

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

FAR No.

Appeals Court No. 2019-P-1222

June Thornton, Plaintiff-Appellant,

V.

Gordon Thornton, Defendant-Appellee.

On Appeal From the Land Court

**PLAINTIFF-APPELLANT'S APPLICATION FOR FURTHER
APPELLATE REVIEW**

Date: 07/21/2020

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**I. REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE
REVIEW**

Pursuant to Mass. R. App. P. 27.1, Plaintiff-Appellant, June Thornton ("Plaintiff"), respectfully requests that this Court grant further appellate review of the Appeals Court's decision issued in this case on June 18, 2020. [Addendum 15-19]. As grounds hereto, Plaintiff states that the Appeals Court misconstrued and misapplied the obsolete mortgage statute, G.L. c. 260, § 33, when it concluded that a mortgage stating that it secured payment of \$33,276.54 "on demand as provided in note of even date" did not constitute a "mortgage in which the term or maturity date of the mortgage is stated" under the statute. [Addendum 19]. In Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, 471 Mass. 248, 253-54 (2015), this Court observed that the "common meaning of the 'maturity date of the mortgage' is the date on which the underlying debt is due." *Id.* For over a hundred years, this Court has consistently held that a "demand note" is a mature obligation and "due and payable immediately without demand." *See Shawmut Bank v. Miller*, 415 Mass. 482, 484 (1993); Bielanski v. Westfield Sav. Bank, 313 Mass. 577, 580 (1943).

The Appeals Court also erred by referring to, and considering, the terms of the underlying note in reaching its decision that the mortgage had no stated maturity date. [Addendum 18-19]. In Fitchburg Capital, this Court looked solely to the terms on the face of the mortgage when interpreting the phrase "mortgage in which the term or maturity date of the mortgage is stated" under the obsolete mortgage statute. Id. As noted in the "well-reasoned" decision of the trial court in Fitchburg Capital, the "Obsolete Mortgage Statute reflects a policy of the Legislature in favor of expediting the discharge of obsolete mortgages. This intent is best carried out when term and maturity date are read as the duration set forth in the mortgage instrument. A mortgage is recorded in the registry of deeds. The note that the mortgage secures is not. Thus, the note may be satisfied, lost, or changed without notice to the public, unlike the notice to the public that the mortgage provides through its recording." Merritt v. Pensco Trust Co., 2019 Mass. LCR LEXIS 81 (Land Ct. April 30, 2019). [Addendum 24-25].

Based upon substantial reasons affecting the public interest and the interests of justice, Plaintiff

respectfully requests that this Court grant further appellate review of this matter. Indeed, the Appeals Court's decision contradicts the legislative intent of the obsolete mortgage statute.

II. STATEMENT OF PRIOR PROCEEDINGS

On November 14, 2017, Plaintiff commenced this action in Land Court seeking a declaratory judgment to determine the enforceability of a certain mortgage on properties located in North Andover, Massachusetts. On March 28, 2019, Plaintiff moved for summary judgment on two grounds. Among other things, Plaintiff argued that the mortgage was obsolete and discharged as a matter of law under G.L. c. 260, § 33. Without hearing on this issue, the Land Court denied Plaintiff's motion for summary judgment and entered summary judgment in favor of Defendant.

On July 12, 2019, Plaintiff filed her Notice of Appeal. On October 1, 2019, Plaintiff submitted her brief. On February 27, 2020, the Appeals Court scheduled oral arguments for April 6, 2020. However, on March 18, 2020, due to the COVID-19 pandemic, the Appeals Court ordered that all cases scheduled for oral argument in April 2020 were deemed submitted on the briefs on file.

Once again, Plaintiff was deprived of a hearing on whether the mortgage was unenforceable under the obsolete mortgage statute.

On June 18, 2020, the Appeals Court issued its decision affirming the judgment of the Land Court. [Addendum 15-19]. Neither party has sought a reconsideration or modification of the decision in the Appeals Court.

III. STATEMENT OF THE FACTS

The pertinent facts stated in the Appeals Court decision are accurate with one notable exception. Plaintiff disputes the Appeals Court's statement that the "mortgage had no identified term or maturity date". [Addendum 16]. The mortgage at issue in this matter stated on its face that it was payable "on demand as provided in [a] note of even date." [Addendum 16]. It is Plaintiff's position that this mortgage stated a maturity date. [Addendum 16]. Under Fitchburg Capital, the "common meaning of the 'maturity date of the mortgage' is the date on which the underlying debt is due." Id. at 253-54. This Court has long held that a "demand note" is payable immediately and "becomes due as

soon as the note is delivered." Shawmut Bank, 415 Mass. at 484; Bielanski, 313 Mass. at 580.

IV. POINTS AS TO WHICH FURTHER APPELLATE REVIEW IS SOUGHT

1) Whether the Appeals Court erred as a matter of law when it held that the mortgage, which provided that the underlying debt was due "on demand", was not a "mortgage in which the term or maturity date of the mortgage is stated," and therefore governed by the thirty-five year statute of limitations, not the five year statute of limitations, under G.L. c. 260, § 33.

2) Whether the Appeals Court erred as a matter of law by referring to, and considering, the terms of the underlying note when it held that the mortgage had no stated maturity date under G.L. c. 260, § 33, in contravention of the legislative intent of the obsolete mortgage statute.

V. REASONS FOR FURTHER APPELLATE REVIEW

The Appeals Court decision impacts both the public interest and the interests of justice. The Appeals Court erred in considering both the mortgage and the underlying note when it concluded that the mortgage had no stated term and remains enforceable for thirty-five

years from the date it was recorded. [Addendum 19]. In enacting the Amendment to the obsolete mortgage statute, the Legislature intended to expedite the discharge of obsolete mortgages. See Merritt v. Pensco Trust Co., 2019 Mass. LCR LEXIS 81 (Land Ct. April 30, 2019). [Addendum 24]. Courts have held that this Legislative intent "is best carried out when the term and maturity date are read as the duration set forth in the mortgage instrument", not the underlying note that the mortgage secures. *Id.* "By basing the discharge date on the term or maturity date included in the mortgage instrument, the Legislature has ensured that the enforcement period of a mortgage is clear from the record, allowing for more efficient discharges of obsolete mortgages." *Id.*

Courts that have construed the obsolete mortgage statute, including this Court in Fitchburg Capital, look solely to the face of the mortgage in determining whether or not a term or maturity date is stated. Fitchburg Capital, 471 Mass. at 257; Harvard 45 Associates v. Allied Properties, 80 Mass. App. Ct. 203, 207-08; Merritt v. Pensco Trust Co., 2019 Mass. LCR LEXIS 81 (Land Ct. April 30, 2019). [Addendum 24]. The reasoning behind this comports with the legislative intent and

policy considerations underlying the 2006 amendment to the obsolete mortgage statute, a "mortgage is recorded in the registry of deeds. The note that the mortgage secures is not. Thus, the note may be satisfied, lost, or changed without notice to the public, unlike the notice to the public that the mortgage provides through its recording." Merritt v. Pensco Trust Co., 2019 Mass. LCR LEXIS 81 (Land Ct. April 30, 2019). [Addendum 24-25].

In the present case, the Appeals Court considered both the language of the mortgage and the underlying note in reaching its decision, contrary to the intent of the Legislature. [Addendum 19]. Specifically, the Appeals Court stated "while the mortgage said it was payable "on demand," the note stated that it was due and payable on October 1, 1997." [Addendum 19]. Based upon the differing language between the mortgage and note as to when each was payable, the Appeals Court went on to state that "we see nothing in Fitchburg Capital that would support using the maturity date of the note as the maturity date for the mortgage." [Addendum 19]. By failing to consider just the terms stated on the face of

the mortgage, the Appeals Court improperly construed the obsolete mortgage statute.

Based upon the foregoing, the next inquiry is whether there is anything in Fitchburg Capital that would support a finding that the mortgage at issue here, which stated on its face that it was payable "on demand as provided in [a] note of even date," stated a "maturity date" under the obsolete mortgage statute. Under Fitchburg Capital, this Court noted that "when interpreting the phrase, 'mortgage in which the term or maturity date of the mortgage is stated,' that triggers the five-year statute of limitations,. . . , 'maturity date' means the date when a debt falls due, such as a debt on a promissory note." *Id.* at 253. This Court went on to find that "the common meaning of the 'maturity date of the mortgage' is the date on which the underlying debt is due because a mortgage derives its vitality from the debt it secures." *Id.* at 253-54.

This Court has long held that a "demand note" is payable immediately and "becomes due as soon as the note is delivered." Shawmut Bank, 415 Mass. at 484; Bielanski, 313 Mass. at 580. In Bielanski, this Court stated that "an indebtedness evidenced by a demand note

becomes due as soon as the note is delivered. An action for collection may be maintained without any previous demand. Id. Similarly, in Shawmut Bank, this Court noted that the "label 'demand note' can be somewhat misleading, because it is the general rule that a note unconditionally on demand is payable immediately without demand." Id.; See also Spencer Cos. v. Chase Manhattan Bank, 81 B.R. 194, 198 (D. Mass. 1987) ("demand notes are considered due and payable immediately upon their execution with or without a prior demand").

Accordingly, under Fitchburg Capital, the instant mortgage, which provides on its face that it is payable "on demand as provided in [a] note of even date", states a "maturity date of the mortgage" under the obsolete mortgage statute. In its decision, the Appeals Court dismissed Plaintiff's reliance upon Bielanski and Shawmut Bank because it construed the terms of the underlying note instead of the face of the mortgage alone. [Addendum 19].

VI. CONCLUSION

Justice and the public interest mandate further appellate review. In enacting the Amendment to the obsolete mortgage statute, the Legislature sought to

expedite the discharge of obsolete mortgages. By basing the enforcement period on the term or maturity stated on the face on the mortgage instrument, the Legislature created a greater level of certainty and consistency for members of the public. The legislative purpose and intent of the obsolete mortgage statute was negated by the Appeals Court. Furthermore, the Appeals Court erred when it held that the mortgage did not state a maturity date. Accordingly, this case presents substantial reasons affecting the public interest and the interests of justice that warrant further appellate review.

Respectfully submitted,

Plaintiff-Appellant,

By her attorney,

/s/ Mark J. Sampson

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19-P-1222

Appeals Court

JUNE THORNTON vs. GORDON THORNTON.

No. 19-P-1222.

Suffolk. April 6, 2020. - June 18, 2020.

Present: Wolohojian, Maldonado, & Ditzkoff, JJ.

Mortgage, Real estate, Discharge. Real Property, Mortgage.

Civil action commenced in the Land Court Department on November 14, 2017.

The case was heard by Jennifer S.D. Roberts, J., on a motion for summary judgment.

Mark J. Sampson, for the plaintiff, submitted a brief.

WOLOHOJIAN, J. The plaintiff filed this action seeking a declaration that a mortgage recorded on February 19, 2003 is no longer enforceable under the obsolete mortgage statute. More specifically, the issue is whether the mortgage, which states that it is payable "on demand," is one with a stated term or maturity date (in which case the mortgage would be deemed discharged five years after the stated term or maturity date) or whether it is one in which no term is stated (in which case the

mortgage would not be deemed discharged until thirty-five years from the recording of the mortgage). See G. L. c. 260, § 33. Like the Land Court judge, we conclude that the mortgage, which stated only that it was payable on demand and made no reference to the maturity date of the underlying note, had no stated term. The mortgage accordingly remains enforceable for thirty-five years from the recording date (i.e., until February 19, 2038), and judgment was properly entered in the defendant's favor.

The pertinent facts are undisputed and may be stated briefly. On March 27, 1997, the plaintiff and her then-husband signed a note in which they agreed to pay the defendant (the plaintiff's brother-in-law) the original principal sum of \$33,276.54. The note was due and payable approximately six months later, on October 1, 1997, with no interest. Also on March 27, 1997, the plaintiff and her then-husband granted a mortgage¹ to the defendant to secure payment on the note. The mortgage had no identified term or maturity date, but instead stated that it was payable "on demand as provided in [a] note of even date." The mortgage was recorded on February 19, 2003.

The plaintiff filed the underlying declaratory judgment action in the Land Court in November 2017, seeking to have the

¹ The mortgage was on two properties located in North Andover. The plaintiff's former husband conveyed his interests in the properties to her in March 2000.

mortgage declared unenforceable. The defendant answered and asserted counterclaims for unjust enrichment and bad faith.² Thereafter, the plaintiff moved for summary judgment on two grounds. First, she argued that the mortgage was unenforceable because the statute of limitations for enforcing the underlying note had expired.³ This argument is not pressed on appeal for good reason. "The [Supreme Judicial Court] has repeatedly held over the last 180 years that, at both law and equity, the inability to recover directly on a note due to the expiration of a statute of limitations is no bar to recovery under a mortgage, so long as the underlying debt remains unpaid." In re Fortin, 598 B.R. 689, 692 (Bankr. D. Mass. 2019). See Nims v. The Bank of N.Y. Mellon, 97 Mass. App. Ct. 123, 129 (2020) ("A mortgage continues to be enforceable in a proceeding in rem against the security, separate from an action in personam against the debtor

² The counterclaims are not before us. The unjust enrichment counterclaim was dismissed as moot given the judge's disposition on the summary judgment motion, and the counterclaim for bad faith was dismissed pursuant to Mass. R. Civ. P. 12 (b) (6), 365 Mass. 754 (1974).

³ The plaintiff argued that the twenty-year statute of limitations, G. L. c. 260, § 1, applied to an action on the note. However, as the Land Court judge pointed out, if the note was a negotiable instrument, the six-year limitations period of G. L. c. 106, § 3-118 (a), would apply. For our purposes here, it does not matter which limitations period applied because, either way, the enforceability of the mortgage does not depend on whether the limitations period for a claim on the note has expired.

on the note"). Second, the plaintiff argued that the mortgage was unenforceable under the obsolete mortgage statute. The second argument is the sole issue before us now.

"The obsolete mortgage statute sets time periods after which a 'mortgage shall be considered discharged for all purposes without the necessity of further action by the owner of the equity of redemption or any other persons having an interest in the mortgaged property.' G. L. c. 260, § 33. In other words, the statute acts as a self-executing mechanism by which to quiet title with respect to old mortgages. In its current form, the statutory period is '[thirty-five] years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, [five] years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgement or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period.' Id." Nims, 97 Mass. App. Ct. at 126. "The 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." Id.

The mortgage here had no stated term; instead it was payable "on demand." Unlike the mortgages in Deutsche Bank

Nat'l Trust Co. v. Fitchburg Capital, LLC, 471 Mass. 248, 257-258 (2015) (upon which the plaintiff relies), and Nims, 97 Mass. App. Ct. at 124, the mortgage here did not refer to the maturity date of the underlying note. Moreover, while the mortgage said it was payable "on demand," the note stated that it was "due and payable on October 1, 1997."⁴ In the absence of any reference in the mortgage to the maturity date of the note, and the differing language between the mortgage and note as to when each was payable, we see nothing in Fitchburg Capital, LLC that would support using the maturity date of the note as the maturity date for the mortgage.

Given that there is no maturity date stated in the mortgage, nor any language making reference to the maturity date of the note, the mortgage has no stated term and remains enforceable for thirty-five years from the date it was recorded. See G. L. c. 260, § 33.

Judgment affirmed.

⁴ Given the fixed repayment date in the note, the plaintiff is incorrect in characterizing it as a "demand note." See G. L. c. 106, § 3-108 (a) ("A promise or order is 'payable on demand' if it [i] states that it is payable on demand or at sight, or otherwise indicates that it is payable at the will of the holder, or [ii] does not state any time of payment"). By contrast, a note such as this one that has a fixed date for payment is one "payable at a definite time." G. L. c. 106, § 3-108 (b). For this reason, the plaintiff's reliance on Shawmut Bank, N.A. v. Miller, 415 Mass. 482, 484 (1993), and Bielanski v. Westfield Sav. Bank, 313 Mass. 577, 580 (1943), is misplaced.

Section 33. Obsolete mortgages

[Text of section effective until October 1, 2006. For text effective October 1, 2006, see below.]

Section 33. No power of sale in any mortgage of real estate shall be exercised and no entry shall be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of a period which shall be fifty years from the recording of the mortgage in case of mortgages recorded on or after January first, nineteen hundred and thirteen, and which shall be from the recording of the mortgage until January first, nineteen hundred and sixty three, in case of mortgages recorded before January first, nineteen hundred and thirteen, unless in either case an extension of the mortgage, or an acknowledgment or affidavit that the mortgage is not satisfied, is recorded within the last ten years of such period. In case an extension of the mortgage or such an acknowledgment or affidavit is so recorded, the period shall continue until ten years shall have elapsed during which there is not recorded any further extension of the mortgage or acknowledgment or affidavit that the mortgage is not satisfied. The period shall not be extended by reason of a longer duration of the debt or obligation secured being stated in the mortgage or in any extension of the mortgage, or otherwise, or by non residence or disability of any person interested in the mortgage or the real estate, or by any partial payment, agreement, extension, acknowledgment, affidavit or other action not meeting the requirements of this section and sections thirty four and thirty five.

[Text of section as amended by 2006, 63, Sec. 6 effective October 1, 2006 applicable as provided by 2006, 63, Sec. 8. See 2006, 63, Sec. 9. For text effective until October 1, 2006, see above.]

Section 33. A power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of, in the case of a mortgage in which no term of the mortgage is stated, 35 years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgment or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period. In case an extension of the mortgage or the acknowledgment or affidavit is so recorded, the period shall continue until 5 years shall have elapsed during which there is not recorded any further extension of the mortgage or acknowledgment or affidavit that the mortgage is not satisfied. The period shall not be extended by reason of non residence or disability of any person interested in the mortgage or the real estate, or by any partial payment, agreement, extension, acknowledgment, affidavit or other action not meeting the requirements of this section and sections 34 and 35. Upon the expiration of the period provided herein, the mortgage shall be considered discharged for all purposes without the necessity of further action by the owner of the equity of redemption or any other persons having an interest in the mortgaged property and, in the case of registered land, upon the payment of the fee for the recording of a discharge, the mortgage shall be marked as discharged on the relevant memorandum of encumbrances in the same manner as for any other mortgage duly discharged.

KAREN MERRITT and JAMES CRONAN
v.
PENSCO TRUST COMPANY Custodian FBO JAMES P. TIERNAN
IRA and
PENSCO TRUST COMPANY Custodian FBO RICHARD J. FAGAN
IRA.

**Commonwealth of Massachusetts Trial Court Land Court
Department**

MISC 18-000521

April 30, 2019

Bristol, ss.

LONG, J.

MEMORANDUM AND ORDER ALLOWING DEFENDANTS' CROSS-
MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT.

Introduction

At issue in this case is the current validity of two private mortgages, one encumbering plaintiff Karen Merritt's former residence at 91 Oak Street in Norton [Note 1] and the other the property at 7 Brayton Woods Drive in Rehoboth which Ms. Merritt rents to tenants. Ms. Merritt is the record owner and mortgagor of both, and she and plaintiff James Cronan (to whom she was then-married) co-signed the underlying promissory notes. The mortgages are held by defendants Pensco Trust Company as Custodian FBO [for the benefit of] the James P. Tiernan IRA (Mr. Tiernan's retirement fund) and Pensco Trust Company as Custodian FBO the Richard J. Fagan IRA (Mr. Fagan's retirement fund), and were granted to secure a \$311,500 loan from the defendants to the plaintiffs, the proceeds of which were used by the plaintiffs to pay off their previous mortgages on these properties, long in default, which were only one week away from foreclosure auction.

Both the notes and the mortgages are dated September 17, 2010, which is when the loan was made. The mortgages were recorded at the Bristol (North) Registry of Deeds on September 23, 2010. The notes were not recorded.

The notes have a one year term for repayment measured from the date the note was executed and, if full payment had not been made by that time, provision for an additional charge and a final due date of March 31, 2012.

The mortgages themselves have no term or maturity date on their face. Instead, they simply state that they secure the payment of the notes (without reciting any of notes' provisions or details), and also "the performance of all agreements herein contained [in the mortgage]" (none of which recite a term or maturity date).

The plaintiffs have never paid anything on the notes ? principal, interest, or charges of any kind. Their due date has long-since passed [Note 2] and, by now, so has the statute of limitations for the plaintiffs' personal liability for that indebtedness. [Note 3] Through this lawsuit, the plaintiffs now seek to avoid foreclosure of the mortgages, contending they are no longer valid. [Note 4]

Two arguments are made in support of that contention. The first is based on the obsolete mortgage statute, G.L. c. 260, § 33, and the second on an assertion that the expiration of the statute of limitations on the notes also makes the mortgages unenforceable. For the reasons set forth below, I disagree with both of these arguments, and rule that the mortgages are still valid and enforceable. The plaintiffs' motion for summary judgment is thus DENIED and the defendants' cross-motion is ALLOWED.

Facts

The following facts are either undisputed or taken in the light most favorable to the plaintiffs ? the parties against whom summary judgment is being entered.

On September 17, 2010, in return for a loan of \$311,500, Ms. Merritt and her now ex-husband Mr. Cronan executed two promissory notes, one to the Tiernan IRA in the principal amount of \$146,500, and the other to the Fagan IRA in the principal amount of \$165,000. As previously noted, both promissory notes stated a one-year term and, if full payment had not been made by that date, provided for an additional charge and a final due date of March 31, 2012.

Simultaneously, also on September 17, 2010, to secure the payment of the promissory notes "and also to secure the performance of all agreements herein contained [in the mortgage deeds themselves]," Ms. Merritt granted two mortgages to the defendants, one on 91 Oak Street in Norton (which she owned individually, and where she and Mr. Cronan resided at the time) and the other on 7 Brayton Woods Drive in Rehoboth (a rental property which she also owned individually). Both mortgages were recorded on September 23, 2010. Neither facially states a date of maturity or amount owed, instead merely referencing the notes (which were not recorded) without giving any of their details. Neither mortgage was executed under seal. No payments

have been made on the notes, ever, and they have long been in default. Ms. Merritt also long since ceased paying property taxes, at least on the Rehoboth property, and it was saved from tax lien foreclosure only because the defendants paid them ? at this point, over \$94,225.62 ? to protect their mortgage interests which would otherwise be wiped out. See G.L. c. 60, § 64.

Ms. Merritt filed for Chapter 13 bankruptcy (reorganization) on May 16, 2018. In re Karen R. Merritt, Bankr. D. Mass., Case No. 18-11840. In response, on July 15, 2018, the defendants filed a motion for relief from the automatic stay applicable to Ms. Merritt and whatever co-debtor stay applied to Mr. Cronan so that they could proceed with foreclosure of their mortgages, and the bankruptcy court scheduled the motion for hearing on August 7, 2018. The day before that hearing, August 6, 2018, Ms. Merritt filed a motion to dismiss her bankruptcy petition. The court scheduled Ms. Merritt's motion for hearing on August 7, 2018, to occur immediately after the hearing of the defendants' motion for relief from stay.

By written Order dated August 8, 2018, the bankruptcy court allowed the defendants' motion for relief from stay, ruling that the defendants could "proceed to foreclose or accept a deed in lieu of foreclosure" despite the pendency of the bankruptcy action. [Note 5] Immediately thereafter, the court allowed Ms. Merritt's motion to dismiss her bankruptcy petition.

Further relevant facts are set forth in the Analysis section below.

Analysis

The Summary Judgment Standard

The case is before me on cross-motions for summary judgment. Summary judgment, governed by Mass. R. Civ. P. 56, is appropriately granted when "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Lev v. Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234 , 307 (2010) (internal quotation and citations omitted). [Note 6] The twin burden of proving both the absence of a genuinely contested issue of material fact and entitlement to judgment as a matter of law is on the party seeking summary judgment. *Pederson v. Time, Inc.*, 404 Mass. 14 , 16-17 (1989). This burden may also be met by demonstrating that the opposing party has no reasonable expectation of proving an essential element of its case at trial. See *Flesner v. Technical Commc'n Corp.*, 410 Mass. 805 , 809 (1991); *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706 , 714 (1991).

Summary judgment may be granted to either party so long as the standard has been met. See Mass. R. Civ. P. 56(c). Here, the defendants have met the summary judgment standard and are entitled to the declaration they seek.

The Mortgages Are Currently Valid Under the Obsolete Mortgage Statute

The plaintiffs' initial argument, addressed by the court in its January 16, 2019 Docket Entry and subsequently withdrawn by the plaintiffs, was that the obsolete mortgage statute, G.L. c. 260, § 33, bars the current enforcement of the mortgages. For the reasons set forth in the Docket Entry and repeated here for the sake of completeness, I disagree.

Based on my reading of (1) the language of G.L. 260, § 33, (2) the trial court's Order in *Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital LLC*, 21 LCR 559 (Oct. 11, 2013), *aff'd* *Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital LLC*, 471 Mass. 248 (2015) (which found that Order "well-reasoned"), and (3) the Supreme Judicial Court's opinion in *Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital LLC*, 471 Mass. 248 (2015), I find and rule that the obsolete mortgage statute is not a bar to enforcement of these mortgages. That statute provides that a mortgage in which the term or maturity date is stated become unenforceable five years after expiration of the term, and a mortgage in which the term or maturity date is not stated becomes unenforceable thirty-five years after recording.

As the *Deutsche Bank* case holds, for the five year period to apply, it is sufficient if the mortgage document states the maturity date of the note. But, as was the case in *Deutsche Bank*, that maturity date must be stated on the face of the mortgage. If it is not so stated, the applicable period is thirty-five years after recording of the mortgage.

The legislative reasoning behind this bright-line rule was well explained in the trial court's Order:

The Obsolete Mortgage Statute reflects a policy of the Legislature in favor of expediting the discharge of obsolete mortgages. This intent is best carried out when *term* and *maturity date* are read as the duration set forth in the mortgage instrument. A mortgage is recorded in the registry of deeds. The note that the mortgage secures is not. Thus, the note may be satisfied, lost, or changed without notice to the public, unlike the notice to the public that the mortgage provides through its recording. [citation omitted]. By basing the discharge date on the term or maturity date included in the mortgage instrument, the Legislature has ensured that the enforcement period of a mortgage is clear from the record, allowing for more efficient discharge of obsolete mortgages. Further, basing the enforcement period on the term or maturity date as set forth in the mortgage instrument has created a greater

level of certainty and consistency for members of the public. Given that mortgages can be and often are separated from the note, [citation omitted], the public cannot reasonably rely on the holder of the note to disclose the terms of the note to the public or remember to discharge the mortgage upon performance of the note. Using the term or maturity date set forth in the mortgage instrument ensures that the enforcement period is clear from the record, affording the discharge process greater efficiency. The plain and ordinary meanings of *term* and *maturity date* are therefore in keeping with the broad policy considerations and objectives underlying the 2006 amendment.

Deutsche Bank, 21 LCR at 562-563 (emphasis in original). Here, no term or maturity date was stated on the face of the mortgage instrument, only a general reference to "the payment of that certain Promissory Note of even date" without stating the term or maturity date of the note. Thus, as discussed more fully below, the thirty-five year period applies, and that period had not yet run.

The Passing of the Statute of Limitations on the Underlying Notes Does Not Invalidate the Mortgages or Make Them Currently Unenforceable

Under G.L. c. 106, § 3-118(a), an action on a promissory note must be brought "within six years after the due date or dates stated in the note." That limitations period ? six years from the notes' March 31, 2012 outside due date ? ended on March 31, 2018. Accordingly, neither Ms. Merritt nor Mr. Cronan currently has any personal liability for any part of the loan they received from the defendants.

The question thus presented is whether the passing of the statute of limitations on the notes also makes the mortgages that were granted to secure them unenforceable. I find and rule that it does not.

In Massachusetts, a mortgage is a transfer of title. *Faneuil Investors Group Ltd. P'ship v. Board of Selectmen of Dennis*, 458 Mass. 1, 6 (2010); see also *U.S. Bank N.A. v. Ibanez*, 458 Mass. 637, 649 (2011). When a property is mortgaged and thus conveyed to the mortgagee, "legal 'title' to the mortgaged real estate remains in the mortgagee until the mortgage is satisfied or foreclosed." *Faneuil Investors*, 458 Mass. at 6 (emphasis added). The mortgagor ? here, Ms. Merritt ? is able to "defease" that title only "upon the payment of money or the performance of some other condition." *Id.* at 6 (internal citations and quotations omitted). Put simply, the mortgage provides an independent remedy for collection of the debt, separate and apart from the remedy of collection on the notes.

"[T]he nature of a mortgage [is] tied to the life of its underlying obligations," to be sure. See *Deutsche Bank*, 471 Mass. at 258. But this is so only in the sense that there needs to be a valid debt to start with, [Note 7] that the debt has not been satisfied by "payment of money or the performance of some other condition," [Note 8] and that the statute of limitations on the mortgage which secures that debt has not run. [Note 9] A statute of limitations on a remedy ends the ability to use that remedy but, unless it is a statute of repose, it does not terminate the underlying obligation, which remains enforceable if another remedy exists. See, e.g., *Lewis v Crowell*, 205 Mass. 497 , 500 (1910) ("A statute of limitations does not take away any substantive rights secured by the contract, but only affects the remedy."). Here, the remedy of enforcement of the note has expired, but if the limitations period has not run on the mortgage, foreclosure of the mortgage (an in rem proceeding) remains a valid and enforceable remedy to collect the underlying debt.

The recent case of *Fortin v. Fed. Nat'l Mortgage Ass'n, Nationstar Mortgage, LLC*, Bankr. D. Mass., 2019 WL 1087871 (Mar. 5, 2019) holds squarely that the remedy of foreclosure on the mortgage remains even after the statute of limitations has run on personal liability for the underlying debt. As *Fortin* notes:

The SJC has repeatedly held over the last 180 years that, at both law and equity, the inability to recover directly on a note due to the expiration of a statute of limitations is no bar to recovery under a mortgage, so long as the underlying debt remains unpaid. See *Pearson v. Mulloney*, 289 Mass. 508 , 515, 194 N.E. 458 (1935) ("A valid mortgage may exist although personal liability on the mortgage note never attached or has been barred by bankruptcy or the statute of limitations.") (citations omitted); *Jeffrey v. Rosenfeld*, 179 Mass. 506 , 509, 61 N.E. 49 (1901) ("At law and in equity the holder can enforce his remedy upon the mortgage independently of or concurrently with that on the note and, in some cases, at least, where he has lost his remedy upon the note."); *Thayer v. Mann*, 36 Mass. 535 , 538 (1837) ("The creditor has a double remedy, one upon his deed, to recover the land, another upon the note, to recover a judgment and execution for the debt, and it does not follow that he cannot recover on one, although there may be some technical objection or difficulty to his recovery upon the other."). These pronouncements from the SJC are unambiguous ? the mere inability to collect on a note due to the expiration of a statute of limitations does not affect the enforceability of a mortgage so long as the debt remains unpaid. The Court cannot discern (nor has the Debtor cited) any subsequent ruling from the SJC indicating an abandonment of this straightforward principle.

2019 WL 1087871 at *2

I agree with the reasoning and holding of Fortin. That Deutsche Bank did not change this "straightforward principle" is clear not only from Deutsche Bank itself ? holding that the statute of limitations applicable to mortgages is the one set forth in the obsolete mortgage statute, Deutsche Bank, 471 Mass. at 257 ("The obsolete mortgage statute created a limitations period for bringing foreclosure actions against mortgages") ? but also from the Supreme Judicial Court's decision in Christakis v. Jeanne D'Arc Credit Union, 471 Mass. 365 (2015), handed down just a few weeks after Deutsche Bank, which reaffirmed the ability to foreclose on a mortgage even after there was no longer any personal liability on the debt, in that case due to its discharge in bankruptcy.

JPMorgan Chase & Co., Inc. v. Casarano, 81 Mass. App. Ct. 353 (2012), on which the plaintiffs also rely, does not hold otherwise. It neither addresses nor holds anything regarding the foreclosure of a mortgage after the statute of limitations on the note has expired but the statute of limitations on the mortgage has not. Instead, it addresses a far different point ? the plaintiff's failure to prove the terms of the note to show that it was in default and the amount, if anything, that was owed. As the Casarano court noted, "[u]nder Massachusetts law, a mortgage is a conveyance made for the purpose of securing performance of a debt or obligation." Id. at 355 (internal citations and emphasis omitted). In Casarano, the mortgage was unenforceable not because the statute of limitations on the note had run, but because the underlying promissory note was lost and "there was no evidence of any terms that would reveal *whether the debt was in default*." Id. at 356 (emphasis added). The evidence was thus "insufficient as a matter of law to demonstrate the existence, much less the amount, of a current debt." Id. Here, it is undisputed that the defendants hold the notes, and that their terms are stated on their face. The amount owed is easily calculated from those terms. It is undisputed that nothing has ever been paid on the notes. And it is undisputed that they have long been in default.

The question then becomes whether the statute of limitations on the mortgage has passed, and here it has not. The plaintiffs claim that the applicable limitations statute is G.L. c. 260, § 2, the general provision for contracts. I disagree. "[W]here statutes deal with the same subject, the more specific statute controls the more general one, so long as the Legislature did not draft the more general statute to provide comprehensive coverage of the subject area." Wing v. Comm'r of Probation, 473 Mass. 368 , 373-374 (2015). Here, G.L. c. 260, §33, the obsolete mortgage statute, sets out a specific limitation for the foreclosure of mortgages that do not have a term or maturity date stated on their face ? thirty-five years from the recording of the mortgage [Note 10] ? and that is the applicable period. See Deutsche Bank, 471 Mass. at 257 ("[t]he obsolete mortgage statute created a

limitations period for bringing foreclosure actions against mortgages"). [Note 11] These mortgages were both recorded on September 23, 2010. Thirty-five years from that date is September 22, 2045. That date has not yet passed. The mortgages are thus currently valid and enforceable.

Conclusion

For the foregoing reasons, the plaintiffs' motion to summary judgment is DENIED and the defendants' cross-motion is ALLOWED. It is ORDERED, ADJUDGED and DECREED that the defendants' mortgages are not invalidated or rendered unenforceable by the expiration of the statute of limitations on the underlying promissory notes, and that the statute of limitations on the mortgages is thirty-five years from the date the mortgages were recorded.

Judgment shall enter accordingly.

SO ORDERED.

FOOTNOTES

[Note 1] Ms. Merritt has since moved to Mexico. Her now ex-husband, plaintiff James Cronan, continues to live in the Norton house.

[Note 2] As previously noted, the outside due date was March 31, 2012.

[Note 3] The applicable statute of limitations for the notes is six years, G.L. c. 106, § 3-118(a), which passed at the latest on March 30, 2018 (six years from March 31, 2012).

[Note 4] All of the plaintiffs' other claims were beyond the subject matter jurisdiction of the court. See Docket Entry (Jan. 16, 2019).

[Note 5] A mortgage remains valid, and may be foreclosed upon even if the underlying debt is discharged in bankruptcy. *Christakis v. Jeanne D'Arc Credit Union*, 471 Mass. 365 (2015).

[Note 6] Material facts are those which "might affect the outcome of the suit under the governing law. . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); see also *Hogan v. Riemer*, 35 Mass. App. Ct. 360 , 364 (1993). Those that don't are not material.

[Note 7] See, e.g., *Perry v. Miller*, 330 Mass. 261 , 263 (1953) ("If there is no consideration for the promise, there is no enforceable contract and the mortgage security is not available to the mortgagee").

[Note 8] Faneuil Investors, 458 Mass. at 6.

[Note 9] See discussion below.

[Note 10] More specifically, it provides:

A power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of, in the case of a mortgage in which no term of the mortgage is stated, 35 years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date.

[Note 11] To the extent Casarano might seemingly suggest otherwise (its passing reference to the six-year and twenty-year statutes of limitation for actions in contract, see 81 Mass. App. Ct. at 355 & n. 8), it actually does not. That part of the opinion is dicta (as previously noted, the case turned on whether or not a provable underlying obligation, currently in default, existed). It does not appear that anyone brought the obsolete mortgage statute to the attention of the court. And, of course, the Casarano court did not have the benefit of the Supreme Judicial Court's opinion in Deutsche Bank which was decided three years after Casarano. In any event, Casarano cannot overrule the clear statement in Deutsche Bank that the applicable limitations provisions for mortgages ? and certainly for mortgages with no stated term or maturity date ? are those specifically set forth in the obsolete mortgage statute.

CERTIFICATE OF COMPLIANCE

**Pursuant to Rule 16(k) of the
Massachusetts Rules of Appellate Procedure**

I, Mark J. Sampson, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a) (13) (addendum);
Mass. R. A. P. 16 (e) (references to the record);
Mass. R. A. P. 18 (appendix to the briefs);
Mass. R. A. P. 20 (form and length of briefs,
appendices, and other documents); and
Mass. R. A. P. 21 (redaction).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12, 10 characters per inch, and contains 10, total non-excluded pages.

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CERTIFICATE OF SERVICE

Pursuant to Mass.R.A.P. 13(d), I hereby certify, under the penalties of perjury, that on July 21, 2020, I have made service of this Application for Further Appellate Review upon the attorney of record for each party, or if the party has no attorney then I made service directly to the self-represented party, by the Electronic Filing System on:

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