaintiff has been unable to rent either condominium unit or derive any income from the units to pay for customary expenses associated with property ownership.

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[5] Thomas Suchodolski filed his affidavit of indigency prior to the December 20, 2021 bond hearing. In compliance with my December 20 order (issued from the bench) Beata Suchodolski filed her affidavit of indigency with the Court by December 22, 2021.

Based on the factual findings set forth in the Court's summary judgment order: (1) Unit 10A and Unit 12A each contain five rooms (including one bedroom and one bathroom), and (2) the fair rental value of each unit (based on HUD fair market rents set for Ware, Massachusetts) is $831.00 per month. Thomas Suchodolski testified that in his opinion the HUD fair market rents are higher than the actual fair market rents for Ware, Massachusetts. He opined that based on his knowledge of comparable rents from two years ago, the fair rental value of each unit is $550.00. I find that the fair market rents determined by HUD are more reliable (and current) then the opinion rendered by Thomas Suchodolski. Therefore, for purposes of this appeal, I find that the fair rental value of each unit is $821.00 (with the plaintiff responsible for taxes, water charges and condominium fees).

Therefore, in accordance with the requirements of G.L. c. 239, ¶ 5 and 6, it is **ORDERED** that defendants Thomas T. Suchodolski and Beat W. Suchodolski, as a condition of entering and prosecuting their appeals, shall:

1. Commencing on or before January 5, 2022 (for the month of January), and on or before **fifth (5th) day of which month thereafter**, pay the plaintiff
    a. **$821.00** for the monthly use and occupation of Unit 10A during the pendency of the appeal entered in case No. 19H79SP004544, and
    b. **$821.00** for the monthly use and occupation of Unit 12A during the pendency of the appeal entered in case No. 19H79SP004537.
2. The defendants must make a separate monthly payment for each condominium unit in the form of a personal check, money order or bank check in the amount of **$821.00** (each check must include the condominium unit number on the memo line) payable to the plaintiff's attorney, ***Joseph Paul Murphy, Esq.***, and mailed to ***Joseph Paul Murphy, Esq., Hinshaw and Culbertson, 53 State Street, 27th Floor, Boston, Massachusetts 02109***. Attorney Murphy shall hold the funds in escrow and deposit the funds in an interest-bearing bank account. Attorney Murphy may file a motion seeking release of the funds during the pendency of the appeal. The court may authorize release of the funds upon a credible showing that the plaintiff requires access to the funds to pay for expenses related directly to the condominium unit. Any escrowed funds

released by order of the Court shall only be used by the plaintiff to pay for those expenses.

3. If during the pendency of this appeal the defendants fail to make the required monthly payments for their use and occupancy of Unit 10A and/or 12A in accordance with this order, then upon motion the plaintiffs may request that the defendants' appeal(s) be dismissed, and that execution(s) for possession and damages issue in each case.

SO ORDERED, this 23rd day of December, 2021.

JEFFREY M. WINIK
Associate Justice (recall appt.)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 21H79CV000049

WILFREDO CEDREZ, Sr. a/k/a WILFREDO CEDREZ,

Plaintiff

v.

CASTLEROCK 2017, LLC,

Defendant

ORDER FOR ASSESSMENT OF DAMAGES AND FOR ENTRY OF JUDGMENT

This matter came before the court on November 15, 2021 for hearing on the plaintiff's *Motion for Assessment of Damages and Statutory Attorney Fees* against the defendant. The defendant did not appear (with or without counsel) and did not otherwise file any written opposition to the motion.

Background and Procedural History

The plaintiff, Wilfredo Cedrez ("Cedrez") has been a tenant residing at the single-family home located at 18 Newman Street, Springfield, Massachusetts ("the premises") since April 2011. Cedrez first occupied the premises as a tenant at will. The monthly rental amount was established at $500.00.

U.S. Bank National Association ("U.S. Bank") acquired title to the property following a foreclosure sale on October 18, 2012. U.S. Bank sold the property to the Defendant, Castlerock 2017 LLC ("Castlerock"), on or about December 8, 2017.

In late December 2019 Castlerock commenced a summary process action against Cedrez in 2019 (Docket No. 19-sp-2759). Cedrez filed an answer that included multiple counterclaims against Castlerock, mostly related to purportedly defective conditions at the property.

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Castlerock sold the premises to a new owner in June 2020. Thereafter, Castlerock's claim for possession was dismissed and Cedrez's counterclaims were transferred to the civil docket through an order dated February 2, 2021.[1]

In advance of a case management conference scheduled for March 31, 2021, Castlerock's attorney filed a motion to withdraw as counsel. Castlerock's attorney stated that he had been instructed by Castlerock to dismiss its claim for possession and close its file related to that case (apparently including representation on the counterclaims). Counsel further represented that despite repeated efforts to communicate with Castlerock regarding the remaining counterclaims, he did not receive any authorization from Castlerock to continue to represent it on Cedrez's counterclaims.

Following a hearing conducted on March 31, 2021, the court allowed the motion to withdraw as counsel, In an amended order dated May 11, 2021 that (1) confirmed that Castlerock's attorney's appearance was withdrawn effect May 1, 2022, and (2) going forward Castlerock, because it is a corporation, can only appear in court through counsel; and that if Castlerock failed to appear with counsel at the next scheduled status conference (June2, 2021), the court would entertain a motion from Cedrez to default Castlerock on the remaining claims.

Castlerock did not appear at the June 2, 2021 status conference (with or without counsel). There had been no appearance filed by successor counsel on behalf of Castlerock as of June 2, 2021, and no appearance has been filed on behalf of Castlerock at any time thereafter.

On August 11, 2021 Cedrez filed a request for entry of default on his claims against Castlerock pursuant to M.R.Civ.P. 55(a), and on September 3, 2021 a default was entered on the docket against Castlerock. An assessment of damages hearing was conducted on November 15, 2021. Despite receiving notice of the hearing, again Castlerock did not appear (with or without counsel) and did not file a written opposition.

Acting in accordance with the court's directions, Cedrez filed an affidavit, together with supporting documents and photographs. The Cedrez affidavit and supporting documents shall be entered in evidence as Exhibit 1. Attorney Hugh D. Heisler filed an affidavit together with supporting documents. The Heisler affidavit and supporting documents shall be entered in evidence as Exhibit 2.

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[1] The case was recaptioned as *Cedrez v Castlerock* 2017 LLC (21H79CV000049).

Assessment of Damages

Assessment of Breach of Implied Warranty of Habitability Damages. There exists with respect to every residential tenancy an implied warranty of habitability that the premises are fit for human habitation. A landlord is in breach of this warranty where there exist defects that may materially affect the health or safety of occupants. *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 199 (1973). A tenant is not entitled to receive damages for minor defects. Not every defect gives rise to a diminution in rental value. Isolated violations do not necessarily constitute a breach of the warranty. *McKenna v. Begin*, 5 Mass. App. Ct. 304 (1977). A breach of the implied warranty of habitability occurs from the point in time when a landlord had notice or should have known of a substantial defect or substantial Sanitary Code violation in the apartment. The breach continues until the defect or violation is remedied. *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196 (1979) [*landlord in breach of warranty from first notice of substantial Sanitary Code violations that recurred over a period of time despite the landlord's efforts to repair*]. The measure of damages for breach of the implied warranty of habitability is the difference between the fair rental value of the premises free of defects and the fair rental value of the premises during the period that the defective conditions existed. *Boston Housing Authority v. Hemingway*, supra; *Haddad v Gonzalez*, 410 Mass. 855, 872 (1991).

Castlerock's liability for breach of the implied warranty of habitability for the period from January 2018 to June 2020 has been established upon its default.

I find that the fair rental value of the premises free of defects was $500.00 per month for the period January 2018 to June 2020. Based upon the defective conditions set forth in the Cedrez's affidavit (Paragraph 6, 9, 10, 11, 13, 15, 16, 17, 18, 19 and 20), I find that the fair rental value of the premises was reduced by 50% for the 30 months from January 2018 to June 2020. There is no evidence that Cedrez failed to pay rent during this period. Accordingly, I assess actual damages for breach of the implied warranty of habitability in the amount of $7,500.00.

Assessment of G.L. c. 186, § 14 Damages. The quiet enjoyment statute, G.L. c. 186, §14, provides that any landlord who "directly or indirectly interferes with the quiet enjoyment of any residential premises" shall be liable for "actual or consequential damages or three month's rent, whichever is greater . . ." While the statute does not require that the landlord's conduct be intentional, *Simon v. Solomon*, 385 Mass. 91 (1982), it does require proof that the landlord's conduct caused a serious interference with the tenant's quiet enjoyment of the premises. A serious

interference is an act or omission that impairs the character and value of the leased premises. *Doe v. New Bedford Housing Authority*, 417 Mass. 273, 284-285 (1994); *Lowery v. Robinson*, 13 Mass. App. Ct. 982 (1982). A landlord violates G.L. c. 186, §14 where he had notice, or reason to know of a serious condition adversely affecting the tenant's use of the apartment and failed to take appropriate corrective measures. *Al Ziab v. Mourgis*, 424 Mass. 847, 850-851 (1997); *Cruz Management Co., Inc. v. Thomas*, 417 Mass. 782 (1994).

Based upon the facts set forth in the Cedrez's affidavit (Paragraph 6, 9, 10, 11, 13, 15, 16, 17, 18, 19 and 20), I find that Castlerock's failed to take appropriate measures to correct and repair these defective conditions from January 2018 to June 2020. Castlerock's failure to take such appropriate measures directly or indirectly interfered with Cedrez's quiet use and enjoyment of the premises in violation of G.L. c. 186, § 14.

The evidence submitted by Cedrez is insufficient to establish that he suffered emotional distress. The evidence is sufficient to show that he incurred actual or consequential damages arising from this violation for (1) diminution of the fair rental value of the premises ($7,500.00 as calculated for breach of the implied warranty of habitability), and (2) $1,257.15 (paid by Cedrez to have water service restored). Since the actual damages resulting from this G.L. c. 186, § 14 violation exceeds three month's rent, I assess actual and consequential damages of **$8,757.15** plus costs and a reasonable attorney's fee.

Assessment of G.L. c 93A Damages. G.L. c 93A makes it unlawful to engage in an unfair act or practice in the course of trade or commerce. "The existence of unfair acts and practices must be determined from the circumstances of each case." *Commonwealth v. DeCotis*, 366 Mass. 234, 242 (1974).

Chapter 93A, § 9 (3) provides that damages " . . . shall be awarded in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the Court finds that use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated section 2." The prevailing party is entitled to reasonable attorney's fees and costs.

Castlerock's liability has been established upon his default on Cortes' G.L. c. 93A claim.

The evidence submitted by Cedrez is insufficient to establish that he suffered emotional distress. Based upon the facts set forth in the Cedrez's affidavit (Paragraph 6, 9, 10, 11, 13, 15,

16, 17, 18, 19 and 20), and supporting documents, the evidence is sufficient to show that Cedrez incurred actual or consequential damages arising from Castlerock's unfair and deceptive acts and practices for (1) diminution of the fair rental value of the premises ($7,500.00 as calculated for breach of the implied warranty of habitability), and (2) $1,257.15 as calculated for violation of G.L. c. 186, § 14 (paid by Cedrez to have water service restored). Accordingly, I assess actual damages for Castlerock's violation of G.L. c. 93A in the amount of **$8,757.15**. I find and rule that Castlerock's conduct with respect to the maintenance of the premises was willful and knowing. Accordingly, I shall treble the actual damages to **$26,271.45**.

Cumulative Damages. Cedrez is not entitled to recover cumulative damages arising from the same facts under every theory of recovery, but he is entitled to recover damages under the theory that results in the largest award of damages. *Wolfberg v. Hunter*, 385 Mass. 390 (1982).

Cedrez's claims for breach of implied warranty of habitability, violation of G.L. c. 186, § 14 and violation of G.L. c. 93A arise from the same operative facts. Accordingly, I shall award damages under Chapter 93A since that count provides Cedrez with the largest monetary recovery.

Attorney Fees. The court should normally use the "lodestar" method to calculate the amount of a statutory award of attorney's fees. Under the "lodestar" method, "[a] fair market rate for time reasonably spent in litigating a case is the basic measure of a reasonable attorney's fee under State law as well as Federal law." *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 325-26 (1993). However, the actual amount of the attorney's fees is largely discretionary with the trial court judge. *Linthicum v. Archambault*, 379 Mass. at 388. An evidentiary hearing is not required. *Heller v. Silverbranch Const. Corp.*, 376 Mass. 621, 630-631 (1978). In determining an award of attorney's fees, the Court must consider "the nature of the case and the issues presented, the time and labor required, the amount of the damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases. *Linthicum v. Archambault*, supra. at 381. 388-9. See Heller *v. Silverbranch Const. Corp.*, supra. at 629 ("the standard of reasonableness depends not on what the attorney usually charges but, rather, on what his services were objectively worth . . . Absent specific direction from the Legislature, the crucial factors in making such a determination are: (1) how long the trial lasted, (2) the difficulty of the legal and factual issues involved, and (3) the degree of competence demonstrated by the attorney"). The prevailing party is entitled to recover fees and costs for the statutory claims on which he was successful.

As the prevailing party on his G.L. c, 186, § 14 and c. 93A claims Cedrez is entitled to recover reasonable attorney's fee and costs.

I have reviewed the affidavit submitted by the plaintiff's attorney, Hugh D. Heisler in which he sets forth in detail that he spent 31.6 hours for work he performed on this G.L. c. 186, § 14 and c. 93A claims. I find that this time was reasonable and reasonably related to the prosecution of this statutory claims. Based upon the relatively uncomplicated claims at issue in this case I find that Attorney Heisler is entitled to be compensated based upon a reasonable hourly rate of $325.00.

Accordingly, after considering the factors set forth above, I award Cedrez a reasonable statutory attorney's fee in the amount of **$10,107.50**. Attorney Heisler did not submit a request for costs and expenses.

The award of attorney's fees is without interest. See, *Patry v. Liberty Mobilehome Sales, Inc.*, 394 Mass. 270, 272 (1985).

ORDER FOR JUDGMENT

Based upon the entry of default and the credible and evidence presented at the assessment of damages hearing, in light of the governing law, it is **ORDERED** that:

1. Judgment shall enter for plaintiff Wilfredo Cedrez, Sr. on his claims for breach of implied warranty of habitability, G.L c. 186, § 14 and G.L. c. 93A against defendant Castlerock 2017 LLC, with actual damages awarded pursuant to G.L. c. 93A in the amount of **$26,271.45**, plus reasonable attorney's fees and statutory interest and costs;
2. The plaintiff shall be awarded a reasonable statutory attorney's fee in the amount of **$10,107.50** pursuant to G.L. c. 186, § 14 and c. 93A.

SO ORDERED.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

March 31, 2022

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. **120H79SP000439**

WELLS FARGO BANK, N.A.,

Plaintiff

VS

NICHOLAS KALOGERAS and EUGENIA KALOGERAS,

Defendants

Memorandum of Decision on Plaintiff's Motion for Summary Judgment

This is a summary process action in which plaintiff Wells Fargo Bank, N.A. (hereinafter "Wells Fargo") is seeking to recover possession of the residential premises from the defendants, Nicolas Kalogeras and Eugenia Kalogeras after Wells Fargo acquired title to the property upon foreclosure. The defendants, the former owners of the property, filed an answer which included defenses/counterclaims that (1) the foreclosure sale was void, and (2) that the termination notice was insufficient because the defendants were bona fide tenants under G.L. c. 186A.

This matter came before the court for hearings on Wells Fargo's Motion for Summary Judgment. The parties submitted memoranda, affidavits and supporting documents. Wells Fargo argues that it foreclosed on the subject property in strict compliance the mortgage and holds legal title to the property. The defendants' sole contention raised in their opposition to summary judgment is that the foreclosure sale was void because Wells Fargo filed to comply with the "face-to-face" meeting requirements set forth in 24 C.F.R. § 203.604 (b), which provisions are incorporated in the defendants' mortgage.[1]

[1] The first summary judgment commenced on January 20, 2022. The court suspended the hearing to afford Wells Fargo time to submit a written response to the defendants' memorandum (filed on January 14, 2020) in opposition to the summary judgment motion. The court directed Wells Fargo to submit supplemental affidavits that include facts (pertaining to it business practices, business records, and the identity of and actions taken by the field representative sent to the property) it relies upon to establish whether it made "reasonable effort" to comply with the applicable pre-acceleration "face-to-face" meeting requirements set forth in HUD regulations incorporated into the mortgage. The summary judgment hearing was completed on March 14, 2022.

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For the reasons set forth in this memorandum, Wells Fargo's motion for summary judgment is **ALLOWED**.

Undisputed Facts

The following facts necessary to resolve the legal issues raised in the cross-motions for summary judgment are based on facts set forth in the record that I conclude are not in dispute.

The defendants, Nicholas and Eugenia Kalogeras, are the former owners of a single-family dwelling situated on property at 51 Fuller Road, Palmer, Massachusetts (the "property"). The defendants reside at the property.

On November 26, 2013, the defendants obtained an FHA-insured loan from Franklin American Mortgage Company ("Franklin American") in the amount of $236,823.00. The promissory note is endorsed in blank. On November 26, 2013 the defendants granted a mortgage on the property to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Franklin American to secure the promissory note.[2]

Wells Fargo serviced the loan for Franklin American. On June 30, 2015 the defendants' mortgage was assigned to Wells Fargo.[3] At all times from July 1, 2015 to August 21, 2019 Wells Fargo held and serviced the mortgage.

The defendants' mortgage was insured by the United States Department of Housing and Urban Development ("HUD") through a program managed by the Federal Housing Administration ("FHA"). The "Acceleration of Debt" clause contained in the defendants' mortgage (Mortg. ¶ 9(a)) provides that "the [l]ender may, except as limited by regulations issued by the Secretary in case of payment defaults, require immediate payment in full of all sums secured by this Security Instrument" (emphasis added). The acceleration clause, ¶ 9(d), further states that "[t]his Security instrument does not authorize acceleration or foreclosure if not permitted by regulations of the Secretary" (emphasis added).

The mortgage incorporates HUD regulations codified at 24 C.F.R. § 203.500-681. The regulations require that prior to accelerating the mortgage loan the mortgagee must have a face-to

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[2] The mortgage was recorded at the Hampden County Registry of Deeds (hereinafter "Registry of Deeds") on November 26, 2013 in Book 20114, Page 461.

[3] The assignment was recorded at the Registry of Deeds in Book 20771, Page 144.

face interview with the mortgagor at the property, or make reasonable effort to arrange such meeting, before three full monthly installments due on the mortgage are unpaid.

The defendants' mortgage loan was modified in March 2017.[4] However, the defendants failed to make their loan payments beginning in September 2017.

Wells Fargo maintains its mortgage loan and foreclosure records in its record keeping system that includes a Imaging and Content Management Platform ("ICMP") and a Mortgage Servicing Platform ("MSP"). Wells Fargo has maintained documents pertaining to the defendants' loan/mortgage/foreclosure in its MSP and ICMP systems as contemporaneously recorded business records kept in the regular course of its business. The relevant entries were made prior to the commencement of this litigation.

The undisputed facts pertaining to Wells Fargo's foreclosure policies/procedures, record keeping systems, and efforts consistent with those policies/procedures to arrange a face-to-face meeting with the defendants in compliance with the mortgage and HUD regulations are set forth the December 3, 2021 affidavit of Richard L. Penno (Wells Fargo's vice president for loan documentation at that time) and the February 24, 2022 affidavit of Elizabeth Joan Taylor (Wells Fargo's vice president for loan documentation at that time).

In a letter dated October 17, 2017, sent by Wells Fargo on October 17, 2017 to the defendants, Wells Fargo offered to arrange a face-to-face meeting with the defendants to discuss their loan default. It is undisputed that Wells Fargo prepared and sent this letter to the defendants by certified mail/return receipt requested. See Penno Affidavit, ¶s 10,11, 12, 13; Exhibits 2 and 3. Wells Fargo did not receive an oral or written response to the letter from the defendants. The defendants contend that they did not receive the letter. For purposes of ruling on this summary process motion I shall accept as true that the defendants did not receive the letter because either (1) they did not receive a notice from the postal service that a certified letter addressed to them was to be picked up at the local post office, or (2) they did not pick up the certified letter from the local post office despite receiving such notice.

[4] The loan modification agreement was recorded at the Registry of Deeds on April 14, 2017 in Book 21640, Page 564.

Wells Fargo retained National Creditors Connection, Inc. ("NCCI") to have a field representative visit the property in an effort to contact the defendants in person. The undisputed facts - pertaining to NCCI's business operations, policies/procedures, record keeping, and the outreach field services it provided on behalf of Wells Fargo - are set forth in the December 8, 2021 affidavit and February 16, 2022 supplemental affidavit of Mark Hunt ((Director of Compliance and Custodian of Records for NCCI).

NCCI is a company that provides "borrower outreach services for financial institutions," including Wells Fargo. NCCI's services include (1) sending field representatives to the borrower's home on behalf of the mortgagee/loan servicer, (2) having the field representative attempt to speak with the borrower in person at the home, (3) and to hand the borrower written information about the borrowers' right to request a face-to-face meeting with the mortgagee/loan servicer; or (4) if the borrower is not home, to leave at the borrowers' home a letter/flyer (prepared by the mortgage/loan servicer) regarding how to arrange a face-to-face meeting with the mortgagee/loan servicer. NCCI keeps, as business records maintained in the regular course of its business, contemporaneous electronic reports prepared by its field representatives after it completes a home visit. Each report prepared by the field representative include the client ID number, the date of the order, the name of the borrower (customer), the property address, the date of the visit, the address of the property visited, whether the field representative contacted anyone in person during the visit to the property, and whether written documents (letters/flyers) were left at the house. The reports are posted and stored in NCCI's proprietary and secure record system known as the Legacy System. NCCI provides its clients with copies of the reports promptly after they are placed in the NCCI record system.

The business records of Wells Fargo and NCCI establish that in October 2017 Wells Fargo retained NCCI to have a field representative visit the property and attempt to contact the defendants to hand deliver a letter/flyer to notify the defendants of their right to arrange a face-to-face meeting with Wells Fargo. The electronically stored business records maintained by NCCI establish that on November 1, 2017 Niklette Walker, a NCCI field representative (ID #01583NW), went to the property but did not encounter the defendants (or anyone else at the property). The NCCI field representative left the Wells Fargo printed letter/flyer at house on the property (in an envelope). The letter/flyer informed the defendants that they could contact Wells Fargo to arrange and

participate in a face-to-face meeting with Wells Fargo. See ¶ 14, Exhibit 11 attached to the December 8, 2021 Hunt affidavit. The NCCI field representative memorialized the visit in a contemporaneous electronic report that she submitted/posted into NCCI's secure electronic record keeping system on November 3, 2017. On November 13, 2017 NCCI transmitted an electronic copy of the field representative's report to Wells Fargo using Wells Fargo's secure email system. Wells Fargo, acting in accordance with its normal business practice, has maintained the NCCI report in its MSP system as a business record. Wells Fargo's notations pertaining to the details of the NCCI field representatives attempt to contact the defendants in person were prepared and placed in the MSP system on November 14, 2017, which was prior to the commencement of this litigation.

The defendants did not contact Wells Fargo on or after October 17, 2017 to request a face-to-face meeting to discuss their unpaid mortgage loan payments.

On October 25, 2017 Wells Fargo sent each defendant a default/right to cure notice. It is undisputed that the defendants did not make any payments to Wells Fargo between October 2017 and the August 21, 2019 foreclosure sale. Further, it is undisputed that the defendants were in default on the terms of the mortgage loan and mortgage continuously from September 2017 to the August 21, 2019 foreclosure sale.

The documents in the summary judgment record establish that Wells Fargo held the defendants' mortgage and note prior to and at the time of the August 21, 2019 foreclosure sale.

In July 2019 Wells Fargo sent the defendants written notice that the foreclosure sale scheduled for August 21, 2019. The notice of sale was published in the Palmer Journal Register, a newspaper having general circulation in Palmer, on July 4, 11, and 18, 2019.

On August 21, 2019 Wells Fargo conducted a foreclose sale on the property. Wells Fargo submitted the high bid of $209,100.00.[5]

[5] The affidavit of sale dated August 28, 2019 was recorded at the Registry of Deeds on September 24, 2019 at Book 22867, Page 129.

On August 29, 2019, Wells Fargo, for consideration paid of $209,100.00, executed and delivered to itself a foreclosure deed to the property.[6] As of August 29, 2019 Wells Fargo held title to the property. The defendants continued to reside at the property.

On September 3, 2019 an authorized representative of Wells Fargo executed the Post-Foreclosure Affidavit Regarding Note Secured by Foreclosed Mortgage.[7]

On December 7, 2019 Wells Fargo served each defendant with a 72-hour notice to vacate (dated December 6, 2019). On January 24, 2020 Wells Fargo served each defendant with a summary process summons and complaint seeking to recover possession of the property and an unspecified amount as damages for unpaid use and occupancy.

The defendants have continued to occupy the property as their residence since the date of the foreclosure sale. They never entered into a tenancy agreement with Wells Fargo and have not made any payments to Wells Fargo for their use and occupancy of the property since Wells Fargo acquired title on August 29, 2019.

Wells Fargo has not presented any evidence to establish the fair rental value for the defendants' use and occupancy of the property since August 29, 2019.

Discussion

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-

[6] The foreclosure deed dated August 29, 2019 was recorded at the Registry of Deeds on September 24, 2019 at Book 22867, Page 127.

[7] The Affidavit was recorded at the Registry of Deeds on September 24, 2019 at Book 22867, Page 133.

moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague and general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) ("[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment").

To prevail in a summary process action involving foreclosed property (where the validity of the foreclosure is challenged) the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. To prove this element of its claim for possession the post-foreclosure plaintiff must show "that the title was acquired strictly according to the power of sale provided in the mortgage." *Wayne Inv. Corp. v. Abbott*, 350 Mass. 775, 775 (1966). See *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226 (2012); *Bank of New York v. Bailey, 460 Mass. 327* (2011).

The defendants' only challenge to the validity of the August 21, 2019 foreclosure sale asserted in their written opposition to the motion for summary judgment (and at oral argument) is that Wells Fargo failed to conduct a face-to-face meeting with them at the property as required under the terms of their mortgage and HUD regulations before three full monthly installments due on their mortgage went unpaid; and that Wells Fargo cannot show that it was exempt from the face-to-face meeting requirement under the provisions of 24 C.F.R. § 203.604 (c). Wells Fargo contends that under the provisions of 24 C.F.R. § 203.604 (c) (5) it was not required to conduct a face-to-face meeting with the defendants prior to commencing the foreclosure process because it made "reasonable effort" to arrange a face-to-face meeting with the defendants that was unsuccesssful. Wells Fargo is correct.

Face-To-Face Meeting Exemption Under HUD Regulation. The defendants' mortgage was insured by the United States Department of Housing and Urban Development ("HUD") through a program managed by the Federal Housing Administration ("FHA"). The "Acceleration of Debt" clause contained in the mortgage (Mortg. ¶ 9(a)) provides that "the [l]ender may, *except as limited by regulations issued by the Secretary in case of payment defaults*, require immediate payment in full of all sums secured by this Security Instrument" (emphasis added). The acceleration clause,

¶ 9(d), further states that "[t]his Security instrument does not authorize acceleration *or foreclosure* if not permitted by regulations of the Secretary" (emphasis added).

Under the statutory power of sale, G.L. c. 183, § 21, upon default by the mortgagor "*in the performance or observation of the foregoing or other conditions*" the mortgagee may sell the mortgaged premises by public auction after "*first complying with the terms of the mortgage* and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale . . ." (emphasis added).

The HUD regulations referenced in ¶ 9(d) of the mortgage include those governing a mortgagee's servicing responsibilities with respect to HUD-insured mortgages are codified in Title 24, Part 203 (Single Family Mortgage Insurance), Subpart C (Servicing Responsibilities) of the Code of Federal Regulations, 24 C.F.R. § 203.500-681. Section 203.500 states *"[i]t is the intent of the Department [HUD] that no mortgagee shall commence foreclosure or acquire title to a house until the requirements of this subpart [C] have been followed*" (emphasis added).

One of the Subpart C requirements that a mortgagee of a HUD-insured mortgage must comply with before initiating a foreclosure is the "face-to-face" meeting requirement set forth in 24 C.F.R. § 203.604 (b), which provides in relevant part:

> (b) *The mortgagee must have a face-to face interview with the mortgagor, or make reasonable effort to arrange such meeting*, before three full monthly installments due on the mortgage are unpaid. . . (emphasis added).

There are five exemptions to this meeting requirement. 24 C.F.R. § 203.604 (c) provides:

> (c) *A face-to-face meeting is not required if*:
>
> (1) *The mortgagor does not reside in the mortgaged house*,
>
> (2) The mortgaged house is not within 200 miles of the mortgagee, its servicer, or a branch office of either,
>
> (3) The mortgagor has clearly indicated that he will not cooperate in the interview . . .
>
> (4) A repayment plan . . . is entered into to bring the mortgagor's account current and thus making the meeting unnecessary . . . or
>
> (5) *A reasonable effort to arrange a meeting is unsuccessful.*

(Emphasis added).[8]

[8] Exemptions 2, 3, and 4 of subsection (c) are not at issue in this action.

24 C.F.R. § 203.604 (d) provides:

> "[a] reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property, unless the mortgaged property is more than 200 miles from the mortgagee, its servicer, or a branch office of either, or it is known that the mortgagor is not residing in the mortgaged property

I rule as a matter of law that the "face-to-face" meeting provision of Subpart C of the HUD regulations was explicitly incorporated into the defendants' mortgage and is a material provision of the mortgage. Specifically, before Wells Fargo could accelerate the debt, commence foreclosure or acquire title to the property pursuant to a foreclosure sale it had to show that it had complied with the HUD mandated "face-to-face" meeting requirement set forth in 24 C.F.R. § 203.604 (b) ***or*** show that it was not required to comply with that requirement under one of the five exemptions identified in 24 C.F.R. § 203.604 (c). *Wells Fargo Bank, N.A. v. Cook*, 87 Mass. App. Ct. 382 (2015); *Jose v. Wells Fargo Bank, N.A.*, 89 Mass. App. Ct. 772 (2016).

It is undisputed that Wells Fargo did not conduct a face-to-face meeting with the defendants prior to commencing the foreclosure process. However, the undisputed evidence in the summary judgment record establishes that in compliance with 24 C.F.R. § 203.604 (c) (5) Wells Fargo was not required to conduct a face-to-face meeting prior to commencing the foreclosure process because it made a reasonable effort to arrange a meeting with the defendants, but that reasonable effort was unsuccessful.

With respect to whether it made a reasonable effort to arrange a face-to-face meeting with the defendants Wells Fargo relies on the facts set forth in the February 24, 2022 affidavit of Elizabeth Joan Taylor (Wells Fargo's vice president for loan documentation) and the February 16, 2022 supplemental affidavit of Mark Hunt (Director of Compliance and Custodian of Records for NCCI).

The facts set forth in the Penno, Taylor and Hunt affidavits are admissible under the business records exception to the hearsay rule. G.L. c. 233, § 78. See, Massachusetts Guide to Evidence, Section 803 (6), (8). The affidavits satisfy the personal knowledge requirement of

Mass.R.Civ.P. 56(e), 365 Mass. 824 (1974). They are submitted by individuals employed by the relevant parties, and each affidavit was based upon the affiant's review of business records maintained by Wells Fargo (Menno and Taylor) and NCCI (Hunt). "The affidavit[s] [were] made on the basis of personal knowledge of the . . . practices of the parties as well as a review of business records and it was sufficient." *Henrietta Eaton v. Federal National Mortgage Association & Another*, 93 Mass.App.Ct. 216, 220 (2018), citing *First Natl. Bank of Cape Cod v. North Adams Hoosac Sav. Bank*, 7 Mass. App. Ct. 790, 791, 794 (1979). The fact that the affiants did not enter or record the information set forth in those business records does not affect the admissibility of the affidavits. In *Wingate v. Emery Air Freight Corp.,* 385 Mass. 402, 406 (1982) the SJC stated that with respect to the business records exception to the hearsay rule, "personal knowledge by the entrant or maker [of the record] is a matter affecting the weight rather than the admissibility of the record."

To establish that is exempt under 24 C.F.R. § 203.604 (c) (5) Wells Fargo must show that it made reasonable effort to arrange a face-to-face meeting with the defendants by (1) sending one letter by certified mail to the defendants offering to arrange a face-to-face meeting with them, and (2) making one trip to the property in an effort to see the mortgagors to arrange a face-to-face meeting with them. See 24 C.F.R. § 203.604 (d).

Certified Letter. As set forth in the Penno and Taylor affidavits the uncontested facts establish that on October 17, 2017 Wells Fargo sent the defendants a letter by certified mail/return receipt requested. In that letter Wells Fargo offered to arrange a face-to-face meeting with the defendants to discuss their mortgage payment arrears.

Wells Fargo is not required to show that the defendants received the letter, and therefore is not required to present evidence of signature proof of delivery. It is required only to show that the letter was sent by certified mail. Wells Fargo has established this element of proof through the undisputed facts set forth in the Penno affidavit, ¶s 10,11, 12, 13; Exhibits 2 and 3.

Accordingly, the evidence establishes that Wells Fargo satisfied the first prong of the "reasonable effort" standard set forth in 24 C.F.R. § 203.604 (d), to wit, that Wells Fargo sent the defendants one letter by certified mail offering to arrange a face-to-face meeting with them.

Trip to Property. As set forth in the Hunt affidavit (¶ 14, Exhibit 11) and supplemental affidavit (¶s 9 – 17) the uncontested facts establish that that on November 1, 2022 an NCCI field

representative, acting on behalf of Wells Fargo (1) made a trip to the property in an effort to contact the defendants to provide them with notification that they could contact Wells Fargo to arrange a face-to-face meeting, (2) upon arrival at the property did not encounter either defendant (or any other person) at the house, and (3) left a written letter/flyer (in an envelope) at the house on the property that stated the defendants should contact Wells Fargo to arrange a face-to-face meeting to discuss their unpaid mortgage loan obligagtions.

Accordingly, the evidence establishes that Wells Fargo satisfied the second prong of the "reasonable effort" standard set forth in 24 C.F.R. § 203.604 (d), to wit, to wit, that a Wells Fargo representative made one trip to the property in an effort to see the mortgagors (defendants) to arrange a face-to-face meeting with them.

Based upon the undisputed admissible evidence in the summary judgment record I rule as a matter of law that in accordance with 24 C.F.R. § 203.604 (c) (5) Wells Fargo was not required to comply with the face-to-face meeting requirement set forth in 24 C.F.R. § 203.604 (b). Wells Fargo has established that it made a reasonable effort to arrange a face-to-face meeting with the defendants before three full monthly installments due on their mortgage were unpaid, but was unsuccessful.

Validity of the Foreclosure Sale. Based upon the undisputed evidence in the summary judgment record I rule as a matter of law that Wells Fargo foreclosed on the property in strict compliance with the statutory power of sale and the mortgage. Wells Fargo was the high bidder at the August 21, 2019 foreclosure sale. On August 29, 2019, Wells Fargo acquired title to the property for consideration paid of $209,100.00 upon execution and delivery of the foreclosure deed.

Claim for Possession. On December 7, 2019 Wells Fargo served each defendant with a legally sufficient 72-hour notice to vacate (dated December 6, 2019). The defendants have failed to vacate the property.

The defendants never entered into a tenancy agreement with Wells Fargo and have not made any payments to Wells Fargo for their use and occupancy of the property since Wells Fargo acquired title on August 29, 2019. I find and rule as a matter of law that the defendants are not residential tenants under a lease, by oral agreement or by implication. The defendant are not "bona fide" tenants under the provisions of G.L. c. 186A.

I rule as a matter of law that Wells Fargo's right to possession of the property is superior to the right asserted by the defendants. Accordingly, Wells Fargo is entitled to recover possession of the property from the defendants.

Wells Fargo has not presented any evidence to establish the fair rental value of the property since August 29, 2019. Accordingly, I shall deem waived its claim for use and occupancy damages, and its claim shall be dismissed.

Defendants' Other Defenses/Counterclaims. Since the defendants are not "bona fide" tenants they do not have standing to assert defenses or counterclaims under G.L. c. 186A. Since the defendants are not tenants they do not have standing to assert tenancy-related defenses or claims under G.L. c. 186, § 14 or c. 93A.

The defendants have not presented any evidence that the foreclosure process was fundamentally unfair. See *U.S. Bank Nat'l Ass'n v. Schumacher*, 467 Mass. 421, 430, 432-433 (2014).

Accordingly, I rule as a matter of law that Wells Fargo is entitled to summary judgment dismissing the defendants' counterclaims.

ORDER FOR ENTRY OF JUDGMENT

Based upon all the credible evidence submitted as part of the summary judgment record in light of the governing law, it is **ORDERED** that:

1. Judgment shall enter for plaintiff Wells Fargo Bank, N.A. against defendants Nicholas Kalogeras and Eugenia Kalogeras on the plaintiff's claim for possession;
2. Judgment shall enter dismissing the plaintiff's claim for use and occupancy damages;
3. Judgment shall enter for the plaintiff dismissing the defendants' counterclaims; and
4. Execution for possession shall issue on May 15, 2022; however, the plaintiff shall not levy on the execution for possession prior to June 27, 2022.

JEFFREY M. WINIK
ASSOCIATE JUSTICE (Recall Appt.)

April 14, 2022

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 19H79SP001491

FRANCISCO JUSTO,
Plaintiff
v.
CARMEN ANDINO,
Defendant

ORDER FOR ASSESSMENT OF DAMAGES AND FOR ENTRY OF JUDGMENT

This matter came before the Court on May 9, 2022 for hearing on the defendant/plaintiff-in-counterclaim's *Motion for Assessment of Damages and Statutory Attorney Fees* against the plaintiff/defendant-in-counterclaim. The plaintiff/defendant-in-counterclaim did not appear (with or without counsel) and did not otherwise file any written opposition to the motion.

Procedural History and Facts

The defendant/plaintiff-in-counterclaim, Carmen Andino ("Andino"), has been a tenant residing in the first-floor apartment ("the premises") of the two-family dwelling located at 172 Lebanon Street, Springfield, MA ("the property") since January 2011. Andino first occupied the premises as a tenant at will. The monthly rental amount was $600.00.

From January 2001 to March 2017 the plaintiff/defendant-in-counterclaim, Francisco Justo ('Justo"), managed the property for the owner, his wife, Angela Garcia ("Garcia"). On March 10, 2017 Garcia deeded the property to herself and Mr. Justo, as tenants by the entirety. In July of 2020 Garcia conveyed her interest in the Property to Justo. In November 2020 Justo sold the property to a third party.

Justo commenced a summary process action Andino in 2014 (the first eviction action). The parties resolved the first summary process action subject to the terms of a settlement agreement dated December 1, 2017. Under the terms of that agreement (1) Andino retained possession of the apartment (2) Justo agreed to waive any rent which was unpaid by Andino through November 30, 2017, and (3) Justo agreed to pay Andino an additional $15,000.00. Under paragraph 4 of the

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agreement, Justo agreed to complete all necessary repairs to the premises on or before December 31, 2017, including the conditions reflected in photographs appended as Exhibit 1 to the agreement.[1]

Justo did not repair the defective conditions in the premises in accordance with the December 1, 2017 agreement (or at any time after December 31, 2017). Between December 1, 2017 and October 2020, the following unsafe and unsanitary conditions existed which the Justo failed to correct. These additional conditions included the following:

a) roof damage and water leaks;

b) damaged heating elements in baseboards heating units throughout the apartment;

c) inadequate heat as a result of damaged heating elements and repeated problems with the functioning of the furnace;

d) damaged and deteriorated flooring tiles and floor covering in a number of rooms in the apartment;

e) raw sewage water leaking from upstairs apartment into son's bedroom and bathroom;

f) water leaks and damaged ceilings in several rooms in the apartment;

g) trash and debris in yard and common areas of the property;

h) rotted and water damaged walls in the bathroom;

i) leaking showerhead in the bathroom causing shower lining around bathtub to become loose and peeling away from wall;

j) rotted and defective windows in the apartment which are not weathertight;

k) defective venting in the bathroom resulting in growth of mold-like substances on walls and ceiling;

l) defective interior doors which do not close or latch properly; and

m) defective lighting fixtures.

Andino made repeated complaints to Justo about these conditions, but Justo did not make any of the necessary repairs prior to the November 2020 sale of the premises.

Absent other evidence, I find that the fair rental value of the premises free of defective conditions between December 2017 and November 2020 was agreed upon contract rent of $600.00. I find that the existence of the unrepaired conditions diminished the fair rental value of the premises by $270.00 per month (45%).

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[1] A copy of this agreement is appended to Andino's Affidavit as Exhibit 1.

The evidence is sufficient to establish that Justo's failure to maintain the premises in good repair over the 35-month period from December 2017 to October 2020 interfered with Andino's quiet use and enjoyment of the property.

The evidence is insufficient to establish that Andino suffered serious emotional distress resulting from Justo's failure to correct the defective conditions in the premises that existed at various times over that 35-month period.

Between December 2017 and October 2020 Andino spent a total of $3,535.00 for repairs to the boiler, the bathroom walls, flooring and shower, two light fixtures, the bathroom fan, and one of the plumbing leaks.[2]

Justo commenced a second summary process action (the current action) against Andino in April 2019. The complaint did not allege cause and did not include an account annexed for unpaid rent. Andino filed a written answer and counterclaims based upon the defective conditions at the premises.

Owing to the federal, state and trial court COVID-19 related statutes, orders, moratoriums and protocols, the current summary process action was essentially dormant through much of 2020 into 2021.

With Justo's sale of the property in November 2020, his claim for possession against Andino was rendered moot. What remained to be litigated were Andino's counterclaims.

On February 8, 2022 the court allowed Justo's attorney to withdraw his appearance as counsel for Justo owing to a breakdown in communications.

At the February 8, 2022 hearing the Court allowed Andino's motion to compel discovery (that had been outstanding since April 2019). Justo was given until February 28, 2022 to respond to the written discovery. The Court scheduled a status conference for March 25, 2022. Justo was sent a copy of the discovery order and the notice of the status conference.

Justo did not provide any responses to the discovery and did not appear at the March 25, 2022 status conference.

In an order dated April 11, 2022, the Court allowed Andino's motion for entry of a default pursuant to M.R.Civ.P. 55(a) against Justo as to liability on Andino's counterclaims (breach of implied warranty, violation of G.L. c. 186, § 14, and violation of G.L. c. 93A).

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[2] Copies of invoices and receipts for these repairs are appended to Andino's May 9, 2022 Affidavit as Exhibit 3.

An assessment of damages hearing was scheduled for and conducted on May 9, 2022. Despite having been sent advance notice of the hearing, Justo did not appear (with or without counsel) and did not file a written opposition.

Acting in accordance with the Court's directions, in support of his motion for assessment of damages Andino filed an affidavit, together with supporting documents and photographs. Andino's affidavit and supporting documents shall be entered in evidence as Exhibit 1. In support of his request for an award of statutory attorney fees Attorney Hugh D. Heisler filed an affidavit together with supporting documents. The Heisler affidavit and supporting documents shall be entered in evidence as Exhibit 2.

Assessment of Damages

Assessment of Breach of Implied Warranty of Habitability Damages. There exists with respect to every residential tenancy an implied warranty of habitability that the premises are fit for human habitation. A landlord is in breach of this warranty where there exist defects that may materially affect the health or safety of occupants. *Boston Housing Authority v. Hemingway*, 363 Mass. 184, 199 (1973). A tenant is not entitled to receive damages for minor defects. Not every defect gives rise to a diminution in rental value. Isolated violations do not necessarily constitute a breach of the warranty. *McKenna v. Begin*, 5 Mass. App. Ct. 304 (1977). A breach of the implied warranty of habitability occurs from the point in time when a landlord had notice or should have known of a substantial defect or substantial Sanitary Code violation in the apartment. The breach continues until the defect or violation is remedied. *Berman & Sons, Inc. v. Jefferson*, 379 Mass. 196 (1979) [*landlord in breach of warranty from first notice of substantial Sanitary Code violations that recurred over a period of time despite the landlord's efforts to repair*]. The measure of damages for breach of the implied warranty of habitability is the difference between the fair rental value of the premises free of defects and the fair rental value of the premises during the period that the defective conditions existed. *Boston Housing Authority v. Hemingway*, supra; *Haddad v Gonzalez*, 410 Mass. 855, 872 (1991).

Justo's liability for breach of the implied warranty of habitability for the period from December 1, 2017 through October 2020 has been established upon his default.

I find that the fair rental value of the premises free of defects was $600.00 per month for the period December 2017 through October 2020. Based upon the defective conditions set forth in the Andino's May 9, 2022 affidavit (Paragraphs 5 - 14), I find and rule that the fair rental value of the premises was reduced by 45% for the 35 months from December 2017 through October

2020. There is no evidence that Andino failed to pay rent during this period. Accordingly, I assess actual damages for breach of the implied warranty of habitability in the amount of $9,450.00.[3]

Assessment of G.L. c. 186, § 14 Damages. The quiet enjoyment statute, G.L. c. 186, §14, provides that any landlord who "directly or indirectly interferes with the quiet enjoyment of any residential premises" shall be liable for "actual or consequential damages or three month's rent, whichever is greater . . ." While the statute does not require that the landlord's conduct be intentional, *Simon v. Solomon*, 385 Mass. 91 (1982), it does require proof that the landlord's conduct caused a serious interference with the tenant's quiet enjoyment of the premises. A serious interference is an act or omission that impairs the character and value of the leased premises. *Doe v. New Bedford Housing Authority*, 417 Mass. 273, 284-285 (1994); *Lowery v. Robinson*, 13 Mass. App. Ct. 982 (1982). A landlord violates G.L. c. 186, §14 where he had notice, or reason to know of a serious condition adversely affecting the tenant's use of the apartment and failed to take appropriate corrective measures. *Al Ziab v. Mourgis*, 424 Mass. 847, 850-851 (1997); *Cruz Management Co., Inc. v. Thomas*, 417 Mass. 782 (1994).

Justo's liability has been established upon his default on Andino's G.L. c. 186, § 14 claim. Based upon the facts set forth in the Andino's May 9, 2022 affidavit (Paragraphs 5 - 14), I find that Justo failed to take appropriate measures to correct and repair the defective conditions that existed at the premises between December 2017 and October 2020 (including intermittent failure to provide working heating equipment). Justo's failure to take such appropriate measures directly or indirectly interfered with Justo's quiet use and enjoyment of the premises in violation of G.L. c. 186, § 14.

The evidence submitted by Andino is insufficient to establish that he suffered serious emotional distress resulting from Justo's conduct that interfered with Andino's quiet use and enjoyment of the premises.

The evidence is sufficient to show that Andino incurred actual or consequential damages arising from this violation for (1) diminution of the fair rental value of the premises ($9,450.00 as calculated for breach of the implied warranty of habitability), and (2) $3,535.00 (paid by Andino for numerous repairs). Since the actual damages resulting from this G.L. c. 186, § 14 violation exceeds three month's rent, I assess actual and consequential damages of **$12,985.00** plus costs and a reasonable attorney's fee.

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[3] $600.00 x .45 = $270.00 x 35 = $9,450.00.

Assessment of G.L. c 93A Damages. G.L. c 93A makes it unlawful to engage in an unfair act or practice in the course of trade or commerce. "The existence of unfair acts and practices must be determined from the circumstances of each case." *Commonwealth v. DeCotis*, 366 Mass. 234, 242 (1974).

Chapter 93A, § 9 (3) provides that damages " . . . shall be awarded in the amount of actual damages or twenty-five dollars, whichever is greater; or up to three but not less than two times such amount if the Court finds that use or employment of the act or practice was a willful or knowing violation of said section two or that the refusal to grant relief upon demand was made in bad faith with knowledge or reason to know that the act or practice complained of violated section 2." The prevailing party is entitled to reasonable attorney's fees and costs.

The evidence submitted by Andino is insufficient to establish that he suffered serious emotional distress resulting from Justo's unfair or deceptive conduct.

Based upon the facts set forth in the Andino's May 9, 2022 affidavit (Paragraphs 5 - 14), and supporting documents, the evidence is sufficient to show that Andino incurred actual or consequential damages arising from Justo's unfair and deceptive acts and practices for (1) diminution of the fair rental value of the premises ($9,450.00 as calculated for breach of the implied warranty of habitability), and (2) $3,535.00 (paid by Andino for numerous repairs as calculated for violation of G.L. c. 186, § 14). Accordingly, I assess actual damages for Justo's violation of G.L. c. 93A in the amount of **12,985.00**. I find and rule that Justo's conduct with respect to his failure to maintain the premises in good repair was willful and knowing. Accordingly, I shall double the actual damages to **$25,970.00** plus costs and a reasonable attorney's fee.

Cumulative Damages. Andino is not entitled to recover cumulative damages arising from the same facts under every theory of recovery, but he is entitled to recover damages under the theory that results in the largest award of damages. *Wolfberg v. Hunter*, 385 Mass. 390 (1982).

Andino's claims for breach of implied warranty of habitability, violation of G.L. c. 186, § 14 and violation of G.L. c. 93A arise from the same operative facts. Accordingly, I shall award damages under Chapter 93A since that count provides Andino with the largest monetary recovery.

Attorney Fees. The court should normally use the "lodestar" method to calculate the amount of a statutory award of attorney's fees. Under the "lodestar" method, "[a] fair market rate for time reasonably spent in litigating a case is the basic measure of a reasonable attorney's fee under State law as well as Federal law." *Fontaine v. Ebtec Corp.*, 415 Mass. 309, 325-26 (1993).

However, the actual amount of the attorney's fees is largely discretionary with the trial court judge. *Linthicum v. Archambault*, 379 Mass. at 388. An evidentiary hearing is not required. *Heller v. Silverbranch Const. Corp.*, 376 Mass. 621, 630-631 (1978). In determining an award of attorney's fees, the Court must consider "the nature of the case and the issues presented, the time and labor required, the amount of the damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases. *Linthicum v. Archambault*, supra. at 381. 388-9. See Heller *v. Silverbranch Const. Corp.*, supra. at 629 ("the standard of reasonableness depends not on what the attorney usually charges but, rather, on what his services were objectively worth . . . Absent specific direction from the Legislature, the crucial factors in making such a determination are: (1) how long the trial lasted, (2) the difficulty of the legal and factual issues involved, and (3) the degree of competence demonstrated by the attorney"). The prevailing party is entitled to recover fees and costs for the statutory claims on which he was successful.

As the prevailing party on his G.L. c, 186, § 14 and c. 93A claims Andino is entitled to recover reasonable attorney's fee and costs.

I have reviewed the May 13, 2022 affidavit submitted by the plaintiff's attorney, Hugh D. Heisler, in which he presents sufficient facts to support his representation that he spent 20.6 hours for work he performed on Andino's G.L. c. 186, § 14 and c. 93A counterclaims. I find that this time was reasonable and reasonably related to the prosecution of the statutory counterclaims. Based upon the relatively uncomplicated statutory claims at issue I find that Attorney Heisler is entitled to be compensated based upon a reasonable hourly rate of $325.00.

Accordingly, after considering the factors set forth above, I award Andino a reasonable statutory attorney's fee in the amount of **$6,695.00**. Attorney Heisler did not submit a request for costs and expenses.

The award of attorney's fees is without interest. See, *Patry v. Liberty Mobilehome Sales, Inc.*, 394 Mass. 270, 272 (1985).

ORDER FOR JUDGMENT

Based upon the entry of default and the credible and evidence presented at the assessment of damages hearing, in light of the governing law, it is **ORDERED** that:

1. Judgment shall enter for defendant/plaintiff-in-counterclaim Carmen Andino on his counterclaims for breach of implied warranty of habitability, violation of G.L c. 186, §

14 and violation of G.L. c. 93A against plaintiff/defendant-in-counterclaim Francisco Justo, with actual damages of $12,985.00, doubled to **$25,970.00,** awarded pursuant to G.L. c. 93A, plus reasonable attorney's fees and statutory interest and costs; and

2. The defendant/plaintiff-in-counterclaim shall be awarded a reasonable statutory attorney's fee in the amount of **$6,695.00** pursuant to G.L. c. 186, § 14 and c. 93A.

SO ORDERED.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

May 23, 2022

COMMONWEALTH OF MASSACHUSETTS

BERKSHIRE, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. **21H79CV000459**

CHRISTIAN CENTER HOUSING CORP. and BERKSHIRE HOUSIG SERVICES, INC.,

Plaintiff

VS

LAURENCE HEBERT,

Defendant

Order on Defendant's Motion for Injunctive Relief

This matter came before the court for an evidentiary hearing on the defendant/tenant's *Motion for Injunctive Relief*.[1] The hearing was conducted over portions of two days, August 31 and September 6, 2022. All parties were represented by counsel.

Based upon all the credible testimony and evidence presented at trial, and the reasonable inferences drawn therefrom, the Court concludes that the defendant has failed to show a reasonable likelihood that he will prevail on the merits of his claim that the plaintiff/landlord is legally obligated to provide him with alternative housing until his fire damaged apartment is repaired.

The plaintiffs own and manage a federally subsidized apartment building in Pittsfield, Massachusetts (known as Epworth Arms). The building contains 39 efficiency and one-bedroom apartments subsidized under the project-based HUD Section 202 program. Tenants eligible for

[1] The plaintiff/landlord commenced this civil action seeking injunctive relief against the defendant/tenant arising from the same apartment fire that is the subject matter of the defendant's motion for injunctive relief. The plaintiff's complaint alleges that the fire was caused by the defendant's reckless, negligent and proscribed conduct (smoking in the apartment) and seeks an order that the defendant vacate his apartment, remain away from the building and relinquish his tenancy rights. Even if the facts are true, to support its claim for injunctive relief the plaintiff will have the burden to show that there is no adequate remedy at law, such as summary process.

The plaintiff further seeks what appears to be a declaratory judgment that it has no duty or obligation to house or provide the defendant with alternative housing. That legal issue is addressed in this order, but only in a preliminary manner in the context of the defendant's request for injunctive relief.

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these units must be elderly (age 62 or older) or disabled. As a matter of fire safety, smoking cigarettes of any kind is prohibited in the apartments or common areas of the building. Each tenant is notified of this smoking prohibition which is incorporated as a specific condition of each tenancy.

Until May 30, 2022 the defendant, Laurence Hebert, resided at Epworth Arms, in Unit 101, a first-floor apartment. The defendant is 65 years old and lives alone.

On the evening of May 30, 2022 members of the Pittsfield Fire Department were dispatched to Epworth Arms in response to a fire alarm. Upon arriving at the building, the fire fighters found that fire was burning in the defendant's apartment. The fire fighters came upon the defendant who was trying to enter his apartment.

Lieutenant Robert Leary and Captain Robert Stevens from the Pittsfield Fire Department testified at the hearing. Captain Robert Stevens testified that he arrived at the building he saw the defendant in the hallway by the door to Apartment 101. When he told the defendant not to enter the apartment the defendant became belligerent. He appeared to Captain Stevens to be intoxicated. Captain Stevens testified that his deputy chief had to physically move the defendant away from the apartment door. When the fire fighters entered the defendant's apartment, they observed that a couch in the living room was burning and there was smoke and heat damage to the apartment. The fire fighters extinguished the fire using water from hoses.[2] After the fire was extinguished, Captain Stevens and Lieutenant Leary observed the condition of the apartment and furniture. They observed a burnt couch and a coffee table in front of the couch. They observed cigarette packs, cigarette filters, lighters and rolling paper on the coffee table and on the floor near couch.

Captain Stevens and Lieutenant Leary spoke with the defendant separately in the hallway after the fire was extinguished. They each testified that the defendant appeared to be visibly upset, and that the defendant's speech was slurred. In separate conversations the defendant told Captain Stevens and then Lieutenant Leary that he had been smoking on the couch and fell asleep. The defendant told them that he did not intentionally start the fire.

Lieutenant Leary, who was the fire investigator, determined that the cause of the fire was the unintentional careless disposal of a lighted cigarette on the couch in the defendant's apartment.

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[2] The fire did not cause damage to any of the other 38 apartments at Epworth Arms. All of these apartments remain occupied by tenants.

The building manager, Greg Wrobel, arrived at the building shortly after the fire fighters extinguished the fire. He spoke with the defendant after Captain Stevens and Lieutenant Leary had spoken with the defendant. The defendant told Wrobel that he had accidentally dropped his cigarette onto the couch and the couch caught fire. Wrobel observed that the defendant's words were slurred, and that the defendant threatened him, saying "I'll kick your butt." Nonetheless, Wrobel assisted the defendant in securing temporary emergency housing for a limited period.

After the fire was contained Lieutenant Leary conducted an investigation at the apartment to determine the the point of origin and ignition source of the fire. He ruled out the kitchen stove, electrical appliances, the electrical box, wires or cords as the origin of the fire. He determined that the likely point of origin was the couch, and that the ignition source of the fire was a lighted cigarette that fell into the couch igniting the fabric and lining.

The defendant testified that he kept cigarettes in his apartment; however, he denied that he ever smoked in the apartment. He denied he told Captain Stevens, Lieutenant Leary or Wrobel that he was smoking in his apartment at the time of the fire.

I credit the testimony of Captain Stevens, Lieutenant Leary and Greg Wrobel. I conclude that a fact finder is likely to find that (1) the apartment fire was caused by the defendant's own careless conduct, specifically smoking a cigarette that fell and ignited the couch, and (2) the defendant was smoking a cigarette in his apartment with knowledge that such conduct violated his landlord's no smoking policy.

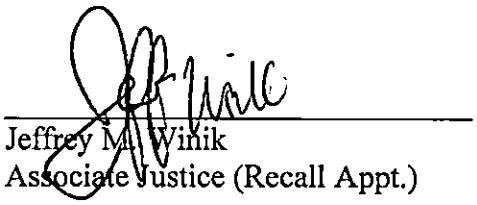
The defendant argues that the plaintiff/landlord has a legal obligation to provide the defendant/tenant with temporary housing or lodging when an apartment becomes uninhabitable without regard to whether the apartment became uninhabitable due to the defendant's negligent, reckless or intentional conduct. Alternatively, the defendant/tenant argues that here is insufficient evidence to prove that the defendant/tenant engaged in negligent or reckless conduct that caused the fire in his apartment.

A landlord may be obligated to provide a tenant with alternative housing as an injunctive remedy where the apartment has been rendered uninhabitable due to the landlord's breach of warranty or negligence. See, G.L. c. 186, § 14. A landlord of a multi-unit dwelling is required to carry fire insurance that provides limited financial assistance ($750.00) to a tenant displaced by a fire. G.L. c. 175, § 15A, clause 15. However, the defendant has pointed to no statute or appellate decision (and the court is not aware of any) that supports the more expansive legal proposition that

a landlord is legally obligated to provide a tenant with alternative housing where the tenant's apartment is rendered uninhabitable due to the tenant's negligence, carelessness or intentional misconduct (such as falling asleep on a couch with a lighted cigarette). Even if the court, for purposes of argument, were to assume that a landlord may be obligated to provide a tenant with alternative housing as an equitable remedy after a fire renders the tenant's apartment uninhabitable, *where the fire was not caused by the landlord's breach of warranty or duty of care*, it is not likely the defendant would prevail on that theory. This is so because the specific facts point to the defendant's carelessness (falling asleep while on the couch holding a lighted cigarette) rather than some other cause (such as negligent or intentional conduct by another tenant or person, or a fire started in another building, or street gas line explosion, or lightening striking the building) as the likely cause of the fire.

Accordingly, the defendant's *Motion for Injunctive Relief* is **DENIED**. The court's interim injunctive order pertaining to temporary housing, entered on August 22, 2022, is **VACATED**.

SO ORDERED this 7th day of September, 2022.



Jeffrey M. Winik
Associate Justice (Recall Appt.)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

Berkshire, ss:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 19CV372

ESTATE OF ABDIKADIR ADEN, ET.AL,

Plaintiffs,

v.

LRS REALTY, LLC and WHITMAN PROPERTIES, INC,

Defendants

ORDER ON PLAINTIFFS' REVISED MOTION TO AMEND COMPLAINT

This matter came before the court on October 13, 2022 for a hearing on the plaintiffs' *Revised Motion for Leave to Amend the Complaint to Add a Party Defendant*.[1] The plaintiffs seek leave to add Russell Sabadosa, a manager and stock holder of LRS Realty, LLC, as a defendant in his individual capacity.[2] Defendant LRS Realty, LLC filed a written opposition to the motion arguing that the motion should be denied, arguing that allowing the motion would be "futile" because there are no plausible claims that can be asserted against Russell Sabadosa in his individual capacity.

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[1] This is the plaintiffs' second motion to amend. In January 2021 the plaintiffs filed their motion to amend to add Russell Sabadosa as a defendant. The parties engaged in mediation and the motion was not ruled upon. In January 2021 I conducted an informal mediation session with the parties. The mediation did not result in a settlement of the claims.

Prior to hearing the revised motion to amend, I discussed with the parties the fact that I had participated in the January 2021 mediation session. I told the parties that I was and could remain impartial, but that at the request of either party I would ask the First Justice to assign another judge to hear the motion. Counsel for all parties stated that they did not have any concerns or objections and gave their assent to my hearing the motion.

[2] The first motion was not heard by the court. The parties engaged in extensive discovery, including depositions, before the plaintiffs' filed their renewed motion to amend. The motion and opposition pleadings reference facts based on that discovery. I have referred to those facts where appropriate; however, I am not ruling on this motion as one for summary judgment under M.R.Civ.P. 56 because Sabadosa is not a party defendant. I am considering this motion as a motion to amend under M.R.Civ.P. 15 (a).

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Factual Allegations

The facts set forth in the plaintiffs' complaint and proposed amended complaint (as supplemented by affidavits, deposition testimony and documents provided by the parties), considered in a light most favorable to the moving party, plausibly support the following:

This case arises from a 2018 fire in an apartment building. The twenty-unit building is located at 49 Belmont Street, Springfield, Massachusetts (the "property").[3]

Abdikadir Aden was a tenant residing in Apartment 2B with his wife and children. On March 18, 2018 a fire started in a bedroom of Apartment 2B. Aden and two of his minor children, Ahmed Ahmed and Faduma Ahmed, died in the fire. The estate for each deceased is a plaintiff in this action. The other plaintiffs are family members of the decedents (or tenants who were residing at the property at the time of the fire).

Defendant LRS Realty, LLC, a limited liability corporation ("LRS"), owned the property at the time of the fire. Russell Sabadosa ("Sabadosa") is one of two corporate managers of LRS and holds a shareholder interest in the limited liability corporation (LLC). LRS was created in 2016 and purchased the property in 2017.[4] LRS held title to the property in its own name. The property was LRS's sole physical asset. Sabadosa, in his capacity as a manager of the LLC, was the only person responsible for the day-to-day operation of LRS, including communications with all LRS agents, and negotiating and approving contracts.

An agent of LRS, Premier Choice Realty, collected rent from tenants residing at the property.

In September 2017 LRS entered into a property management agreement with Defendant Whitman Properties, Inc. ("Whitman"). Leading up to the 2018 fire Whitman's management responsibilities included tenant selection, tenant retention and termination, addressing tenant complaints, but did not include building maintenance.

In September 2017 LRS entered into an independent contract with Chris Lemanski ("Lemanski") to perform day-to-day maintenance at the property.

At the time that LRS purchased the property in 2017, a longtime tenant at the building, Joan Anderson ("Anderson"), had been performing certain tenant liaison and simple cleaning/maintenance services at the property for the prior owner. Shortly after LRS purchased

[3] 49 Belmont Street included three buildings. LRS sold the property in 2019.

[4] Lisa Renee was the other LLC manager. Renee is not a named defendant.

the property Sabadosa entered into an oral independent contract or arrangement with Anderson whereby Anderson continued to provide these services at the property. Anderson knew that LRS owned the property and that LRS was "Sabadosa's company." The evidence presented by the parties as part of their motion submissions does not plausibly suggest that Sabadosa hired Anderson as an employee of either LRS or Sabadosa, in his individual capacity.

It is unclear from the submissions what specific tenant liaison and simple cleaning/maintenance services Anderson provided; however, for purposes of ruling on the motion to amend I shall assume, without deciding, that Anderson's services included communication with tenants in a liaison capacity, forwarding tenant maintenance requests to Whitman or Lemanski, and forwarding non-maintenance tenant complaints to Whitman or Sabadosa. Anderson also performed minor maintenance services such as cleaning the common areas, clearing clogged toilets upon request, and checking when a fire alarm sounded.

I shall assume, without deciding, that on one or more occasions if a smoke/fire alarm sounded in a tenant's apartment, and there was no fire, Anderson would reset the smoke/fire detector when requested to do so by a tenant. However, there is no evidence that that plausibly suggests that Anderson was responsible for the general maintenance, repair or testing of the smoke/fire detectors or the smoke/fire alarm system at the building. There is no evidence that plausibly suggests that prior to the 2018 fire Anderson was authorized or directed by Sabadosa to disable or remove smoke/fire detectors from tenant apartments. There is no evidence that plausibly suggests that prior to the 2018 fire Sabadosa knew or had been told that Anderson had ever disabled or removed a smoke/fire detector from a tenant's apartment. And there is no evidence that plausibly suggests that prior to the 2018 fire Sabadosa directed, controlled or ratified actions that Anderson may have taken to disable or remove smoke/fire detectors from tenant apartments, including apartment 2B.

In exchange for her services Anderson received as compensation (a) a monthly rent credit in the form of a monthly rent deduction from the rent that she otherwise paid to LRS and (b) the use of a cell phone provided to her by Premier Choice Realty (the rent collection agent for LRS). These forms of compensation were provided to Anderson by LRS. There is no evidence that plausibly suggests that Anderson received cash payments or other compensation from Sabadosa, as manager for LRS (other than occasional cash advances or reimbursements for cleaning materials purchased by Anderson). And there is no evidence that plausibly suggests that Sabadosa, acting

in his individual capacity, made any cash payments or provided any other compensation to Anderson.

Shortly after it acquired the properties in 2017, LRS instructed tenants in writing to contact either Lemanski or Anderson to address maintenance issues.

Though this fact is disputed, for purposes of ruling on the plaintiffs' motion to amend the complaint I shall assume, without deciding, that a few days before the 2018 fire Anderson removed or disabled a smoke detector from Aden's apartment 2B after she had received reports that cooking smoke from Apartment 2B had repeatedly triggered one of the smoke/fire alarm units in that apartment.

In 2019 the plaintiffs filed a complaint arising from the 2018 fire seeking personal injury damages against LRS and Whitman. The complaint alleges that a smoke/fire detector in Apartment 2B did not sound an alarm at the time of the fire. The complaint further alleges that Anderson was the last person to touch the smoke detector, and that shortly before the day of the fire she either deactivated or removed the battery from the smoke/fire detector because the alarm frequently was triggered when the tenants were cooking. The complaint includes counts for negligence, negligent infliction of emotional distress, wrongful death, breach of the implied warranty of habitability, violation of G.L. c. 93A (consumer protection act), violation of G.L. c. 186, § 14 (interference with quiet enjoyment), and the negligent hiring, supervision and retention of Anderson.

The proposed amended complaint seeks to add Sabadosa, *in his individual capacity*, as a defendant. The proposed amended complaint alleges that (a) Sabadosa, acting individually and independent of his duties as an manager of LRS, hired Anderson as the "quasi-building manager" to perform maintenance related tasks at the property (¶2.10), (b) Sabadosa, in his individual capacity (and not on behalf of LRS), paid compensation to Anderson in exchange for her building manager services (¶2.14), (c) Sabadosa acted independently of his duties as an officer/manager of LRS when he hired Anderson, (d) Anderson acted as Sabadosa's personal agent or employee (and with Sabadosa's authorization) when she tortiously disabled or removed the battery from the smoke alarm in Aden's apartment shortly before the fire, and/or (e) Sabadosa, as manager of the LLC, directed, controlled or ratified Anderson's tortious conduct.

The amended complaint asserts that Sabadosa is personally liable to the plaintiffs for negligence, negligent infliction of emotional distress, wrongful death, breach of the implied

warranty of habitability, violation of G.L. c. 93A (consumer protection act), violation of G.L. c. 186, § 14 (interference with quiet enjoyment), and the negligent hiring, supervision and retention of Anderson.

Discussion

M.R.Civ.P. 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." As stated in *Bangar v. Clark Equipment Co.*, 24 Mass. App. Ct. 41, 43 (1987), "[t]he express policy of the rule is in favor of allowing amendments and 'a motion to amend should be allowed unless some good reason appears for denying it' [citation omitted] . . . Reasons which might justify the denial of a motion to amend include 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, *futility of amendment*, etc.' [citation omitted]." [emphasis added].

A proposed amendment seeking to add a defendant will be considered *futile* to the extent that the proposed claims asserted against the proposed new defendant could not survive a motion to dismiss. See generally *Johnston* v. *Box*, 453 Mass. 569, 583 (2009) ("Courts are not required to grant motions to amend [a complaint] where 'the proposed amendment ... is futile.'" (quoting *All Seasons Servs., Inc.* v. *Commissioner of Health & Hosps. of Boston*, 416 Mass. 269, 272 (1993)); *Mancuso* v. *Kinchla*, 60 Mass. App. Ct. 558, 572 (2004) (if the amendment to add a claim could not survive a motion to dismiss, then allowing the amendment would be exercise in futility).

To survive a motion to dismiss under M.R.Civ.P 12 (b) (6) (the standard used to determine whether the proposed claims would be *futile* under M.R.Civ.P. 15) a proposed amended complaint must allege facts that, if true, would "plausibly suggest[] ... an entitlement to relief." *Lopez* v. *Commonwealth*, 463 Mass. 696, 701 (2012), quoting *Iannacchino* v. *Ford Motor Co.*, 451 Mass. 623, 636 (2008), and *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). Conclusory allegations are insufficient.

A limited liability corporation is a "separate and distinct" entity; shareholders, officers, directors, members, or managers are not alter egos of the business. See, e.g., *Dickey* v. *Inspectional Services Dept. of Boston*, 482 Mass. 1003, 1004 (2019) (rescript) ("corporations and limited liability companies are entities that exist separate and distinct from the individuals who own them"); *Spaneas* v. *Travelers Indem. Co.*, 423 Mass. 352, 354 (1996) ("A corporation is an

independent legal entity, separate and distinct from its shareholders, officers, and employees."); see also *Scott* v. *NG US 1, Inc.*, 450 Mass. 766, (2008).

It is rare when a plaintiff may breach the corporate veil and assert claims against individual corporate officers/managers. See *Scott* v. *NG US 1, Inc.*, supra at 767-768.[5]

The relevant mixed factual/legal allegations set forth in the plaintiffs' proposed amended complaint are that (1) Sabadosa, acting in his personal capacity and for his own benefit, employed Anderson to provide maintenance and tenant liaison services at the property owned by LRS, (2) Anderson, while acting within the scope of her agency or employment with Sabadosa, in his individual capacity, tortiously disabled or removed the battery from the smoke alarm in Apartment 2D, and (3) Sabadosa, as Anderson's principal, was liable for his agent/employee's tortious conduct. Alternatively, the proposed amended complaint alleges that (1) Sabadosa, as manager of

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[5] "In Massachusetts, the equitable doctrine of corporate disregard differs in no material respect from the description in United States v. Bestfoods, supra at 62-63, . . . [C]orporate veils are pierced only in 'rare particular situations,' and only when an 'agency or similar relationship exists between the entities.' My Bread Baking Co. v. Cumberland Farms, Inc., supra at 619, 620. A veil may be pierced where the parent exercises 'some form of pervasive control' of the activities of the subsidiary 'and there is some fraudulent or injurious consequence of the intercorporate relationship.' Id. at 619. See Hanson v. Bradley, 298 Mass. 371, 381 (1937) ('The right and the duty of courts to look beyond the corporate forms are exercised only for the defeat of fraud or wrong, or the remedying of injustice'). See also 1 W.M. Fletcher, Cyclopedia of Corporations, supra at § 43, at 292 ('the injured party must show some connection between its injury and the parent's improper manner of doing business -- without that connection, even when the parent exercises domination and control over the subsidiary, corporate separateness will be recognized'). Corporate formalities also may be disregarded "when there is a confused intermingling of activity of two or more corporations engaged in a common enterprise *with substantial disregard of the separate nature of the corporate entities*, or serious ambiguity about the manner and capacity in which the various corporations and their respective representatives are acting" (emphasis added). My Bread Baking Co. v. Cumberland Farms, Inc., supra at 619. Stated more directly, control, even pervasive control, without more, is not a sufficient basis for a court to ignore corporate formalities: 'There is present in the cases which have looked through the corporate form an element of dubious manipulation and contrivance [and] finagling . . .' Evans v. Multicon Constr. Corp., 30 Mass. App. Ct. 728, 736 (1991). See United States v. Bestfoods, supra at 62 (veil piercing appropriate when, "inter alia, the corporate form would otherwise be used to accomplish certain wrongful purposes, most notably fraud, on the shareholder's behalf"); 1 W.M. Fletcher, Cyclopedia of Corporations, supra at § 43, at 296 ('although corporations are related, there can be no piercing of the corporate veil without a showing of improper conduct'). Ultimately, the decision to disregard settled expectations accompanying corporate form requires a determination that the parent corporation directed and controlled the subsidiary, and used it for an improper purpose, based on evaluative consideration of twelve factors: (1) common ownership; (2) pervasive control; (3) confused intermingling of business assets; (4) thin capitalization; (5) nonobservance of corporate formalities; (6) absence of corporate records; (7) no payment of dividends; (8) insolvency at the time of the litigated transaction; (9) siphoning away of corporation's funds by dominant shareholder; (10) nonfunctioning of officers and directors; (11) use of the corporation for transactions of the dominant shareholders; and (12) *use of the corporation in promoting fraud*" (emphasis added). Attorney Gen. v M.C.K., Inc., supra at 555 n.19, citing Pepsi-Cola Metro. Bottling Co. v. Checkers, Inc., 754 F.2d 10, 15-16 (1st Cir. 1985) (categorizing My Bread Baking Co. factors)."

LRS, is an "owner" of the property as defined in the State Sanitary Code, 105 C.M.R. § 410.020 and is liable for personal injuries resulting from the breach of the implied warranty of habitability, or (2) Sabadosa, as manager of LRS, directed, controlled or ratified Anderson's tortious conduct.

I shall address each contention.

Whether Anderson Was Sabadosa's Employee or Agent. The conclusory factual allegations set forth in the proposed amended complaint (as supplemented by the referenced deposition and affidavit testimony), do not plausibly suggest that Anderson was hired and employed by LRS or by Sabadosa acting in his independent capacity and for his own benefit.

For purposes of ruling on this motion the court need not decide whether Anderson was an independent contractor or agent based upon an informal arrangement. The only relevant issue, whatever the service/compensation arrangement might he been, is whether the facts set forth in proposed amended complaint (as supplemented by the referenced deposition and affidavit testimony) plausibly suggest with respect to his dealings with Anderson that Sabadosa was acting in furtherance of his own interests and for his own benefit separate and distinct from the interests of LRS.

The conclusory factual allegations set forth in the proposed amended complaint (as supplemented by the referenced deposition and affidavit testimony) do not plausibly suggest that Sabadosa was acting in his individual capacity and for his own benefit when he either entered into an independent contract or arrangement with Anderson to provide services at the property owned by LRS.

It appears to be undisputed that Sabadosa, as the manager of the LLC responsible for the day-to-day operations of LRS, was the sole person authorized to act on behalf of LRS regarding matters pertaining to the property. This included the authority to enter into independent agreements or contracts with service providers or managers (or quasi-managers). It is undisputed that Sabadosa and Anderson had an agreement by which in exchange for compensation she continued to perform certain tenant liaison or simple maintenance tasks at the property. However, this fact, standing alone, is insufficient to plausibly suggest that Sabadosa, when he entered into the agreement with Anderson, was acting in his individual capacity, rather than as the manager for LRS.

It is undisputed that the only compensation Anderson received for her services came in the form of (a) a monthly rent credit, and (b) use of a mobile phone. In is undisputed that Premier

Choice Realty collected rent from tenants that was owed to LRS, as the property owner. It is obvious that the monthly rent credit granted to Anderson was deducted from income (in the form of rent) that would otherwise have been retained by LRS. Thus, the rent credit compensation was paid to Anderson by LRS, not to Sabadosa in his individual capacity. The cell phone was provided to Anderson by LRS's rent collection agent, Premier Choice Realty. Since Premier Choice Realty was acting as an agent for LRS, the compensation paid to Anderson in the form of the use of a cell phone was in fact paid by the principal, LRS.

The proposed amended complaint (as supplemented by the affidavits and deposition testimony) does not plausibly suggest that Premier Choice Realty was acting under the direction and control of Sabadosa, in his individual capacity, rather than as manager of LRS.

The proposed amended complaint (as supplemented by the affidavits and deposition testimony) does not plausibly suggest that Sabadosa, acting in his individual capacity, made any payments to Anderson as compensation for the work she performed at the property. The only evidence presented suggests that any cash payments from Sabadosa to Anderson pertained to advance payments or reimbursements for expenditures for cleaning supplies used in furtherance of LRS's interests in maintaining the property in good condition.

There is no evidence that Sabadosa, in his individual capacity, received any benefit or anything of value from Anderson's services, be it cash or other financial benefit, that otherwise properly belonged to LRS. Aside from his right as an LRS shareholder to receive a share of the profits from the income or capital gains earned by LRS, there is no allegation or evidence that plausibly suggests that Sabadosa engaged in any conduct in his individual capacity (and specifically with respect to the relationship with Anderson) to collect or retain any moneys or benefits from the operation of the property that belonged to LRS.[6]

The plaintiffs allege without factual support that Sabadosa made unreported compensation payments to Anderson in an effort to avoid LRS's obligations to, among other obligations, pay unemployment and workers compensation insurance premiums, make employer social security payments or to withhold and transmit employee tax payments. These payment/reporting obligations would attach only if Anderson had been an employee of LRS; and there is no evidence

[6] Whether or how LRS accounted for or reported compensation paid to Anderson is an irrelevant consideration. Likewise, the fact that LRS did not prepare a 1099 for Anderson is irrelevant. The sole issue is whether there is any evidence that plausibly suggests that Sabadosa, acting in furtherance of his own interests and not in furtherance of the interests of LRS, entered into an agreement with Anderson. Speculation is not a substitute for evidence.

that plausibly suggest that Anderson was an employee of LRS. But even if Anderson was an employee of LRS, that allegation does not plausibly suggest that Sabadosa was acting in furtherance of his own financial interests at the expense of LRS's interests.[7]

Whether Sabadosa, as Manager of the LLC, has Individual Legal Liability Based on Anderson's Conduct. The amended complaint sets forth facts that plausibly suggest that Anderson disabled or removed a smoke/fire detector in the apartment 2B shortly before the fire, and that the purported tortious act, involved conduct within the scope of her agency with LRS. These allegations would be sufficient to survive a motion to dismiss with respect to the claims asserted by LRS.

However, I rule as a matter of law that the facts set forth in the amended complaint (as supplemented by the affidavits and deposition testimony) do not plausibly suggest that that there are any legal or equitable grounds sufficient to disregard the LRS's corporate structure and thus pierce the corporate veil to assert the tort-based claims against Sabadosa individually. And since the evidence presented to the court does not plausibly suggests that Anderson was acting as an agent or employee of Sabadosa in his individual capacity, the proposed amended complaint does not assert any claims upon which relief can be granted against Sabadosa in his individual capacity sounding in negligence, negligent infliction of emotional distress, violation of G.L. c. 186, § 14, or G.L. c. 93A. To allow these claims to proceed against Sabadosa, in his individual capacity, would be futile.

As an alternative basis, the plaintiffs assert that Sabadosa, as a manager of the LLC, is obligated to comply with the State Sanitary Code as if he were an "owner." The plaintiffs argue that to the extent the fire resulted from a failure to comply with the minimum standards of habitability Sabadosa is subject to liability in tort for breach of the implied warranty of habituality.

The problem with this argument is that Sabadosa, as a manager of the LRS, is entitled to the limited liability protections afforded to officers of an LLC. And Sabadosa, in his individual capacity, does not fall with any of the categories of "owner" defined in the State Sanitary Code, 105 CMR § 410.020. The allegations set forth in the plaintiffs' proposed amended complaint (as

[7] It is LRS that is responsible for any government required employee-based payment and reporting obligations. While both LRS and Sabadosa (as corporate manager) potentially could be subject to civil and criminal sanctions had they failed to comply with these governmental payment/reporting obligations), the proposed amended complaint does not plausibly suggest that Sabadosa would have benefited by such wrongful conduct in a manner that was separate and distinct from his status as an LRS manager and stockholder.

supplemented by the affidavits and deposition testimony) do not plausibly suggest that Sabadosa individually (1) held legal title to the property, (2) had care, charge or control of the property in is individual capacity, (3) is a mortgagee in possession of the property, (4) is a court appointed agent vested with control of the property, or (5) that the property is a condominium and Sabadosa is an officer or trustee of the association.

Accordingly, the proposed amended complaint does not assert a claim upon which relief can be granted against Sabadosa, in his individual capacity, for breach of the implied warranty of habitability. To allow this warranty claim to proceed against Sabadosa, in his individual capacity, would be futile.

Finally, the plaintiffs argue that Sabadosa, is individually liable because as a manager of LRS, he directed, controlled or ratified Anderson's tortious conduct. The allegations set forth in the plaintiffs' proposed amended complaint (as supplemented by the affidavits and deposition testimony) do not plausibly suggest that Sabadosa directed or controlled anything that Anderson may have done to disable or remove a smoke/fire detector in the apartment shortly before the fire. And the proposed amended complaint does not plausibly suggest that Sabadosa ever did or said anything that could reasonably be construed as authorizing or ratifying Anderson's purported tortious conduct. Accordingly, the proposed amended complaint does not assert a claim upon which relief can be granted against Sabadosa individually under this theory of liability. To allow this claim to proceed against Sabadosa, in his individual capacity, would be futile.

Conclusion

For these reasons, the plaintiffs' *Revised Motion to Amend the Complaint to Add a Party Defendant* is **DENIED**.

So entered this 31st day of October, 2022.

Jeffrey M. Winik
Associate Justice (Recall Appt.)

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-4190

AAD, LLC,

Plaintiff,

v.

CARMEN CALDERON, et al.,

Defendants.

ORDER

After hearing on March 2, 2023, on the tenants' motion to stop a physical eviction currently scheduled for March 3, 2023, at which the plaintiff appeared through counsel and the defendants appeared through Lawyer for the Day Counsel, and which was joined by Way Finders, Inc. regarding RAFT, the following order shall enter:

1. The representative from Way Finders, Inc. reported that the tenants' RAFT application was "timed out" in part because the landlord failed to provide its

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paperwork. In addition, Way Finders, Inc. reported that there is nothing in her records that would indicate ineligibility for RAFT up to $10,000.

2. The tenant, Carmen Calderon, reported to the court that she has been [redacted] hospitalized three time during the past year.
3. The physical eviction currently scheduled shall be cancelled by the landlord.
4. The tenants shall work with Community Legal Aid to apply forthwith to RAFT and the landlords shall include all court costs, including the $640 incurred by scheduling and cancelling the physical eviction, in its ledger provided to Way Finders, Inc.

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

CC: Gordon Shaw, Community Legal Aid (Lawyer for the Day Program)
Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-3076

JAMES BENNET,

Plaintiff,

v.

ELIAS ALICEA,

Defendant.

ORDER

After hearing on February 23, 2023, on the landlord's motion for entry of judgment at which both parties appeared, the following order shall enter:

1. The landlord shall have licensed technicians make repairs to the hearing system and a professional exterminator to treat for rodents FORTHWITH. The technicians must show their professional licenses to the tenant upon entry.
2. Access shall not be unreasonably denied by the tenant for said work after at least 24 hours' written notice is provided by the landlord.

3. The tenant shall pay his use and occupancy each month.
4. If the tenant has not vacated the premises by September 1, 2023, or has failed to pay use and occupancy, the landlord may file a motion for entry of judgment and issuance of the execution thereafter.

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

CC: Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 21-SP-2321

CITY VIEW COMMONS,

Plaintiff,

v.

LANNISHA TAYLOR,

Defendant.

ORDER

After hearing on February 23, 2023, on the landlord's motion for entry of judgment at which only the landlord appeared, the following orders shall enter:

1. The landlord reported that since the last hearing on January 24, 2023, the tenant's only payment towards use and occupancy was made on February 23, 2023, in the amount of $200.
2. The landlord has met its burden of proof that the tenant has violated the terms of the Agreement of the parties dated October 7, 2023.

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3. There being no pending application with RAFT (confirmed with Way Finders, Inc. during the hearing), upon the filing of a non-military affidavit judgment shall enter for the landlord for possession and for $139 in use and occupancy through February 2023 plus $195.01 in court costs.

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

CC: Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-1670

TIMOTHY DOBEK,

Plaintiff,

v.

GABRIEL CEDRES, DARCIE LEWANDOWSKI, and GABRIEL CEDRES ARRUFFATT,

Defendants.

ORDER SETTING THE APPEAL BOND

After hearing on March 8, 2023, on the defendants' motion to waive the appeal bond, the following order shall enter:

1. In accordance with G.L. c.23, s.5, the court must determine if the defendants are indigent and whether they have non-frivolous defenses or claims.
2. Given the submissions of the defendants including affidavits of indigency, the court finds that the defendants are indigent in accordance with G.L. c.261, s.27A-27G.

21 W.Div.H.Ct. 142

3. Additionally, the court finds the defendants have non-frivolous defenses or counterclaims. Though the court found against the defendants on said claims after trial, it does not mean that they are without merit for purposes of this motion to waive the appeal bond.
4. The parties stipulated at the hearing that the fair use and occupancy rate for the subject premises is $1,500 per month.
5. **The Bond:** In accordance with G.L. c.239, s.5 the bond is waived other than monthly use and occupancy payments due by the fifth day of each month beginning April 2023 in the amount of $1,500 while the defendants occupy the premises pending appeal. These monthly payments shall be paid to the landlord by certified funds.

So entered this 10th day of March, 2021.

Robert Fields, Associate Justice

Cc: Laura Fenn, Esq., Assistant Clerk Magistrate (Re: Appeals)
Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-1670

TIMOTHY DOBEK,

Plaintiff,

v.

GABRIEL CEDRES, DARCIE LEWANDOWSKI, and GABRIEL CEDRES ARRUFFATT,

Defendants.

AGREED UPON ORDER

After hearing on March 8, 2023, on the plaintiff landlord's motion for access and for protocols regarding the sale of the premises, the following order shall enter:

1. By agreement of the parties, the landlord may place a fore sale sign on the yard of the subject premises and it will not be taken down or disturbed by the tenants.
2. A licensed real estate broker may schedule viewings for potential purchasers through coordination directly with the tenants. Access for such viewings may

21 W.Div.H.Ct. 144

only occur by agreement of the tenants, and denial of access for such shall not be unreasonably denied.

3. The landlord may schedule a time with coordination with the tenants to appear with the Agawam Police Department to access the basement one time to remove his personal belongings. At the time agreed to by the parties in compliance with the above, the tenants will open the door to the basement.

So entered this 10th day of March, 2021.

Robert Fields, Associate Justice

Cc: Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss: **HOUSING COURT DEPARTMENT**

WESTERN DIVISION

CASE NO. 19-SP-3771

RAYMOND LABONTE, JR.,

Plaintiff,

v.

ANN M. BECKER, JOHN C. BECKER, and JOSEPH WILSON,

Defendants.

After hearing on March 3, 2023, to release funds to the plaintiff, the following order shall enter:

1. On April 6, 2022, the court set the appeal bond as monthly installment use and occupancy payments beginning April 2022, to be deposited with the court.
2. The defendants have fully complied with said bond order and the court is currently holding $8,800.

21 W.Div.H.Ct. 146

3. By this motion, the plaintiff is seeking the release of those funds to be paid to him to be put towards carrying costs for the subject premises which include taxes, water and sewer charges, insurance, and maintenance.
4. Given the relevant language in G.L. c.239, s.5(c), that such funds should be "conditioned to pay to the plaintiff" and other than a general objection with no legal argument is being put forward by the defendants to not comply with the plain language of that statute, the motion is allowed.
5. The court shall release said funds that have accrued with the court to the plaintiff, payable to plaintiff's counsel Richard Herbert.
6. Additionally, the defendants are directed to continue to make their monthly payments in accordance with the April 2022 bond order pending appeal but, beginning in April 2023, to be paid to the plaintiff by way of his counsel, Richard Herbert.

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

Cc: Maria Pereira, Office Manager/Clerks Office

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-1270

LUDLOW HOUSING AUTHORITY,

Plaintiff,

v.

SCOTT MCDANIEL,

Defendant.

ORDER

After hearing on February 27, 2023, at which the landlord appeared through counsel and the tenant appeared pro se and accompanied by [redacted] and also at which a representative from the Tenancy Preservation Program (TPP) joined by Zoom, the following order shall enter:

1. The parties are required to engage in a reasonable accommodations dialogue as noted in the court's January 30, 2023, order.

2. TPP and [redacted] shall work with the parties regarding this reasonable accommodations dialogue.
3. Ms. Perry is following up on the tenant's health with focus on [redacted] and will be prepared to update the court at the next hearing noted below.
4. The landlord shall investigate the installation of soundproofing on the shared walls between the tenant and his neighbors' unit.
5. In the meantime, the tenant shall not act aggressively towards his neighbors or the landlord's staff. If the landlord alleges that the tenant has violated this term, it may file a motion for further injunctive order or judgment. Any such motion shall include a description of any such event, the date and time, and the name of any witness thereto.
6. TPP reported to the court that it has not been successful in connecting with the tenant but will meet with the tenant directly after the hearing in one of the court's Zoom rooms.
7. This matter shall be scheduled for an update from the parties, [redacted] and TPP, on **April 18, 2023, at 9:00 a.m.**

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

CC: TPP

[redacted]

Court Reporter

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss.

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 22-SP-4472

VICTOR MONSERRAT,

PLAINTIFF

v.

REYNA SANABRIA,

DEFENDANT

ORDER

This summary process case came before the Court for a bench trial on February 23, 2023. Both parties appeared self-represented. Plaintiff landlord resides on the second floor of a duplex located at 77-79 Casino Ave., Chicopee, Massachusetts (the "Property"). Defendant tenant lives on the first floor.

Prior to trial, the parties assented to an order to resolve this case without trial. The following order shall enter:

1. Defendant will vacate by May 1, 2023.
2. Defendant will pay for March use and occupancy (rent) of $900.00 by March 1, 2023 and April use and occupancy (rent) of $900.00 by April 1, 2023 if she is still living at the Property.
3. Plaintiff will provide a neutral reference to any prospective landlord (dates of tenancy and amount of monthly rent).
4. So long as Defendant resides at the Property, both parties shall respect the rights of the other to live peacefully. This order applies to their guests and family members as well. The parties shall not cause any disturbances,

engage in any threats or intimidating behavior, or make excessive noise. Further, the parties shall have no communications with each other except as necessary to address urgent issues such as repairs.

5. Defendant shall not block the driveway.
6. If Defendant does not vacate as required, Plaintiff may file a motion for entry of judgment and may ask for any rent arrears and court costs. If Defendant does vacate, Plaintiff may schedule a motion to assess damages to determine how much, if anything, Defendant owes after vacating.

SO ORDERED.

DATE: 3.10.23

Jonathan J. Kane

Jonathan J. Kane, First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss.

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 23-CV-0069

ABDUL JABBAR MOHSIN,
PLAINTIFF

v.

USMAN MALIK,
DEFENDANT

ORDER

This matter came before the Court on March 8, 2023 following two previous hearings at which Mr. Malik did not appear. Mr. Malik appeared on this occasion through counsel. The City of Springfield Code Enforcement conducted an inspection prior to this hearing and a copy of the report was provided to the Court. Mr. Malik's counsel will provide a copy to Mr. Mohsin. After hearing, the following order will enter:

1. Mr. Malik will address all citations in the Code Enforcement report by April 6, 2023. Counsel reports that the two missing smoke detectors have been installed already.
2. Mr. Malik and his agents will provide Mr. Mohsin at least 48 hours advance notice of any intent to enter his room to make repairs.
3. Mr. Malik will cooperate with Way Finders with respect to Mr. Mohsin's application for funds.

21 W.Div.H.Ct. 152

4. Mr. Malik shall provide Mr. Mohsin with an accounting of all monies received from any source relating to Mr. Mohsin's tenancy no later than April 6, 2023. To the extent that Mr. Malik received Way Finders' funding for time periods for which Mr. Mohsin also paid, Mr. Malik shall return the excess payment to Way Finders or credit Mr. Mohsin for rent going forward.
5. If either party requires further Court order, he may serve and file a motion for hearing after April 6, 2023.

SO ORDERED.

DATE: 3.10.23

Jonathan J. Kane

Jonathan J. Kane, First Justice

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Berkshire, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-4016

MATTHEW RUDIN,

Plaintiff,

v.

ANNA ROSA GOMEZ and JOSE GOMEZ,

Defendants.

ORDER

After hearing on March 1, 2023, at which the plaintiff appeared with counsel and the defendants appeared through counsel (but were not otherwise present in the courtroom) the following order shall enter:

1. Counsel for the defendants reported to the court that the defendants have vacated the premises and that they completely relinquish possession of the premises.

21 W.Div.H.Ct. 154

2. Counsel for the defendants shall provide the court with the defendants' new mailing address. NOTE: Attorney Lee's LAR appearance on behalf of the defendants has been completed and Attorney Lee shall file and serve an LAR withdrawal.
3. The plaintiff's claim for use and occupancy and/or rent and the defendants' counterclaims shall be severed and transferred to the Civil Docket.
4. A Case Management Conference in that newly generated civil action shall be scheduled for **April 11, 2023, at 11:30 a.m. by Zoom**. A separate notice shall issue from the court with the Zoom details.

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

CC: Laura Fenn, Assistant Clerk Magistrate
Darren Lee, Esq. (Former LAR counsel for the defendants)
Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-141

TENSIM SONAM,

Plaintiff,

v.

MARYBETH GUILLEMETTE, et al.,

Defendants.

ORDER

After hearing on February 27, 2023, on the plaintiff landlord's motion for issuance of the execution, the following order shall enter:

1. The tenants shall pay $2,750 to the landlord forthwith to cover use and occupancy and all other costs through February, 2023.
2. The tenants shall also pay and additional $1,100 for March 2023 use and occupancy by no later than March 15, 2023.

21 W.Div.H.Ct. 156

3. Having been a year since the original move out Agreement, and several months since the original move out date (December 31, 2022), and also given the tenants' failures to pay use and occupancy in January and February, 2023, and to provide copies of their housing search log, the execution for possession shall be issued by the court.
4. The landlord may levy on the execution as early as March 16, 2023, if use and occupancy is not paid by the tenants for March 2023 as noted above. If said payment is made, the landlord may levy on the execution on April 1, 2023, or thereafter.

So entered this 10th day of March, 2023.

Robert Fields, Associate Justice

CC: Court Reporter

21 W.Div.H.Ct. 157

OK

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
CASE NO. 22-SP-4430

WINDSOR REALTY, LLC,

Plaintiff,

v.

MONICA SANCHEZ, CARLOS DIAZ, and MARGARITA RODRIGUEZ,

Defendants.

ORDER

After hearing on March 10, 2023, on review of an Agreement of the parties, at which the landlord appeared through counsel and the tenant Margarita Rodriguez appeared *pro se*, and also at which a representative from Way Finders, Inc. joined, the following order shall enter:

1. The tenant paid $1,000 since the last agreement (March 1, 2023) but was supposed to pay $1,400 (monthly rent). The tenant was also supposed to pay

$200 on March 7, 2023, but did not make a payment. Accordingly, the tenant owes $600 to catch up to the terms of February 27, 2023, Agreement.

2. The representative from Way Finders, Inc. reported that because the tenant received RAFT funds in August 2022, she should be eligible for $5,900.
3. The tenant shall immediately apply for RAFT and the landlord shall cooperate with such efforts and provide needed documents to Way Finders, Inc. The tenant and Ms. Luna from Way Finders, Inc. will meet in a court Zoom room immediately following the hearing. The landlord's email address (to assist in the Way Finders, Inc. RAFT application) is [redacted].
4. The tenant shall pay the landlord $300 today (same was paid during the hearing) and another $300 on March 22, 2023.
5. If RAFT pays $5,900 towards the debt, the tenant will still owe $2,100 in use and occupancy and $267.25 in court costs.
6. Beginning in May 2023, the tenant shall pay the landlord her rent plus $300 on the 3rd and another $300 on the 22nd of each month until the balance is $0.
7. Upon a $0 balance, this matter shall be dismissed.

So entered this 13th day of March, 2023.

Robert Fields

Robert Fields, Associate Justice

CC: Janis Luna, Way Finders, Inc. [redacted]
Court Reporter

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 22-SP-4526

OCEAN PROPERTY MANAGEMENT,	)	
	)	
PLAINTIFF	)	
v.	)	FINDINGS OF FACT, RULINGS
	)	OF LAW AND ORDER FOR JUDGMENT
DUDLEY STEEL AND JANICE M. TORRES,	)	
	)	
DEFENDANTS	)	

This summary process case came before the Court for a bench trial on February 23, 2023. Plaintiff appeared through counsel. Defendants appeared self-represented. Plaintiff seeks to recover possession of 556 South Bridge Street, 1R, Holyoke, Massachusetts (the "Premises") from Defendants.

Based on all the credible testimony, the other evidence presented at trial and the reasonable inferences drawn therefrom, the Court finds and rules as follows:

The Premises are part of an 8-unit building. Marilyn Benitez was the leaseholder when Plaintiff took over management of the Premises in February 2021. Marilyn Benitez passed away in May 2022. Defendant Torres claims to have been Ms. Benitez's unpaid caregiver.

The Court finds no evidence Defendants had any legal basis to reside in the Premises after Mr. Benitez's death. They have never executed a rental agreement with Plaintiff and Plaintiff has never agreed to allow Defendants to reside there. They

have never paid rent and there was no "meeting of the minds" whereby Plaintiff agreed that Defendants could take possession of Ms. Benitez's unit. When Plaintiffs sought to remove Defendants from the unit as trespassers, Defendants were able to convince the Holyoke Police Department that they had a right to live there by showing their name on an electric bill. Defendants, however, provided a false lease (with a forgery of the property manager's signature) to Holyoke Gas & Electric in order to have electricity turned on in their names.

The Court rules that Defendants have no rights as tenants. They have no right to occupy the Premises whatsoever. They were given proper notice to vacate the Premises but failed to do so. Accordingly, in light of the foregoing, the following order shall enter:

1. Judgment for possession shall enter in favor of Plaintiff.
2. Execution may issue ten days after the judgment enters on the docket.
3. A levy shall not be scheduled prior to March 15, 2023 to allow Defendants time to vacate the Premises voluntarily.

SO ORDERED.

DATE: 3-15-23

Jonathan J. Kane

Jonathan J. Kane, First Justice

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampshire, ss: HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-2461

RELATED VILLAGE PARK, LLC,

Plaintiff,

v.

IRENE ALVAREZ,

Defendant.

ORDER

After hearing on Zoom on March 13, 2023, on the landlord's motion for entry of judgment at which the landlord appeared through counsel and the tenant appeared *pro se* and at which a representative from the Tenancy Preservation Program (TPP), Michael Richtel, joined the hearing, the following order shall enter:

1. The basis for this motion is the tenant's failure to comply with the terms of the parties' agreement dated December 19, 2022.
2. More specifically, the tenant has failed to clean up her porch, update the landlord on her income, and work with TPP.
3. Despite TPP's efforts to reach out to the tenant, she has not engaged.

21 W.Div.H.Ct. 162

4. The TPP representative reported that TPP is in a position to assist with the cleaning up of the porch, with updating the landlord regarding her income and assisting with the tenant's recertification, investigating the need for RAFT,and with working with the tenant's current health care providers and assessing whether there might be additional services available for the tenant.
5. The court was impressed during the hearing that [redacted] leads the court to conclude that this tenant's failures to comply with the Agreement---and perhaps the basis for the eviction itself---may be related to disabilities.
6. The tenants shall work TPP in all regards, including the specifics described above.
7. The tenant and Mr. Richtel of TPP shall meet in a Zoom breakout room directly after this hearing.
8. This matter shall be scheduled for review on **April 10, 2023, at 9:00 a.m.** at the Hadley Session of the court.

So entered this 15th day of March, 2023.

Robert Fields, Associate Justice

CC: Michael Richtel, Tenancy Preservation Program
Court Reporter

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss.

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 23CV202

ANTHONY DANEK ET AL,	)	
	)	
PLAINTIFFS	)	
	)	
V.	)	ORDER
	)	
SUBURBAN PROPANE,	)	
	)	
DEFENDANT	)	

This matter came before the Court on March 15, 2023 on Plaintiff's emergency motion for a civil restraining order. Plaintiffs appeared and represented themselves. Defendant did not appear.

After hearing, the following order shall enter:

1. Defendant is hereby prohibited from disconnecting or removing propane tanks from Plaintiffs' property at 310 Main Street, Granville, Massachusetts without written agreement of Plaintiffs or further Court order.
2. Defendant shall not enter onto Plaintiffs' property at 310 Main Street, Granville, Massachusetts without Plaintiffs' permission.

SO ORDERED.

DATE: 3.16.23

Jonathan J. Kane
Hon. Jonathan J. Kane, First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 22-SP-4377

MIGUEL A. GUZMAN,	)	
	)	
PLAINTIFF	)	
v.	)	FINDINGS OF FACT, RULINGS
	)	OF LAW AND ORDER FOR JUDGMENT
DAVID PABON,	)	
	)	
DEFENDANT	)	

This no fault summary process case came before the Court for a bench trial on February 23, 2023. Plaintiff appeared through counsel. Defendant appeared self-represented. Plaintiff seeks to recover possession of 513 ½ Avery Street, 2d Floor, Springfield, Massachusetts (the "Premises") from Defendant as well as unpaid rent and use and occupancy.[1]

Based on all the credible testimony, the other evidence presented at trial and the reasonable inferences drawn therefrom, the Court finds and rules as follows:

Defendant stipulated to Plaintiff's claim for possession (see Order dated January 30, 2023). Although he was permitted to file a late answer by January 20, 2023, no answer was filed. Nonetheless, Defendant testified without objection as to potential defenses to payment.

[1] Prior to trial, Plaintiff filed a motion to amend the account annexed to add rent and use and occupancy unpaid through the date of trial, which Plaintiff claims is $11,050.00 based on 13 months without payment at a rate of $850.00 per month. Defendant does not dispute this figure.

At trial, Defendant alleged that he had to endure numerous conditions of disrepair during his tenancy, including an infestation of mice and roaches, several windows without glass, insufficient heat, slow draining pipes, cabinets and counters that need repair, a mold-like substance in the bathroom and a broken oven that took two to three months to replace. He claimed that many of the issues existed at the time he took over tenancy of the Premises when his roommates moved out, but he could not remember what year that occurred. He could not remember when he notified Plaintiff of the conditions of disrepair, and he had no photographs or other documentary evidence and no witnesses to corroborate his testimony.

In order for the Court to determine whether Defendant has a defense to possession pursuant to G.L. c. 239, § 8A, Defendant must establish that Plaintiff or his agents knew of the conditions before he was behind in rent.[2] Because Defendant's memory as to dates was poor, and because he had no evidence, he could not establish a § 8A defense. Likewise, with respect to Plaintiff's liability for breach of warranty, given the absence of credible evidence, the Court would simply be guessing as to the significance and duration of the alleged conditions of disrepair.

Accordingly, based on these findings and in light of the governing law, the following order shall enter:

1. Judgment for possession and $11,050.00 in damages, plus court costs, shall enter in favor of Plaintiff.

---

[2] Defendant conceded that Plaintiff's claim that he had not paid for 13 months "sounds about right"; accordingly, the Court concludes that the last time Defendant was not in arrears was in January 2022.

2. Execution (the eviction order) shall issue upon written application after expiration of the 10-day appeal period.

SO ORDERED.

DATE: 3·16·23

Jonathan J. Kane

Jonathan J. Kane, First Justice

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampshire, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-3507

MARLENE A. CHRISTY REVOCABLE TRUST,

Plaintiff,

v.

SHAMYYA WASHINGTON,

Defendant.

ORDER

After hearing on March 13, 2023, on the landlord's motion for entry of judgment at which it appeared through counsel and the tenant appeared with Limited Appearance Counsel, the following order shall enter:

1. By the time of the last agreement in this non-payment of rent matter, which was January 18, 2023, the tenant had obtained rental arrearage funds and had paid all outstanding amount owed to the landlord other than $323 "including court costs and all late fees."

21 W.Div.H.Ct. 168

2. It was anticipated in that Agreement that the tenant was going to have those funds paid by Community Action.
3. Community Action did pay $323 and if said funds were received by January 31, 2023, this case would have been dismissed. The landlord reports that said funds were not received by the landlord until February 1, 2023. As such, the landlord argues that February 2023 rent of $1,100 became due and the tenant failed to pay it. The tenant also did not pay March 2023 rent.
4. LAR Counsel, is also currently representing the tenant in a matter involving her Section 8 Voucher. The parties reported that the tenant secured a Section 8 Voucher but the rent for the subject unit was $50 over the amount the Voucher could cover. The tenant then timed out and lost her Voucher when she could not secure housing within the Voucher limits. LAR counsel is now working with the administering agency to have the Voucher reinstated and is hopeful that the Voucher will be able to be used for the subject unit (though the landlord is planning to raise the rent even more, to $1,250, explaining that the landlord would bring the rent amount for this unit equal to the other like size units in the building).
5. The tenant reports also that she has obtained two jobs and believes she is able to pay the outstanding rent balance and cover the rent going forward, even without a subsidy.
6. The tenant shall pay the landlord $1,100 for April 2023 plus $100 towards the $2,200 arrearage prior to the next hearing noted below.

7. LAR counsel shall continue to pursue the reinstatement of the tenant's Section 8 Voucher and shall work with the landlord's attorney in regards to its possible use for the subject premises.
8. This matter shall be scheduled for further hearing on **April 24, 2023, at 9:00 a.m.** at the Hadley Session of the court. LAR counsel has agreed to extend her representation through the date of said hearing.
9. Additionally, the landlord shall bring proof of the date of receipt of the Community Action funds noted above and also a copy of its ledger for this tenancy that dates back to at least August 2022.

So entered this 16th day of March, 2023.

Robert Fields, Associate Justice

CC: Jennifer Cunningham-Minnick, Esq. (LAR Counsel)
Court Reporter

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 22-SP-4102

ANTHONY STEWART,	)	
	)	
PLAINTIFF	)	
v.	)	AGREED-UPON ORDER
	)	
BRITTANY HILLMAN,	)	
	)	
DEFENDANT	)	

This no fault summary process case came before the Court for a bench trial on February 23, 2023. Both parties appeared self-represented. Plaintiff seeks to recover possession of 19 Butler Avenue, Chicopee, Massachusetts (the "Premises") from Defendant as well as unpaid rent and use and occupancy.

Defendant filed a late answer and request for discovery, but did first seek leave of Court. She informed the Court, however, that she was simply looking for additional time to move, although she disputed the amount of rent that Plaintiff was seeking. The end of the six-month statutory stay period is April 30, 2023. In order to resolve this matter without trial, the parties agreed to certain terms, which are hereby incorporated into this order:

1. This order shall resolve the issue of possession, but not the issue of unpaid use and occupancy (rent).

21 W.Div.H.Ct. 171

2. Defendant shall vacate no later than April 30, 2023. Plaintiff will be entitled to a judgment for possession only if she fails to vacate by this date.
3. Plaintiff will make all repairs for which he was cited by the Chicopee Code Enforcement Department within the time frames provided.
4. Defendant will pay March use and occupancy (rent) by March 5, 2023 and April use and occupancy (rent) by April 5, 2023.
5. The parties shall return on April 27, 2023 at 9:00 a.m. for further proceedings with respect to the determination of damages.

SO ORDERED.

DATE: 3·16·23

Jonathan J. Kane

Jonathan J. Kane, First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPSHIRE, ss.	HOUSING COURT DEPARTMENT WESTERN DIVISION DOCKET NO. 22-SP-1521
U.S. BANK TRUST, NATIONAL ASSOCIATION, NOT IN ITS INDIVIDUAL CAPACITY, BUT SOLELY AS TRUSTEE OF LSF9 MASTER PARTICIPATION TRUST, PLAINTIFF v. MARIAELENA GARCIA, DEFENDANT	FINDINGS OF FACT, RULINGS OF LAW AND ENTRY OF JUDGMENT

This post-foreclosure summary process matter came before the Court on January 27, 2023 for an in-person bench trial. Plaintiff appeared through counsel. Defendant appeared self-represented. The property in question is located at 74 North Whitney Street, Amherst, Massachusetts (the "Premises").

Based on all the credible testimony and evidence presented at trial, and the reasonable inferences drawn therefrom, the Court finds and rules as follows:

Defendant took title to the Premises in 2008. She granted a mortgage to Bank of America, N.A. containing the right to invoke the statutory power of sale. The mortgage was assigned to Plaintiff by assignment recorded in the Hampshire County Registry of Deeds on January 7, 2016. Defendant failed to make a mortgage payment for January 2019 and February 2019. On February 20, 2019, the loan servicer, Caliber Home Loans ("Caliber") sent Defendant a certified letter pursuant to G.L. c. 35A, giving her 90 days to cure letter and offering a loan modification pursuant to G.L.

c. 35B. The 90-day right to cure letter allowing her until May 21, 2019 to pay the past due amount of approximately $3,800.00, plus any additional payments that became due in the meantime. On or about May 24, 2019, Defendant made a payment of approximately $7,000.00, which covered the past due payments for January 2019 and February 2019 as well as the monthly installment payments for March 2019 and April 2019. The payment did not satisfy her obligation to pay the May 2019 installment.

On June 20, 2019, Caliber sent a default notice to Defendant pursuant to paragraph 22 of the mortgage. The cure amount at that time was $3,805.91, representing past due payments for May 2019 and June 2019, and giving her until July 25, 2019 to make the missing payments. She was also offered a loan modification option, for which she was approved on a trial basis.

Defendant did not cure the default or enter into a formal loan modification. On November 22, 2019, Plaintiff recorded an Affidavit of Compliance with G.L. c. 244, § 35B and 35C in the Hampshire County Registry of Deeds (the "Registry"). Plaintiff filed a Servicemembers complaint and obtained a judgment from Land Court on December 5, 2019, which was recorded in the Registry on October 18, 2020. Plaintiff recorded another Affidavit of Compliance with G.L. c. 244, § 35B and 35C in the Registry on October 15, 2021.

Following the end of the COVID-related forbearance period, Plaintiff schedule a foreclosure auction for December 2021. The auction was postponed to February 4, 2022. Plaintiff was the highest bidder at $687,501.86. An affidavit of sale attesting to compliance with G.L. c. 244, § 14 was recorded in the Registry on April 7, 2022, along with a foreclosure deed, an affidavit of sale made by an attorney for Plaintiff that

complies with the statutory form, a Certificate of Entry, Power of Attorney, and a post-foreclosure *Eaton* and *Pinti* affidavit attesting to compliance with the statutory power of sale.

Defendant claims that the foreclosure should be set aside for two reasons: first, because the servicer made accounting errors that were never corrected, and second, because the foreclosure was fundamentally unfair. With respect to the former, she claims that the $7,000.00 payment in May 2019 cured the default. However, the Court finds her argument to be without merit. The lump-sum payment of $7,000.00 did not cure the default because, although it covered four months of missed payments from January 2019 through April 2019, it was insufficient to cover the May 2019 payment which was then outstanding. When Caliber sent the default letter in June 2019, it accounted for Defendant's $7,000.00 payment and demanded that she pay for May 2019 and June 2019. The Court, therefore, finds no credible evidence that Plaintiff's servicer made an accounting error.

With respect to Defendant's claim that the process was fundamentally unfair, she argues that she was allowed to enter a loan modification trial period in May 2020, just before the forbearance period commenced. When forbearance period ended, she claims she should then have had the same opportunity to enter the loan modification trial for which she had been previously accepted. Defendant's argument fails, however, because at the time she entered into a loan modification trial in 2020, she owed less than $4,000.00. In December 2021, following the expiration of the forbearance period, she owed approximately $60,000.00. Although she sought another loan modification at that time, the servicer was not obligated to offer a loan

modification given the changed circumstances.[1] The Court find insufficient evidence from which to draw the conclusion that Plaintiff or its servicer engaged in wrongful practices or that the foreclosure process was fundamentally unfair.

Plaintiff established its a prima facie case for possession by providing the Court with a certified copy of the foreclosure deed and an affidavit of sale made by an attorney for Plaintiff that complies with G.L. c. 183, App. Form 12. See *Federal National Mortgage Ass'n v. Hendricks*, 463 Mass. 635, 637 (2012). These documents, together with the notice to quit served upon and received by Defendant, and the summary process summons and complaint, which was timely served and filed, entitle Plaintiff to a judgment for possession of the subject premises. See *Adjartey v. Central Div. of Housing Court*, 481 Mass. 830, 834-835 (2019). Defendant offered no credible legal defense. Accordingly, based on the foregoing and in light of the governing law, the following order shall enter:

1. Judgment for possession shall enter in favor of Plaintiff.
2. After expiration of the 10-day appeal period, Plaintiff may request issuance of the execution (eviction order) by written application.

SO ORDERED.

DATE: 3·16·23

Jonathan J. Kane

Hon. Jonathan J. Kane, First Justice

[1] The terms of the loan modification agreement explicitly recite that the lender is not obligated to move forward with the loan medication.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, ss.

HOUSING COURT DEPARTMENT
WESTERN DIVISION
DOCKET NO. 22-CV-0824

VILLA NUEVA VISTA ASSOCIATION, LP,

PLAINTIFF

v.

LESLIE ORTIZ,

DEFENDANT

ORDER ON PLAINTIFF'S COMPLAINT FOR CONTEMPT

This matter came before the Court on March 13, 2023 on Plaintiff's complaint for contempt. Both parties were represented by counsel.

Based on certain undisputed facts, the Court finds sufficient facts to warrant entry of judgment for contempt; however, no judgment shall enter at this time. A judgment of contempt shall not enter unless Plaintiff establishes a substantial violation of one or more of the following terms:

1. Defendant shall not invite nor permit Johnny Rivera to be in her apartment (number 02024B) or in the common areas of the property located at 24B Bancroft Street, Springfield, Massachusetts (the "Property").
2. Neither Defendant nor her household members, guests and/or invitees shall cause or create any unreasonable disturbances or be involved in any criminal conduct in her apartment or on or near the Property.[1]

[1] Defendant shall be held responsible for the conduct of her household members and guests while on the Property in accordance with Massachusetts law.

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3. Defendant shall not permit or allow anyone other than those listed as authorized occupants/tenants pursuant to the lease to reside in her apartment, including remaining overnight on more than 4 nights per calendar year.
4. The restrictions described in Paragraph 1 of this order shall remain in effect for one year from the date this order is entered on the docket, and the restrictions described in Paragraphs 2 and 3 of this order shall remain in effect through November 30, 2023
5. If Plaintiff alleges a substantial violation of these terms, it may serve and file a motion for entry of the judgment of contempt. If no motion has been filed during the periods of time in which the restrictions described in this order are in effect, no judgment of contempt shall enter and the complaint for contempt shall be dismissed.

SO ORDERED.

DATED: 3.16.23

Jonathan J. Kane

Jonathan J. Kane, First Justice

OK

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-1670

TIMOTHY DOBEK,

Plaintiff,

v.

GABRIEL CEDRES, DARCIE LEWANDOWSKI, and GABRIEL CEDRES ARRUFATT,

Defendants.

CLARIFICATION ORDER

The following clarification order shall issue:

1. On November 28, 2022, a trial was held and afterwards the court issued an Order (dated January 10, 2023) which adjudicated all the claims between the parties. The tenants filed an Appeal of that decision on January 17, 2023.

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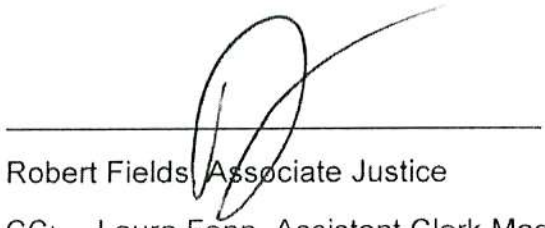
2. The court then issued a judgment for the landlord for possession and for monies owed under the Order by the tenants, as the tenants had not deposited the funds required under the terms of Order and in accordance with G.L. c.239, s.8A.
3. The Clerks Office correctly determined that the tenants' Appeal was premature, having been filed within 10 days of the Order but prior to the entry of judgment, and issued an execution upon the landlord application for same.
4. On February 23, 2023, the court heard the tenants' motion to stop the physical eviction and viewed the January 17, 2023, Appeal as timely and cancelled the physical eviction.
5. Thereafter, on March 10, 2023, the court issued a bond order after hearing and waived the bond other than monthly payment of use and occupancy to the landlord in the amount of $1,500 to being on April 1, 2023.
6. For clarification purposes, although the Appeal filed by the tenants on January 17, 2023, was technically premature (as it was filed after the court's trial decision but before the actual judgment entered) and the tenants' appeal should have been re-filed after January 24, 2023, the court is treating that Appeal as a timely appeal of the court's judgment and the parties shall comply with the court's appellate rules going forward.
7. The parties are reminded that in addition to the tenants' obligations pursuant to the bond order, the parties have obligations as Appellants and Appellee and are referred to the *Rules of Appellate Procedure* and to the Trial Court's website which can be reached through Mass.gov, particularly that site's *Housing Appeals Guide* and *Summary Process Appeals Frequently Asked Questions*.

So entered this 17th day of March, 2023.



Robert Fields, Associate Justice

CC: Laura Fenn, Assistant Clerk Magistrate

Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss: HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-4642

RILEY HUYNH, **Plaintiff,** **v.** **WOODROW HUBBARD,** **Defendant.**	ORDER

This matter came before the court for trial on March 16, 2023, at which both parties appeared without counsel. After hearing, the following order shall enter:

1. The prima facie elements of the landlord's claim for possession in this no-fault eviction are not disputed by the tenant.
2. The tenant is seeking time to relocate in accordance with G.L. c.239, s.9.
3. The tenant is disabled [redacted]. He has been and continue to search for alternate housing accommodations and asking the court for additional time. In accordance with G.L. c.239, s.9, no judgment shall enter at this time.

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4. The landlord purchased the subject premises with the tenant having resided as a tenant of the former owner for many years. The terms of that tenancy was that the tenant paid $400 per month and all utilities were included. Currently the tenant is paying for gas and electric service and avers that those bills are close to or in excess of $400 per month.
5. Going forward, if the landlord puts those utilities in his name immediately the tenant shall pay him $400 (or pro-rated) to the landlord. If the utilities remain in the tenant's name, he shall not be obligated to pay rent unless by court order.
6. The tenant shall provide the landlord with copies of the utility bills from the past six months.
7. If the landlord does not put the electrical service in his own name, he shall ensure that no electricity is used on the third floor, which the parties agree is connected to the tenant's first floor account.
8. The tenant shall also diligently search for alternate housing and keep a log of such efforts and shall provide a copy of said log to the landlord by May 8, 2023.
9. This matter shall be scheduled for review in accordance with G.L. c.239, s.9, on **May 11, 2023, at 9:00 a.m.**

So entered this 17th day of March, 2023.

Robert Fields, Associate Justice

CC: Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Franklin, ss:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
CASE NO. 22-SP-3196

COURTNEY FIFIELD,

Plaintiff,

v.

CHRIS DIONNE,

Defendant.

ORDER

After hearing on March 17, 2023, on the landlord's motion to amend the execution to include "all other occupants", at which only the landlord and his counsel appeared, the following order shall enter:

1. The landlord explained to the court that the sheriff appeared to levy on the execution for possession and was met by individuals at the premises who the landlord avers are not part of this tenancy.

2. The landlord avers that the sheriffs informed him that they will not levy on the execution without it being amended to include "all other occupants".
3. As such, the execution shall be so amended and issued, but its use shall be stayed pursuant to the terms of this order.
4. The landlord shall have a sheriff deliver a copy of this order to the premises and the landlord shall also have one posted on the front door at least three weeks before any scheduled levying on the execution.
5. Any occupant who wishes to assert their possessory rights to the premises, and possibly postpone the physical eviction, may file a motion in this matter with the Western Division Housing Court. The court also urges the same individuals to contact the landlord and/or his attorney, Carla Halpern at [redacted].
6. The Western Division Housing Court can be reached by telephone at 413-748-7838.

So entered this 20th day of March, 2023.

Robert Fields, Associate Justice

CC: Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 22-SP-3989

PALMER NBM, LLC,

Plaintiff,

v.

LARRY JACKSON,

Defendant.

ORDER

After hearing on March 16, 2023, on the landlord's motion for entry of judgment at which only the landlord appeared (through counsel), the following order shall enter:

1. A representative from Way Finders, Inc. joined the hearing and informed the court that the RAFT application pending at the time of the parties' agreement (1/6/23) was "timed out" due to the landlord's failure to provide certain information to Way Finders, Inc.

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2. As such, the landlord's motion to for entry of judgment is denied , without prejudice.
3. The tenant needs to re-apply for RAFT and include all outstanding use and occupancy. The landlord shall cooperate with this new RAFT application.
4. This matter was referred to the Tenancy Preservation Program (TPP), a representative of which was present in the courtroom during the hearing. The representative obtained the tenant's telephone number and email address from Way Finder Inc.'s records and will reach out to the tenant to assist him with the new RAFT application.
5. The tenant shall cooperate with TPP.

So entered this 20th day of March, 2023.

Robert Fields, Associate Justice

CC: Carmen Morales, TPP
Court Reporter

COMMONWEALTH OF MASSACHUSETTS

TRIAL COURT

Hampden, ss:

HOUSING COURT DEPARTMENT

WESTERN DIVISION

CASE NO. 21CV222

GINA TYK,

Plaintiff,

v.

GREGORY and MICHELLE HILL,

Defendants.

ORDER

This matter came before the court on March 6, 2023, for a hearing on damages at which the defendants (plaintiffs-in-counterclaim) and their counsel appeared but for which the plaintiff failed to appear. After hearing, the following order shall enter:

1. **Background:** The plaintiff, Gina Tyk (hereinafter "Ms. Tyk" or "tenant") was a tenant of the defendants ("The Hills" or "landlords") from February 2020 through

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March 2021. The subject rental premises were situated in the Hills' home where the tenant rented a bedroom on the third floor and had access to certain common areas on the first floor. After the tenant vacated, she filed this lawsuit against the landlord seeking damages on various claims that were ultimately dismissed by way of a default. A default was also entered against the tenant on the landlords' counterclaims and a damages hearing was scheduled for March 6, 2023. Ms. Tyk did not appear, and the hearing was held jury-waived. After consideration of all of the evidence admitted at said hearing, the following order for judgment shall enter:

2. **The Hills' Claim for Unpaid Rent, Use, and Occupancy:** The Hills met their burden of proof on their claim for unpaid rent, use and occupancy totaling **$2,950**.
3. **The Hills' Claim for Property Damage:** The Hills met their burden of proof on their claim for property damage caused by Ms. Tyk, totaling **$403.75**.
4. **The Hills' Claim of Wiretapping:** Though the Hills testified that it is their belief that Ms. Tyk was recording them and their family without their permission, there is no evidence to support a finding that Ms. Tyk ever made any such recordings. There is also no evidence that any such recordings have ever existed or were used in any way. The court credits the Hills' testimony that Ms. Tyk acted in a manner with her phone that could have appeared to be unauthorized recording and also that they found a cell phone placed at the third-floor door, but there is no evidence submitted to the court that recordings were made or used in any manner.

5. **The Hills' Claim of Serious Interference with Privacy Rights:** As this claim is based on Ms. Tyk's alleged wiretapping and the court has ruled that the Hills did not meet their burden of proof that wiretapping occurred, the court rules that the Hillls have not met their burden on this claim. To the extent that the Hills may be alleging this claim based on other behaviors and action by Ms. Tyk, the court also finds no such violation (as is greater detailed in the below section on Intentional Infliction of Emotional Distress).
6. **The Hills' Claim of Conversion (Mail and Packages):** The Hills allege that Ms. Tyk stole the Hills' mail and packages. Among the thousands of texts between Ms. Hill and Ms. Tyke there is some mention of mail and packages being removed from the outside mailbox and/or porch. Ms. Tyk states in her emails that there is no law against bringing "in packages that are addressed to residents in the same house." (December 22, 2020). Ms. Hill testified at the Damages Hearing that Ms. Tyk would often bring the packages and mail in and sometimes she would find mail had fallen behind something (perhaps furniture) and found later. It is the Hills' position that in addition to bringing mail and packages inside, Ms. Tyk also kept some mail and packages for herself but failed to provide sufficient evidence of any specific item that was alleged to have been taken by Ms. Tyk. The Hills alleged that Ms. Tyk mettled with the Hills' cable and/or internet service and speculate that she could only have done so by having taken their mail with the account information, but this is insufficient to meet the burden of proof on the Hills' claim of conversion.

7. **The Hills' Claim of Intentional Infliction of Emotional Distress:** To prevail on their claim of , the plaintiff would have to show "(1) that the actor intended to inflict emotional distress or that [she] knew or should have known that emotional distress was the likely result of [her] conduct ... ; (2) that the conduct was 'extreme and outrageous,' was 'beyond all possible bounds of decency' and was 'utterly intolerable in a civilized community'; (3) that the actions of the defendant were the cause of the plaintiff's distress ... ; and (4) that the emotional distress sustained by the plaintiff was 'severe.' " *Howell v. The Enterprise Publishing Company, LLC,* 455 Mass. 641, at 672 (2010), quoting *Agis v. Howard Johnson Co.*, 371 Mass. 140, 144-145 (1976).
8. In addition to the testimony of Mr. and Mrs. Hill, the court reviewed hundreds of test messages between Ms. Hill and Ms. Tyk. It is clear that their relationship deteriorated and became very difficult. It is also clear that Ms. Hill felt emotionally overwhelmed by having Ms. Tyk as her tenant. This increasingly tense situation was exacerbated by the fact that Ms. Tyk's tenancy inclueed access to areas of the first floor that were shared by the Hills. As such, some of Ms. Tyk's behaviors that the Hills found so troubling occurred in areas of the house that were shared by the landlords and their family members in the heart of their own home.
9. In the final analysis, however, the court does not find that the landlords met their burden of proof that the tenant's actions and omissions meet the elements of the claim for Intentional Infliction of Emotional Distress (noted above in paragraph #7).

10. Conclusion and Order: Based on the foregoing, judgment shall enter in favor of Gregory and Michelle Hill in the amount of **$3,353.75**.

So entered this 20th day of March, 2023.

Robert Fields, Associate Justice

CC: Court Reporter