

COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

SJC NO. _____
APPEALS COURT CIVIL No. 2019-P-0742
HOUSING COURT No. 17H83SP03015TA

MTGLQ INVESTORS, L.P.
Plaintiff/Appellee

v.

JACQUINE VIBERT, et al
Defendant/Appellant

ON APPEAL FROM THE JUDGMENT OF THE HOUSING COURT
DEPARTMENT, SOUTHEAST DIVISION

DEFENDANT-APPELLANT JACQUINE VIBERT'S APPLICATION FOR
DIRECT APPELLATE REVIEW

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Dated: June 10, 2019

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COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

BARNSTABLE, SS

Appeals Court NO. 2019-P-0742
S.J.C. NO. DAR _____

MTGLQ Investors, L.P.
Plaintiff-Appellee

v.

Jacquine Vibert
Defendant-Appellant

APPELLANT JACQUINE VIBERT'S APPLICATION
FOR DIRECT APPELLATE REVIEW
BY THE SUPREME JUDICIAL COURT

I. REQUEST FOR LEAVE

Defendant-appellant Jacquine Vibert hereby requests that the Supreme Judicial Court ("Court") accept this appeal for direct appellate review. The resolution of this case will determine (a) whether the "strict compliance" standard of the *Pinti v. Emigrant Mortgage Company, Inc.* decision, 472 Mass. 226, 236 (2015), is to be applied only prospectively even when the buyer is the same party that gave defective notice of default, or whether *U.S. Bank, Nat'l Ass'n v. Milan*, 92 Mass. App. Ct. 511, 516 (2017), rev. den. 478 Mass. 1110 (2018) should be overruled; (b) whether *Pinti* is to be applied only prospectively even where

the sale itself took place more than a year after the *Pinti* decision was issued; and (c) provide clarity regarding the standard of compliance with the power of sale in a mortgage where *Pinti's* strict compliance standard is not applicable.

These are questions of first impression in the Court, and are questions of public interest. Because justice requires a final determination by this Court, Jacquine Vibert requests that this Court directly review this appeal.

II. STATEMENT OF PRIOR PROCEEDINGS

MTGLQ Investors, L.P., ("MTGLQ") entered a Summary Process Summons and Complaint in the Housing Court, Southeastern Division, on July 12, 2017. Vibert filed her *pro se* Answer and Counterclaims on August 1, 2017.

MTGLQ moved for Summary Judgment on November 1, 2017, and Vibert, through counsel, filed her Opposition and Cross-Motion for Summary Judgment. In said Opposition and Cross-Motion, Vibert argued the MTGLQ's Motion for Summary Judgment should be denied as there existed genuine issues of material fact regarding MTGLQ's status of mortgagee at the time of

the foreclosure, and further that summary judgment should be granted in favor of Vibert because the foreclosure was void due to failure of the foreclosing entity to send a notice compliant with paragraph 22 of the mortgage.

The case was argued before Chief Justice Timothy Sullivan on March 6, 2018, and after hearing, on April 12, 2018, Justice Sullivan ruled in favor of MTGLQ.

After the Court's ruling, Vibert filed a Notice of Appeal and Motion to Waive Appeal Bond, which the Court denied in part. Vibert sought review by the Single Justice of the Appeals Court and obtained a favorable ruling (*MTGLQ Investors, L.P. vs. Jacqueline Vibert*, 2018-J-0501, Appeals Court (2018)) and has since proceeded with this appeal, which was docketed on May 20, 2019.

III. STATEMENT OF FACTS

MTGLQ is currently the record owner of 55 1/2 Liberty Street in Taunton, Massachusetts, claiming to have obtained title by virtue of a foreclosure auction conducted on March 21, 2017, with the foreclosure deed executed on May 26, 2017. MTGLQ does not claim to be a third-party purchaser, but rather that it was the

former mortgagee by way of a series of assignments, which included so-called "confirmatory" and "corrective" assignments.

Vibert disputes the validity of the foreclosure on the grounds that the foreclosure was not conducted strictly or even substantially in accordance with the power of sale contained in the mortgage, or in the alternative, that because of flaws in the chain of title, MTGLQ was not the true mortgagee and therefore had no authority to foreclose.

Jacquine Vibert purchased the property in 2001, and later refinanced on March 27, 2007, granting a mortgage to Mortgage Electronic Registration Services ("MERS") as nominee for the lender. Paragraph 22 of this mortgage included provisions requiring the mortgagee to inform the borrower of his or her "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."

On or around January 23, 2014, Vibert received a notice from Green Tree, which was servicing the loan at the time on behalf of the mortgagee. The notice stated in part:

Please review your mortgage or deed of trust for any right you may have to reinstate your account after acceleration but prior to the earlier of (a) five days before the sale of the property under any power of sale in the Security Instrument or (b) entry of a judgment enforcing the Security Instrument, by paying the Creditor all sums then due as if not acceleration had occurred. . . **You may also have the right to assert in the foreclosure proceeding the non-existence of a default or any other defense available to you.**

Emphasis added. This is a classic example of a notice that does **not** comply strictly with Paragraph 22. See *Aurora Loan Servs., LLC v. Murphy*, 88 Mass. App. Ct. 726 (2015) (holding invalid notice that homeowner could “assert the nonexistence of a default or any other defense to acceleration of the loan in a foreclosure proceeding.”) Although this notice was sent prior to this Court’s *Pinti* decision on July 17, 2015, MTGLQ Investors, L.P. relied on it when it purported to foreclose almost two years later, on March 21, 2017.

IV. ISSUES OF LAW RAISED ON APPEAL

Ms. Vibert presents to this Court three issues. First, whether the prospective nature of this Court’s ruling in *Pinti v. Emigrant Bank* applies when there is no innocent third-party purchaser and the relevant notice was sent by the foreclosing entity itself.

Second, whether *Pinti* prospectivity applies where the foreclosure auction itself took place more than a year after the *Pinti* decision was issued. Third, even if the *Pinti* standard of "strict compliance" does not apply, whether such notices must at least meet a standard of "substantial compliance" and whether the notice in this instance met that standard. Ms. Vibert preserved these issues for appeal in her Opposition and Cross-Motion for Summary Judgment, and at oral argument for same.

V. ARGUMENT

A. The "strict compliance" standard apply here because there is no third-party buyer.

In 2015, this Court held in *Pinti* that foreclosing mortgagees must strictly comply with the default notice provisions of the mortgage in order to have a valid foreclosure. 472 Mass. at 236. However, it also held that this standard should apply prospectively because of concerns about the potential impact on innocent third-party buyers, i.e. "because the failure of a mortgagee to provide the mortgagor with the notice of default required by the mortgage is not a matter of record and, therefore, where there is a foreclosure sale in a title chain, ascertaining

whether clear record title exists may not be possible." 472 Mass. at 243. Roughly two years later, the SJC issued a new decision about the applicability of *Pinti* (*F.N.M.A v. Marroquin*, 477 Mass. 82 (2017)), which was explicit that the basis for *Pinti* prospectivity was purely to protect third-party purchasers:

Our concern [in *Pinti*] was that a third party who purchases property that had once been sold at a foreclosure auction would not, through a title search, be able to determine whether the notice of default strictly complied with the terms of the mortgage. It would therefore be nearly impossible to eliminate the risk that the foreclosure sale would later be declared void and that the title would be returned to the foreclosed property owner.

477 Mass. at 87.

Declining to apply the "strict compliance" standard in the instant case, where there is no innocent third-party purchaser, is unjustified. The "prospective effect only" rule is intended to strike a balance in preserving the interests of two **innocent** parties. "The question in such cases [involving bona fide purchasers] is which of two **innocent** persons should suffer a loss which must be borne by one of them." Emphasis added. *Pinti*, 472 Mass. at 245 (Cordy, J., dissenting, quoting Restatement (First) of

Restitution § 172 comment a (1937)). "The law does not go a great way, however, in protecting the title of those who **do** have notice of defects in the seller's title." *Id.*, 472 Mass. at 248 (emphasis in original).

Here, MTGLQ is **not** innocent - it purported to foreclose knowing notice was defective. "It is hardly unfair or burdensome to require a mortgagee . . . to comply with the provisions of paragraph 22 in one of its own mortgages by sending a notice that conforms to the language of the paragraph." *Pinti*, 472 Mass. at 237-238.

Ms. Vibert acknowledges that in *U.S. Bank v. Milan*, the Appeals Court declined to apply *Pinti* "strict compliance" retroactively even where the summary process plaintiff was "the same party that gave the defective notice of default." 92 Mass. App. Ct. at 516. The *Milan* court's entire stated reasoning for that decision was that the *Marroquin* court had not done so. But the *Marroquin* turned on the question of whether the *Pinti* holding could be applied retroactively to cases in which the defense had been timely raised in the trial court at the time *Pinti* was decided. The *Marroquin* Court simply did not discuss whether *Pinti* prospectivity would apply in the absence

of an innocent third-party buyer. The Appeals Court erred in *Milan* when it treated *Marroquin* as resolving this issue.

Furthermore, subsequent to the *Pinti* decision, the Legislature enacted Chapter 141 of the Acts of 2015, amending G.L.c. 244 §15. This Act provides that a foreclosure affidavit of sale:

shall after 3 years from the date of its recording, be conclusive evidence in favor of an arm's length third party purchaser for value at or subsequent to the foreclosure sale that the power of sale under the foreclosed mortgage was duly executed and that the sale complied with this chapter and section 21 of said chapter 183.

Absent a timely challenge, after the statutory period runs, a foreclosure "shall not be set aside." *Id.*

Chapter 141 thus echoes this Court's desire to protect innocent third-party purchasers and the title system, but **not** foreclosing lenders with notice of defective default notices which they sent themselves.

This Court must yield to the balance struck by the Legislature. See *DiLiddo v. Oxford Street Realty, Inc.*, 450 Mass. 66, 73-76 (2007); *Mellor v. Berman*, 390 Mass. 275, 283 (1983). In any case, the underlying concern which gave rise to the "prospective limitation" in *Pinti* - namely, that "ascertaining whether clear record title exists may not be possible"

for a third-party purchaser - is now greatly diminished. Given this legislative action, it is no longer appropriate for the courts to limit the *Pinti* ruling to prospective application only.

B. The "strict compliance" standard should apply where the auction took place nearly two years after Pinti was decided.

When this Court made *Pinti* prospective, it could not have contemplated that mortgagees which had sent incorrect Paragraph 22 notices prior to the *Pinti* decision would not foreclose for many months or even years after *Pinti* was decided. Yet, that is precisely what happened. *Pinti* was decided on July 17, 2015, but the purported foreclosure in this case did not take place until March 21, 2017.

Housing Court Judge Kerman has articulated precisely why *Pinti* should apply in these situations:

[T]he plaintiff and its predecessor had more than adequate time and opportunity to issue a new notice in proper compliance with the mortgage, but chose instead to conduct a public auction foreclosure sale [months later] knowing there were defects in the pre-foreclosure documents, and that such defects might chill the sale.

Fannie Mae v. Spang, Northeast Housing Court, No. 16-SP-1023 (Kerman, J) (May 17, 2017). Here, the

foreclosure took place almost two years after *Pinti* was decided. During that time, it would have been quite easy for MTGLQ to send a new, compliant notice, but whether through malice or incompetence, it failed to do so. Knowing knowing that its notice did not meet the "strict compliance" standard, MTGLQ foreclosed anyway.

In *M&T Bank v. Conway*, Appeals Court Justice Grainger, sitting as a Single Justice six months after the *Pinti* decision, observed that while cases testing *Pinti's* application had been brought "in the immediate aftermath of that decision," he expected "that the issue of *Pinti's* prospective effect will have a limited shelf life." 2016-J-0020 (January 22, 2016). But MTGLQ apparently thinks that defective pre-*Pinti* notices have an indefinite "shelf life" and can be pulled off the shelf and used years after *Pinti* ruled such notices invalid.

This approach does not serve the purpose of *Pinti* prospectivity, which is to protect the interests of those who did not know until *Pinti* was decided that Paragraph 22 notice would be held to a standard of "strict compliance." And it does great harm to homeowners such as Ms. Vibert, who was entitled - by

the plain terms of the mortgage to which the mortgagee had agreed - to a proper notice of her right to cure before foreclosure.

Where the mortgagee had a more than adequate opportunity following *Pinti* to send such a conforming notice prior to commencing the foreclosure, there is no reason for this Court to excuse a notice that does not conform. Accordingly, as a matter of fairness and justice, the strict compliance standard should be applied in the instant case.

C. Alternatively, even if strict compliance is not required, substantial compliance is required.

Even the Defendant Mortgagee in the *Pinti* case conceded that at a minimum, **substantial** (if not strict) compliance with paragraph 22 was required: "[Emigrant] argue[s] that Emigrant's notice of default was required only to comply with paragraph 22 substantially, not strictly, and that the notice sent by Emigrant to the plaintiffs met this standard." 472 Mass. at 232. The *Pinti* court did not assess what the standard might be for "substantial compliance" because it held that strict compliance was required. Later, in *Marroquin*, the Court elaborated on what constitutes strict compliance, ruling that the mere insertion of

the word "may" into the contractually required language constituted a "significan[t] and inexcusabl[e]" deviation. 477 Mass. at 87. Again, finding strict compliance was required, the Court did not elucidate the requirements for "substantial compliance."

Although neither *Pinti* nor *Marroquin* explicitly defines "substantial compliance," *Pinti* does cite with approval a federal case, *Sullivan vs. Bank of New York Mellon Corp.*, 91 F. Supp.3d 154 (2015),

in which the court concluded, for essentially the same reasons as just stated in the text, that a notice of default stating that a Massachusetts mortgagor "will have an opportunity to assert a defense to acceleration or foreclosure `in the foreclosure proceeding'" did not constitute substantial compliance with paragraph 22.

Pinti, 472 Mass. at 237, footnote 19.

Here, the relevant notice not only contained the very same defect of purporting to inform Ms. Vibert of "the right to assert" defenses "in the foreclosure proceeding," but also contained other and even more dramatic departures from the required language than that in *Marroquin* or *Pinti*. First, unlike the notice in *Sullivan* (or in *Murphy*), the notice sent to Ms. Vibert did not even purport to tell her that she had the right to assert a defense to foreclosure at all,

but merely that she "**may**" have had that right. In *Marroquin*, this Court held that a notice which differed from the required language only in that it included the conditional phrasing "may have the right" (Emphasis added) was invalid because it ". . . suggest[ed] the homeowner may need to perform legal research and analysis to discern whether the right to cure and reinstate is available." Second, the notice sent to Ms. Vibert, rather than informing her of her right to reinstate the mortgage loan (as required by the mortgage), instead commanded her to ". . . review [her] mortgage or deed of trust for any right you may have to reinstate your account. . .". Thus, the notice in the instant case, more than "suggesting" Vibert engage in legal research and analysis, outright demands she do so in direct contradiction to the terms of the mortgage. In short, the language in the Vibert notice, even more than the notice in the *Sullivan* case cited in the *Pinti* footnote 19, is deeply and fundamentally misleading.

The trial court, however, did not regard these defects as fatal. It reasoned, having decided "[t]his case does not qualify for the *Pinti* application," therefore "[a]s a result, Viberts' challenge of the

Notice of Default and Right to Cure fail as a matter of law." In other words, the trial court concluded that notices not subject to *Pinti's* strict compliance standard were not subject to **any** standard at all.

But that cannot be what this Court intended in *Pinti*. It was well established before *Pinti* that a foreclosure by sale depended on compliance with the terms of the mortgage. See, e.g. *McGreevey v. Charlestown Five Cents Sav. Bank*, 294 Mass. 480, 481, 484 (1936); *Moore v. Dick*, 187 Mass. 207, 211 (1905); *Smith v. Provin*, 4 Allen 516, 516, 518 (1862); *Roarty v. Mitchell*, 7 Gray 243, 243-244 (1856). So MTGLQ knew that it must send the notice required by Paragraph 22 of the mortgage. Indeed, it sent such a notice, albeit grossly defective. And even if it did not know that the notice would be held to a "strict compliance" standard, it had to have known that the notice must at least comply "substantially" with the mortgage. Yet trial courts, including the court below in the instant matter, have repeatedly interpreted the prospective nature of the *Pinti* decision to mean that **no** evaluation of a paragraph 22 notice is required if it was sent prior to *Pinti*.

Ms. Vibert asks that this Court make clear that where "strict compliance" is not required because of *Pinti* prospectivity, such default notices must still meet a standard of "substantial compliance."

**VI. STATEMENT OF REASONS WHY
DIRECT APPELLATE REVIEW IS APPROPRIATE**

This matter involves novel questions of law, issues of first impression, and questions in the public interest which require final determination by the Supreme Judicial Court, to wit:

(A) Whether *Pinti's* "strict compliance" standard is to be applied only prospectively even when the buyer is the same party that gave defective notice of default. The Appeals Court in *Milan, supra*, held - with no basis except that this Court's decision in *Marroquin* did not address this issue - that it was. This Court should take this opportunity to overrule *Milan*. Such a result is particularly compelling in light of the Legislature's decision in Chapter 141 of the Acts of 2015 to limit the safe harbor of the title clearing act to innocent third-party purchasers. Chapter 141 of the Acts of 2015 should assuage prior concerns regarding the clarity of record titles and

supplants the basis for the prospective limitation in *Pinti*, but there are, to date, no appellate decisions on this point.

(B) Whether *Pinti* is to be applied only prospectively even where the sale itself took place months of even years after the *Pinti* decision was issued. A finite, but unknowable number of homeowners received notices prior to the *Pinti* decision, and many of these notices were defective. There may well be individuals who received such defective notices and yet still have not been subject to foreclosure. Trial courts are coming to different conclusions as to the application of the *Pinti* standard in such circumstances. Compare the result in the instant case to *Fannie Mae v. Spang*, Northeast Housing Court, No. 16-SP-1023 (Kerman, J., May 17, 2017), as discussed *supra*. In addition, another Housing Court judge recently ruled that *Pinti* prospectivity applied even though the foreclosure took place a year-and-a-half after *Pinti* was decided. *Federal Home Loan Mortgage Corporation v. Skidgel*, Northeast Housing Court, No. 17SP05525 (Dalton, J., May 24, 2019). This Court should resolve this dispute by holding that where a mortgagee had a reasonable opportunity following *Pinti*

to send a notice that was in "strict compliance" with the terms of the Paragraph 22 of the mortgage, such a notice is required for a valid foreclosure.

(C) Similarly, as noted, many trial courts (including the court below) have interpreted the prospective nature of the *Pinti* decision to mean that **no** evaluation of a paragraph 22 notice is required if it was sent prior to *Pinti*. This Court should make clear that notices not subject to *Pinti*'s "strict compliance" standard must still meet a standard of "substantial compliance."

CONCLUSION

For the reasons set forth above, this Honorable Court should grant direct appellate review of this case.

Respectfully Submitted,
Jacquine Vibert
By her counsel,

/s/ Jane Alexandra Sugarman

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CERTIFICATE OF SERVICE

I, Jane Alexandra Sugarman, hereby certify that I have on this 10th day of June, 2019, served the foregoing on James Creed, Esq., 733B Plain Street, Marshfield MA 02050 through the Massachusetts eFile provider system, and via email and by causing it to be sent first-class mail.

/s/ Jane Alexandra Sugarman
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CERTIFICATE OF COMPLIANCE
PURSUANT TO MASS.R.A.P. 16(k)

I, Jane Alexandra Sugarman, hereby certify, pursuant to Mass.R.A.P. 11(b), that I have complied with Mass. R.A.P. 16(k), and Mass. R.A.P. 20(a). Specifically, this Application e brief is written in the monospaced font Courier New, 12-point size, which contains 10 characters per inch, and the Argument Section consists of 10 non-excluded pages.

/s/ Jane Alexandra Sugarman
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ADDENDUM

Pursuant to Mass. R.A.P. 11(b), the following docket entries and lower court decisions relevant to the Defendant-Appellant's Application for Direct Appellate Review appeal are reproduced in this addendum.

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17H83SP03015TA MTGLQ Investors LP vs. Jacqueline Vibert A/K/A Jacquine C Vibert et al

Case Type
Housing Court Summary Process

Case Status
Active

File Date
07/12/2017

DCM Track:

Initiating Action:
SP Summons and Complaint - Foreclosure

Status Date:
07/12/2017

Case Judge:

Next Event:

Property Address

55 1/2 Liberty Street
East Taunton MA 02718

All Information	Party	Event	Docket	Disposition	Judgment
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[More Party Information](#)**Events**

<u>Date</u>	<u>Session</u>	<u>Locality</u>	<u>Location</u>	<u>Type</u>	<u>Result</u>
08/01/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
08/22/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
09/05/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
09/26/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
10/03/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
10/31/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
Continued					

<u>Date</u>	<u>Session</u>	<u>Locality</u>	<u>Location</u>	<u>Type</u>	<u>Result</u>
11/14/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	
12/19/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Rescheduled
12/26/2017 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
01/30/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Continued
03/06/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Summary Process Trial	Held
04/24/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Hearing	Continued
05/15/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Hearing	Continued
05/22/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Hearing	Continued
06/12/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Hearing	Held
08/28/2018 08:30 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Motion Hearing	Off the list
12/04/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Motion Hearing	Continued
12/18/2018 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Motion Hearing	Held
02/08/2019 04:10 PM	New Bedford Session	Southeast Housing Court - New Bedford	Southeast Housing - New Bedford	Hearing on Application for TRO	Allowed - TRO or PI
02/11/2019 08:30 AM	Plymouth Session	Southeast Housing Court - Plymouth	Southeast Housing - Plymouth	Motion Hearing	Denied
02/19/2019 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Motion Hearing	Motion Withdrawn
02/26/2019 11:00 AM	Taunton Session	Southeast Housing Court - Taunton	Southeast Housing Court - Taunton	Motion Hearing	Held

Docket Information

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
07/12/2017	SP Summons and Complaint - Foreclosure	
07/12/2017	SURCHARGE 185C:Entry of Action filed (Section 466 - M.G.L. c. 185C, §19) SURCHARGE Receipt: 81264 Date: 07/12/2017	
07/12/2017	Summary Process: MGL Chapter 185C Section 19; Chapter 262 Section 2 Receipt: 81264 Date: 07/12/2017	
07/13/2017	Scheduled Event: Summary Process Trial Date: 08/01/2017 Time: 08:30 AM Result: Continued	
07/13/2017	Notice to quit filed	2
07/13/2017	Military Service and Rule 10 Affidavit	3
08/01/2017	Alternative Dispute Resolution Outcome Referral Date: 08/01/2017	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
	Referral Source: Referral Event: Summary Process Trial Aug 1, 2017 8:30:00 AM Referral Status: Did Not Enter Process Referral Specialist: Viveiros, Keith A	
08/01/2017	Motion file late ans and disc filed by Jacquine Vibert A/K/A Jacquine C Vibert	4
08/01/2017	Answer and Counterclaim of Jacquine Vibert A/K/A Jacquine C Vibert filed. filed late	6
08/01/2017	Jury claim of Jacquine Vibert A/K/A Jacquine C Vibert	
08/01/2017	Defendant Discovery Requests	7
08/01/2017	Opposition to to d filing ans and disc late by MTGLQ Investors LP	8
08/01/2017	Event Resulted The following event: Summary Process Trial scheduled for 08/01/2017 08:30 AM has been resulted as follows: Result: Continued Reason: Court Action ah pp mtn to file late ans all'd see order per Fields J cc: 8/22/17 8:30am for trial	
08/02/2017	Notice of limited appearance by for Jacquine Vibert A/K/A Jacquine C Vibert.	5
08/02/2017	Scheduled Event: Summary Process Trial Date: 08/22/2017 Time: 08:30 AM Result: Continued	
08/18/2017	Motion joint to extend discovery deadline and cont trl filed by MTGLQ Investors LP, Jacquine Vibert A/K/A Jacquine C Vibert	6
08/22/2017	Event Resulted The following event: Summary Process Trial scheduled for 08/22/2017 08:30 AM has been resulted as follows: Result: Continued -joint motion to ext disc and cont'all'd CC: 9/5/17@8:30AM Reason: Both Parties Request	
08/22/2017	Scheduled Event: Summary Process Trial Date: 09/05/2017 Time: 08:30 AM Result: Continued	
09/01/2017	Motion to extend discovery deadline and to continue trial filed by MTGLQ Investors LP (JOINT)	7
09/05/2017	Event Resulted The following event: Summary Process Trial scheduled for 09/05/2017 08:30 AM has been resulted as follows: Result: Continued Joint motion to continue all'd cc:9/26/2017 @8:30am trial Reason: Both Parties Request	
09/05/2017	Scheduled Event: Summary Process Trial Date: 09/26/2017 Time: 08:30 AM Result: Continued	
09/26/2017	Event Resulted The following event: Summary Process Trial scheduled for 09/26/2017 08:30 AM has been resulted as follows: Result: Continued Reason: Court Action per Edwards J cc: 10/3/17 8:30am clerk office to ntfy parties	
09/27/2017	Scheduled Event: Summary Process Trial Date: 10/03/2017 Time: 08:30 AM Result: Continued	
10/03/2017	Event Resulted The following event: Summary Process Trial scheduled for 10/03/2017 08:30 AM has been resulted as follows:	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
	Result: Continued Reason: Both Parties Request	
10/03/2017	Motion by MTGLQ Investors LP, Jacquine Vibert A/K/A Jacquine C Vibert to continue AND TO EXTEND DISCOVERY DEADLINE ALLOWED	8
10/03/2017	Scheduled Event: Summary Process Trial Date: 10/31/2017 Time: 08:30 AM Result: Continued	
10/31/2017	Event Resulted Judge: Chaplin, Honorable Anne Kenney The following event: Summary Process Trial scheduled for 10/31/2017 08:30 AM has been resulted as follows: Result: ContinuedP' only P's mtn to continue filed and all'd CC;11/14/17 @8:30Am tri Plntf to Ntfy Def Reason: Court Action Judge: Chaplin, Honorable Anne Kenney	
10/31/2017	Scheduled Event: Summary Process Trial Date: 11/14/2017 Time: 08:30 AM Result: Continued	
11/01/2017	Motion for summary jdgmnt for lack of standing by reason of issue preclusion filed by MTGLQ Investors LP	9
11/01/2017	Memorandum of MTGLQ Investors LP and order	10
11/01/2017	P's supplemental brief as to amnd complaint to include previously unnamed person in poss filed	11
11/01/2017	Motion by MTGLQ Investors LP to continue fil'd and all'd	12
11/14/2017	Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Summary Process Trial scheduled for 11/14/2017 08:30 AM has been resulted as follows: Result: Continued Reason: Both Parties Request	
11/14/2017	Motion by Jacquine Vibert A/K/A Jacquine C Vibert to continue filed and all'd by assent cc: 12/19/17 @8:30am	13
11/14/2017	Scheduled Event: Summary Process Trial Date: 12/19/2017 Time: 08:30 AM Result: Continued	
12/01/2017	Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Summary Process Trial scheduled for 12/19/2017 08:30 AM has been resulted as follows: Result: Continued -Housing Court Conference Reason: Rescheduled Judge: Edwards, Jr., Hon. Wilbur P Judge: Edwards, Jr., Hon. Wilbur P	
12/01/2017	Scheduled Event: Summary Process Trial Date: 12/26/2017 Time: 08:30 AM Result: Continued	
12/20/2017	Motion by MTGLQ Investors LP, Jacquine Vibert A/K/A Jacquine C Vibert to continue	14
12/26/2017	Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Summary Process Trial scheduled for 12/26/2017 08:30 AM has been resulted as	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
	<p>follows: Result: Continued-joint motion to cont fil'd and all'd CC:1/30/18 at 11am tri Reason: Both Parties Request</p> <p>Judge: Edwards, Jr., Hon. Wilbur P</p> <p>Judge: Edwards, Jr., Hon. Wilbur P</p>	
12/26/2017	<p>Scheduled Event: Summary Process Trial Date: 01/30/2018 Time: 11:00 AM Result: Continued</p>	
01/30/2018	<p>Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Summary Process Trial scheduled for 01/30/2018 11:00 AM has been resulted as follows: Result: Continued Reason: Both Parties Request Parties present: Plaintiff's mot to allow time to respond to d's opp to p's mot for summary judgment and d's cross motion for summary judgment filed and all'd by assent CC: 3/6/18 @ 11am</p> <p>Judge: Edwards, Jr., Hon. Wilbur P</p>	
01/30/2018	<p>Scheduled Event: Summary Process Trial Date: 03/06/2018 Time: 11:00 AM Result: Held</p>	
01/30/2018	<p>Motion Plaintiff's mot to allow time to respond to d's opp to p's mot for summary judgment and d's cross motion for summary judgment filed and all'd by assent CC: 3/6/18 @ 11am filed by MTGLQ Investors LP</p>	15
03/06/2018	<p>Event Resulted Judge: Sullivan, Honorable Timothy F The following event: Summary Process Trial scheduled for 03/06/2018 11:00 AM has been resulted as follows: Result: Held AH PP per Sullivan CJ, cross motions for SJ TUA, record remains open until 3/16/18 @12pm for supplemental memoranda of parties, if any* please note that any supplemental pleadings needed to be forwarded to judge Sullivan</p> <p>Judge: Sullivan, Honorable Timothy F</p>	
03/06/2018	Defendants opposition and cross motion for summary judgement	16
03/06/2018	Plaintiff's memorandum of law in opposition to the defendants' cross motion for summary judgment	17
03/06/2018	Taken under advisement	
04/04/2018	Case Disposed	
04/12/2018	<p>Judgment issued: Final Judgment Finding Presiding: Honorable Anne Kenney Chaplin</p> <p>Judgment For: MTGLQ Investors LP</p> <p>Judgment Against: Jacquine Vibert Kenny Vibert Jimmy Vibert Hardy Vibert</p> <p>Terms of Judgment: Jdgmnt Date: 04/12/2018 Damages: Filing Fees: 218.45 Judgment Total: 218.45</p>	
04/12/2018	<p>judgment entered Sullivan CJ, allowing p mtn summary judgment as to possession, costs, as well as d counterclaims issues Note appeal period exp 4/20/18 further note case set down further hearing on issued post foreclosure u&o on 4/24/18 11am in TA</p> <p>Judge: Sullivan, Honorable Timothy F</p>	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
04/12/2018	Scheduled Event: Hearing Date: 04/24/2018 Time: 11:00 AM Result: Continued	
04/17/2018	Appearance by attorney for Jacquine Vibert A/K/A Jacquine C Vibert filed.	18
04/20/2018	Notice of Appeal by Jacquine Vibert A/K/A Jacquine C Vibert from Judgment dated 04/10/2018	19
04/20/2018	D's Motion to Set or Waive Appeal Bond fld	20
04/20/2018	Affidavit of Indigency FILED	21
04/24/2018	Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Hearing scheduled for 04/24/2018 11:00 AM has been resulted as follows: Result: Continued Reason: Both Parties Request	
04/24/2018	Motion by to continue joint mtn to cont filed and all'd cc: 5/15/18 @1100am hrng on U+O	22
04/24/2018	Scheduled Event: Hearing Date: 05/15/2018 Time: 11:00 AM Result: Continued	
05/15/2018	Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Hearing scheduled for 05/15/2018 11:00 AM has been resulted as follows: Result: Continued Reason: Both Parties Request	
05/15/2018	Agreement of parties filed and all'd cc:5/22/18	23
05/15/2018	Scheduled Event: Hearing Date: 05/22/2018 Time: 11:00 AM Result: Continued	
05/22/2018	Event Resulted Judge: Edwards, Jr., Hon. Wilbur P The following event: Hearing scheduled for 05/22/2018 11:00 AM has been resulted as follows: Result: Continued Reason: Both Parties Request	
05/22/2018	Agreement of parties all'd cc:6/12/18 11am hrng on u+o/ mtn waive appeal bond	24
05/22/2018	Scheduled Event: Hearing Date: 06/12/2018 Time: 11:00 AM Result: Held	
06/12/2018	Event Resulted: Hearing scheduled on: 06/12/2018 11:00 AM Has been: Held AH w PP per Edwards, J; mot to waive appl Bond TUA Hon. Wilbur P Edwards, Jr., Presiding Appeared: Staff: Judge: Edwards, Jr., Hon. Wilbur P	
06/12/2018	Opposition to to D's mot to waive Appeal Bond filed by MTGLQ Investors LP	25
06/12/2018	Taken under advisement	
08/02/2018	Attorney Appearance On this date Pro Se dismissed/withdrawn for Defendant Jacquine Vibert A/K/A Jacquine C Vibert	
08/07/2018	Findings and Order p/further order (Edwards,J) D J.Vibert's mtn waive appeal bond-denied- bond amount established (see order for additional specifics)	

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
08/07/2018	Findings - judgment entered Nunc pro tunc to 4-10-18 relative unpaid use & occupancy (Edwards, J)	
08/16/2018	Correspondence received from D's request for review by the single justice of orders relating to appeal bond	26
08/16/2018	Notice of Appeal by Jacqueline Vibert A/K/A Jacqueline C Vibert from Judgment dated 04/10/2018	27
08/16/2018	Motion to Set or Waive Appeal Bond (Second)	28
08/16/2018	Scheduled Event: Motion Hearing Date: 08/28/2018 Time: 08:30 AM Result: Off the list	
08/21/2018	Correspondence received from D'S attorney re- mot off list faxed	29
08/28/2018	Event Resulted: Motion Hearing scheduled on: 08/28/2018 08:30 AM Has been: Off the list NPIC D's 2nd mot to waive Appeal Bond @ D's req Hon. Joseph Michaud, Presiding Appeared: Staff: Judge: Michaud, Hon. Joseph	
10/17/2018	Attorney Appearance On this date Jane Alexandra Sugarman, Esq. added for Defendant Jacqueline Vibert A/K/A Jacqueline C Vibert	
10/19/2018	Notice of Assembly of Record on Appeal sent to all counsel of record and appeal court	
10/24/2018	CERTIFIED MAIL RETURN RECEIPT (GREEN CARD) FILED	30
10/24/2018	Affidavit of Indigency Faxed to Appeals Court	
11/13/2018	Notice of docket entry from Appeals court fld	31
11/20/2018	Motion FOR FURTHER ORDERS ON APPEAL BOND & WAIVER OF COSTS OF APPEAL filed by Kenny Vibert	32
11/20/2018	Scheduled Event: Motion Hearing Date: 12/04/2018 Time: 11:00 AM Result: Continued	
12/03/2018	Motion by MTGLQ Investors LP, Jacqueline Vibert A/K/A Jacqueline C Vibert to continue to 12/18/18 (Joint)	33
12/04/2018	Event Resulted: Motion Hearing scheduled on: 12/04/2018 11:00 AM Has been: Continued For the following reason: Both Parties Request Hon. Wilbur P Edwards, Jr., Presiding Appeared: Staff:	
12/04/2018	Motion by to continue joint all'd cc:12/18/2018	
12/04/2018	Scheduled Event: Motion Hearing Date: 12/18/2018 Time: 11:00 AM Result: Held	
12/18/2018	Event Resulted: Motion Hearing scheduled on: 12/18/2018 11:00 AM Has been: Held Honorable Anne Kenney Chaplin, Presiding Appeared: Staff:	
12/18/2018	Attorney Appearance On this date Julianne Clark, Esq. dismissed/withdrawn for Defendant Jacqueline Vibert A/K/A Jacqueline C Vibert	34

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
12/18/2018	Attorney Appearance On this date Jane Alexandra Sugarman, Esq. added for Defendant Jacquine Vibert A/K/A Jacquine C Vibert	
12/18/2018	Opposition to to the D's mot for further orders on Appeal Bond fid by MTGLQ Investors LP	35
12/18/2018	Taken under advisement Judge: Chaplin, Honorable Anne Kenney	
01/09/2019	Per Order (Chaplin,J) D's motion further orders on appeal Bond & Waiver costs Appeal all'd)See order further Specifics Judge: Sherring, Neil	
02/08/2019	Motion emergency exparte motion for TRO and sanctions filed by Jacquine Vibert A/K/A Jacquine C Vibert	36
02/08/2019	Scheduled Event: Hearing on Application for TRO Date: 02/08/2019 Time: 04:10 PM Result: Allowed - TRO or PI	
02/08/2019	Application of Defendant for temporary restraining order on case already established	
02/08/2019	Affidavit of Indigency FILED	37
02/08/2019	Affidavit of Indigency APPROVED	38
02/08/2019	Event Resulted: Hearing on Application for TRO scheduled on: 02/08/2019 04:10 PM Has been: Allowed - TRO or PI Honorable Anne Kenney Chaplin, Presiding Appeared: Staff:	
02/08/2019	Temporary Restraining Order or Preliminary Injunction: Hearing on Application for TRO scheduled on: 02/08/2019 04:10 PM Has been: Allowed - TRO or PI Honorable Anne Kenney Chaplin, Presiding Appeared: Staff: Dismissed Type: INDIGENCY Dismissed Date: 02/08/2019 Dismissed Amount: 90.00 Dismissed By: BENEVIDESL	
02/11/2019	Motion Emergency motion to dissolve TRO filed by MTGLQ Investors LP	39
02/11/2019	Scheduled Event: Motion Hearing Date: 02/11/2019 Time: 08:30 AM Result: Denied	
02/11/2019	Memorandum of MTGLQ Investors LP in support of mtn	40
02/11/2019	Affidavit of James Creed	41
02/11/2019	Motion to strike sanctions filed by MTGLQ Investors LP	42
02/11/2019	Opposition to to P's mtns by Jacquine Vibert A/K/A Jacquine C Vibert	43
02/11/2019	Event Resulted: Motion Hearing scheduled on: 02/11/2019 08:30 AM Has been: Denied Honorable Anne Kenney Chaplin, Presiding Appeared: Staff:AH PP per Chaplin, FJ; P's mtn dissolve TRO denied, see Order endorsed on face of mtn; TRO extended as PI to 2/19/19 @ 11:00 in Taunton for further hrg and for all remaining mtns	
02/11/2019		

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
	Scheduled Event: Motion Hearing Date: 02/19/2019 Time: 11:00 AM Result: Motion Withdrawn	
02/15/2019	Interpreter in Haitian is ordered by the court to assist Jacqueline Vibert A/K/A Jacqueline C Vibert on the date and time and for the court event indicated: 02/19/2019 11:00 AM Motion Hearing; interpreter request form issued.	44
02/19/2019	Motion to Transfer to Civil docket filed by Jacqueline Vibert A/K/A Jacqueline C Vibert	45
02/19/2019	Stipulation of parties filed	46
02/19/2019	Event Resulted: Motion Hearing scheduled on: 02/19/2019 11:00 AM Has been: Motion Withdrawn Honorable Anne Kenney Chaplin, Presiding Appeared: Staff:	
02/19/2019	AH/PP Def't's motion to appt. Interpreter WITHDRAWN in open Court CC: 2/26/19 @ 11:00am - Motions	
02/19/2019	Orders Issued Judge: Chaplin, Honorable Anne Kenney	
02/19/2019	Scheduled Event: Motion Hearing Date: 02/26/2019 Time: 11:00 AM Result: Held	
02/19/2019	Transcript of hearing filed with CD Rom	47
02/19/2019	Referred to Housing Specialist	48
02/20/2019	Alternative Dispute Resolution Outcome Referral Date: 02/19/2019 Referral Source: Referral Event: Motion Hearing Feb 19, 2019 11:00:00 AM Referral Status: Closed - Not Settled Referral Specialist: Rooney, Melissa	
02/22/2019	Motion TO QUASH DEPOSITION OF J. VIBERT FLD filed by Jacqueline Vibert A/K/A Jacqueline C Vibert	49
02/25/2019	Motion Def't amended opposition to Pltfs mtn to strike and for sanctions and costs filed by Jacqueline Vibert A/K/A Jacqueline C Vibert	50
02/25/2019	Affidavit of Jane A. Sugarman	51
02/25/2019	Opposition to the Motion to transfer to the Civil Docket by MTGLQ Investors LP	52
02/25/2019	Affidavit of James F. Creed, Jr.	53
02/25/2019	Opposition to the Motion to Quash Deposition Subpeona by MTGLQ Investors LP	54
02/26/2019	Event Resulted: Motion Hearing scheduled on: 02/26/2019 11:00 AM Has been: Held Hon. Irene Bagdoian, Presiding Appeared: Staff: Case transferred to Civil Docket - Tracking Order F to issue	
02/26/2019	Motion withdrawn in open Court as to Quash Depo - Motions DENIED as to Plt's mtn to Strike and Sanctions - DENIED as to Def't's opposition to Plt's mtn to dissolve TRO and to stroke and for Sanctions	
02/26/2019	Transferred to 19-CV-0060TA	
04/18/2019	Correspondence received from party or attorney	55
05/08/2019	Notice of Assembly of Record on Defendant's Appeal sent to all (Appeal Court and Counsel of record.)	
05/13/2019	Return of service (green signature card) for appeal sent to Massachusetts Appeals Court completed	56

<u>Docket Date</u>	<u>Docket Text</u>	<u>File Ref Nbr.</u>
05/13/2019	Return of service (green signature card) for appeal sent to Jane Alexandra Sugarman, Esq. South Coastal Counties Legal Services, Inc. completed	57
05/13/2019	Return of service (green signature card) for appeal sent to James F Creed, Jr. Esq, Creed & Formica completed	58

Case Disposition

<u>Disposition</u>	<u>Date</u>
Disposed	04/04/2018

Judgments

<u>Date</u>	<u>Type</u>	<u>Method</u>	<u>For</u>	<u>Against</u>
04/12/2018	Final Judgment	Finding	MTGLQ Investors LP	Vibert, Hardy

Commonwealth of Massachusetts

BRISTOL, SS:
PLYMOUTH, SS

HOUSING COURT DEPARTMENT
SOUTHEASTERN DIVISION
Docket No. 17-SP-03015

MTGLQ Investors, L.P.
Plaintiff

vs.

Jacquine Vibert aka Jacqueline C. Vibert,
Kenny Vibert, Jimmy Vibert, Hardy Vibert, et al.
Defendants

JUDGMENT


This action came on for trial/hearing before the Court, Sullivan, J. presiding, and the issues having been duly tried/heard and findings having been duly rendered, it is **ORDERED** and **ADJUDGED** under Rule 10 of the Uniform Rules of Summary Process that:

Judgment for the Plaintiff, ALLOWING its Motion for Summary Judgment as to possession, costs, as well as the Defendants' counterclaim issues.

The within matter is further continued for evidentiary hearing on the issue of post-foreclosure use and occupancy on April 24, 2018 at 11:00 A.M. in Taunton.

Accordingly, judgment enters at 10:00 a.m. this 10th day of April 2018.

Pursuant to Massachusetts General Laws Chapter 239, Section 5, an aggrieved party must file a notice of appeal with the Court within ten (10) days after the entry of the judgment.


MARK R. JEFFRIES
CLERK MAGISTRATE

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

BRISTOL, SS
PLYMOUTH, SS

HOUSING COURT DEPARTMENT
SOUTHEASTERN DIVISION
Docket No. 17-SP-03015

MTGLQ Investors, L.P.)
PLAINTIFF)
)
V.)
)
Jacquine Vibert aka Jacquine C. Vibert)
Kenny Vibert, Jimmy Vibert, Hardy Vibert, et. al.)
DEFENDANTS)
)

**MEMORANDUM OF DECISION ON PARTIES' CROSS MOTION
FOR SUMMARY JUDGMENT**

This is a summary process action in which the Plaintiff, MTGLQ Investors, L.P. (the "Plaintiff" or "MTGLQ") seeks to recover possession of a residential property located at 55 ½ Liberty Street, East Taunton, Massachusetts (the "Premises") following a foreclosure sale. The Premises is occupied by the Defendants, Jacquine Vibert aka Jacquine C. Vibert, Kenny Vibert, Jimmy Vibert and Hardy Vibert (the "Defendants" or "Viberts"). Jacquine Vibert aka Jacquine C. Vibert is the former owner and mortgagor. Jimmy Vibert and Hardy Vibert are the family members of the former owner, Jacquine Vibert aka Jacquine C. Vibert. Both parties were represented by counsel at the hearing.

MTGLQ asserts that it acquired title to the Premises by virtue of a Foreclosure Deed, following a foreclosure sale. MTGLQ filed its **Motion for Summary Judgment** and argues that it is entitled to judgment as a matter of law as to possession. Viberts filed their **Cross Motion for Summary Judgment**.

In Viberts Answer¹, Affirmative Defenses and Counterclaims, they essential challenge the foreclosure sale and argues that MTGLQ lacks superior title to the property. Viberts also claims: 1) Fannie Mae failed to properly serve Kenny, Jimmy and Hardy Vibert with a Notice to Quit; and 2) Viberts were unfairly denied a loan modification.

¹ August 1, 2017, Viberts filed their Motion to file late Answer, Counterclaims, Discovery and Jury Demand. See Defendants' Motion to file Late Answer. The Motion to File Late Answer was **Allowed**. Furthermore, the MTGLQ requested leave of the Court to Amend the Complaint to include the unnamed adult occupants (Kenny, Jimmy and Hardy Vibert). This Court **ALLOWED** MTGLQ. See Order dated August 1, 2017.

On March 6, 2018, this matter came before the Court (Sullivan, C.J.) for hearing. The parties filed memoranda of law together with affidavits and documents in support of their respective positions². After reviewing the undisputed facts set forth in the summary judgment record and considering the arguments of the respective parties, I conclude as set forth below that the Premises was foreclosed upon by the exercise of the statutory Power of Sale in compliance with M.G.L. c. 183, § 21, the mortgage instrument, relevant parts of M.G.L. c. 244, §§ 11 – 17, and M.G.L. c. 244, § 35A. The evidence establishes as a matter of law that MTGLQ acquired title to the Premises upon foreclosure and has a superior right to possession over the right to possession asserted by Viberts. Accordingly, MTGLQ's Motion Summary Judgment is **ALLOWED** as to its claim for possession. The Viberts Counterclaims are **DISMISSED** with prejudice.

STANDARD OF REVIEW

To prevail on a Motion for Summary Judgment, the moving party must demonstrate with admissible evidence, based upon the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, that there are no genuine issues as to any material facts and that the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c); Community National Bank v. Dawes, 369 Mass. 550, 553-556 (1976). 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 party opposing summary judgment must therefore present and allege specific facts which establish the existence of a genuine issue of material fact demonstrating that there is a live issue for trial. Joslyn v. Chang, 445 Mass. 345 (2005).

"When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." Mass.R.Civ.P.56 (c).

² At the March 6th hearing, Viberts requested leave of the Court to file supplemental brief on or before March 16, 2018. This Court ALLOWED Viberts request to file a supplemental brief and held the file open until March 16th. However, no such briefs were filed.

MATERIAL FACTS
The Initial Mortgage and Default

The Court, following review, finds the following undisputed facts: MTGLQ is the record owner of the Premises. Viberts have occupied the Premises since at least 2007. On March 27, 2007, Jacquine Vibert signed a Note in the amount of \$296,000.00, payable to Countrywide Home Loans, Inc. ("Countrywide"). On March 27, 2007, Jacquine Vibert granted a Mortgage in favor of Mortgage Electronic Registration Systems ("MERS") as nominee for Countrywide Home Loans, Inc. that encumbered the Premises. The Mortgage was recorded with the Bristol (Northern District) County Registry of Deeds in Book 16684, Page 58. *See Plaintiff's Memorandum of Law in Support of Summary Judgment* ("Plaintiff's Memorandum"). In November 2010, Jacquine Vibert Defaulted on her Mortgage and Note obligations. As a result, on January 23, 2014, nearly four years later, Green Tree Servicing a Notice of Default and Right to Cure ("Notice of Right to Cure") was sent to Jacquine Vibert, pursuant to G.L. c. 244, § 35A. *See Defendant's Cross Motion for Summary Judgment at Exhibit B*. Jacquine Vibert did not cure the default, nor does she allege she cured.

The chain of title in this case is a bit tricky to follow, since Viberts' Mortgage was assigned multiple times. It is important that the Court provide clarity as it pertains to the chain of title.

Assignments of Viberts' Mortgage

On July 27, 2011, MERS assigned the Mortgage to BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing LP, by an Assignment of Mortgage, which was recorded with the Bristol (Northern District) Registry of Deeds in Book 19676, Page 263. *See Plaintiff's Memorandum at Exhibit A*. On October 18, 2012, MERS executed a Confirmatory Assignment of Mortgage³ which assigned Viberts Mortgage to Bank of America, N.A. successor by merger to BAC Home Loans Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. The Confirmatory Assignment was recorded with the Bristol (Northern District) Registry of Deeds in Book 20563, Page 69. *See Plaintiff's Memorandum at Exhibit A*.

³ The Confirmatory Assignment of Mortgage states, in pertinent part, that it "confirm[ed] and correct[ed] the prior Assignment...which failed to include the entire legal name of the assignee." *See Plaintiff's Memorandum at Exhibit A*.

On May 13, 2013, Countrywide Home Loans Inc. assigned the Mortgage to Green Tree Servicing LLC by an Assignment of Mortgage, which was recorded with the Bristol (Northern District) Registry of Deeds in Book 21535, Page 13. *See Plaintiff's Memorandum at Exhibit A.* On November 17, 2014, Bank of America, N.A. successor by merger to BAC Home Loan Servicing LP, f/k/a Countrywide Home Loan Servicing, LP executed a Corrective Corporation Assignment of Mortgage and assigned the Mortgage to Greentree Servicing LLC⁴ by an Assignment of Mortgage, which was recorded with the Bristol (Northern District) Registry of Deeds in Book 22054, Page 59. On September 15, 2016, DiTech Financial LLC assigned the Mortgage to MTGLQ, by an Assignment of Mortgage, which was recorded at the Bristol (Northern District) Registry of Deeds at Book 23307, Page 170.

The Foreclosure Process

On November 18, 2015, Ditech executed an "Affidavit Pursuant to M.G.L. c. 244, §§ 35B and 35C" in compliance with M.G.L. c. 244, § 35B and M.G.L. c. 244, § 35C. *See Plaintiff's Memorandum at Exhibit A.* The Affidavit was recorded with the Bristol (Northern District) Registry of Deeds in Book 22662, Page 21. *See Plaintiff's Memorandum at Exhibit A.* The "Affidavit Pursuant to M.G.L. c. 244, §§ 35B and 35C" stated in pertinent part that, "[t]he requirement of M.G.L. c. 244, §§ 35B have been complied with" and "Ditech [wa]s the authorized agent of the holder of said promissory note for purpose, inter alia, of foreclosing said mortgage on behalf of said note holder." *See Plaintiff's Memorandum at Exhibit A.*

On February 21, 2017, February 28, 2017 and March 7, 2017, MTGLQ caused to be published the "Notice of Mortgagee's Sale of Real Estate" in the Taunton Daily Gazette, a newspaper in general circulation in East Taunton. *See Plaintiff's Memorandum at Exhibit A.* Pursuant to M.G.L. c. 244, § 14, a Notice of Sale was sent to Viberts via certified mail informing them of the foreclosure sale scheduled for March 21, 2017. *See Plaintiff's Memorandum at Exhibit A.* On March 21, 2017, MTGLQ avers it made entry and conducted a foreclosure sale at the Premises. On June 1, 2017, the Certificate of Entry was recorded with the Bristol (Northern District) Registry of Deeds in Book 23873, Page 187. *See Plaintiff's Memorandum at Exhibit*

⁴ On August 1, 2015, Green Tree merged with DiTech Financial, LLC. *See Plaintiff's Memorandum at Exhibit A.*

A. MTGLQ avers it was the high bidder⁵ was conveyed the Premises via a Foreclosure Deed. *See Plaintiff's Memorandum at Exhibit A.*

On May 1, 2017, MTGLQ executed a subsequent "Affidavit of Continuing Noteholder Status" stating in pertinent part that MTGLQ was "the holder of the promissory note." The Affidavit recorded with the Bristol (Northern District) Registry of Deeds in Book 23783, Page 196. *See Plaintiff's Memorandum at Exhibit A.* On April 4, 2017, MTGLQ executed an "Affidavit of Compliance with Conditions Precedent to Acceleration and Sale (*Pinti Affidavit*)". The Affidavit is recorded with the Bristol (Northern District) Registry of Deeds in Book 23783, Page 200. *See Plaintiff's Memorandum at Exhibit A.* The *Pinti* Affidavit stated in pertinent part that "Notice(s) of Default to Mortgagor(s) pursuant to the terms and conditions precedent in the mortgage to acceleration and sale *was sent on or before July 17, 2015...*" *See Plaintiff's Memorandum at Exhibit A.*

On June 1, 2017, the Foreclosure Deed dated May 26, 2017, was recorded with the Bristol (Northern District) Registry of Deeds in Book 23783, Page 189. *See Plaintiff's Memorandum at Exhibit A.* On June 1, 2017, pursuant to G.L. c. 244, § 14 the Plaintiff recorded the Affidavit of Sale at the Bristol (Northern District) Registry of Deeds in Book 23783, Page 190. *See Plaintiff's Memorandum at Exhibit A.*

The Summary Process Action in Housing Court

On June 15, 2017 MTGLQ, through counsel, caused Viberts to be served with a 72 hour Notice to Vacate seeking possession and use and occupancy of the Premises. *See Plaintiff's Supplemental Brief at Exhibits A-C.* On June 29, 2017, Fannie Mae, again through counsel, caused Viberts to be served with a Summons and Complaint which sought, use and occupancy payments in the amount of \$2,625.00⁶ and ongoing and possession of the Premises. A trial date was set for August 1, 2017.

THE PLAINTIFF'S MOTION for SUMMARY JUDGMENT

MTGLQ's Motion for Summary Judgment sets forth affidavits and documentation in support of its argument that it complied with the Power of Sale and the statutes governing

⁵ According to the foreclosure deed, MTGLQ bid amount was \$299,000. *See Plaintiff's Memorandum at Exhibit A.*

⁶ MTGLQ calculates the amount of use and occupancy owed as follows: \$52.50 per day X 50 days = \$2,625.00. *See Plaintiff's Summons and Complaint.*

foreclosure of the Viberts Mortgage. As a result, MTGLQ argues it is entitled to judgment as a matter of law. This Court agrees that Plaintiff is entitled to judgment as a matter of law on its claim of superior title and possession. Viberts' claim that MTGLQ or any of its predecessor in interest engaged in unfair and deceptive acts when the property went to foreclosure auction fails as a matter of law as explained *infra*.

The undisputed facts in the summary judgment record establish as a matter of law that (1) Viberts was continually in default on her mortgage loan obligations since at least November 1, 2010; (2) Viberts' mortgage contains the statutory power of sale (Mortgage at ¶ 22); (3) MTGLQ had the authority to exercise the Power of Sale contained in Viberts' Mortgage to foreclose on the Premises; (4) MTGLQ was the noteholder of Viberts promissory Note, secured by the Mortgage on the Premises, and had the authority to conduct the foreclosure sale (*see Eaton v. Federal Nat. Mortg. Ass'n*, 462 Mass. 569 (2012)); (5) On March 21, 2017, MTGLQ foreclosed on the property in compliance with the relevant provisions of M.G.L. c. 244, §§ 11-17 (*See Bank of New York v. Bailey*, 460 Mass. 327 (2011), *see Federal National Mortgage Association v. Hendricks*, 463 Mass. 635 (2012), and also *see Turra v. Deutsche Bank Trust Company Americas*, 476 Mass. 1020 (2017)); (6) the foreclosure sale foreclosed Viberts fee simple interest in the property; (7) MTGLQ was the high bidder at the foreclosure sale; (8) Viberts are the former owner/mortgagor and family members of the former owner/mortgagor; (9) Viberts never sought to enter into a tenancy and never occupied the Premises as a residential tenant; and, (10) MTGLQ's right to possession of the Premises is superior to any right to possession held by Viberts⁷.

THE DEFENDANT'S DEFENSES AND CLAIMS

Assignment Challenge

Viberts' assignment challenge fails as a matter of law. Although the chain of title takes some "twist and turns" it shows that MTGLQ was assigned the Mortgage and had the power to foreclose. Two assignments in the chain of title misname the grantor, or intended grantee, and a

⁷ MTGLQ argues incorrectly that Viberts are "judicially estopped" from challenging the foreclosure sale because they filed for bankruptcy and indicated they would "surrender" the Property on their Statement of Intention. *See Plaintiff's Memorandum*. However, this court finds the ruling in *Everbank v. Chacon* persuasive and disagrees with the MTGLQ's characterization of the term "surrender". *See Everbank v. Chacon*, 92 Mass.App.Ct. 1101 (2017).

Confirmatory Assignment in once case and a Corrective Assignment in the other, clarify those issues. Simply put chain of title can be summarized as follows:

1. July 27, 2011: MERS → BAC Home Loan Servicing, LP f/k/a Countrywide Home Loan Servicing LP.
2. October 18, 2012: MERS → Bank of America, N.A. successor by merger to BAC Home Loan Servicing, LP f/k/a Countrywide Home Loans Servicing, LP. (Confirmatory)
3. May 13, 2013: Countrywide Home Loans Servicing, LP → Green Tree Servicing LLC
4. November 17, 2014: Bank of America, N.A. successor by merger to BAC Home Loans Servicing LP, f/k/a Countrywide Home Loan Servicing LP. → Green Tree Servicing LLC (Corrective).
5. August 31, 2015: Ditech merges with Green Tree Servicing LLC.
6. September 15, 2016: Ditech → MTGLQ
7. March 21, 2017: MTGLQ forecloses

“Because only a present holder of the mortgage is authorized to foreclose on the mortgaged property, and because the mortgagor is entitled to know who is foreclosing and selling the property, the failure to identify the holder of the mortgage in the notice of sale may render the notice defective and the foreclosure sale void.” See US Bank, N.A. v. Ibanez, 458 Mass. 637, 648 (2010). On September 15, 2016, MTGLQ was the holder of the Mortgage and Note. See Plaintiff’s Memorandum at Exhibit A. At the time the notice of sale was first published, February 21, 2017, MTGLQ was the holder of both the Mortgage and Note. As a result, the foreclosure sale that took place on March 21, 2017 was a valid exercise of the power of sale in compliance with the principals, as set forth in Ibanez.

Pinti Application

Viberts argues incorrectly that the 150 Day Notice to Cure she received was deficient because it did not unequivocally advise her of the right to bring a court action. See Defendant’s Opposition. A careful review of the Notices show that Pinti holding is inapplicable to this case.

On January 23, 2014, a Notice of Default and Right to Cure (“Notice of Right to Cure”) was sent to Viberts, pursuant to M.G.L. c. 244, § 35A. See Defendant’s Opposition at Exhibit B. Pinti, held that the mortgagee was required to conduct the foreclosure in strict compliance with the mortgage’s provision (i.e. ¶ 22) regarding notice of default. See Pinti v. Emigrant Mortgage Co., 472 Mass. 226. The SJC held that the Pinti decision will “apply to mortgage foreclosure sales of properties that are the subject of a mortgage containing paragraph 22 or its equivalent and for which the notice of default required by paragraph 22 is *sent after the date of this opinion* [July 17, 2015].” See Pinti v. Emigrant Mortg. Co., 472 Mass. 226, 243 (2015) (emphasis added).

The Notice of Default and Right to Cure was sent on January 23, 2014, before the Pinti, decision. Moreover, this case was filed with this court July 12, 2017. Pursuant to Marroquin, the Pinti ruling extended to cases “pending in the trial court where the Pinti issue was timely and fairly raised before we issued [the SJC’s] decision in Pinti.” See Federal National Mortgage Ass’n v. Marroquin, 477 Mass. 82, 88 (2017). This case does not qualify for the Pinti application. As a result, Viberts’ challenge of the Notice of Default and Right to Cure fail as a matter of law.

Loan Modification

Viberts aver that they were wrongly denied a loan modification and as a result the MTGLQ is liable for damages under G.L. c. 93A. See Answer at ¶¶ 39 and 44. “Because . . . the denial of a request for a loan modification does not affect the [MTGLQ’s] title, the [Defendants’ are] left with the argument that the denial of [their] request for a loan modification was so fundamentally unfair that [they were] entitled to equitable relief.” See Bank of N.Y. Mellon v. Fernandez, 2015 WL 4426213, at *2. On the record before this Court, the Viberts have not submitted evidence which constitutes “fundamental unfairness”, which would warrant setting aside the foreclosure. See U.S. Bank Nat’l Ass’n v. Schumacher, 467 Mass. 421 (2014). As a result, Viberts counterclaim fails as a matter of law.

PLAINTIFF’S USE AND OCCUPANCY CLAIM

The Plaintiff also seeks use and occupancy from the date of the foreclosure sale. See **Summary Process Complaint**. This Court is not persuaded by the MTGLQ’s claim for use occupancy. Accordingly, the Court will conduct a hearing on **Tuesday, April 24, 2018 at 11:00 A.M.** to establish damages for the Viberts’ use and occupancy of the Premises through the date of this Order.

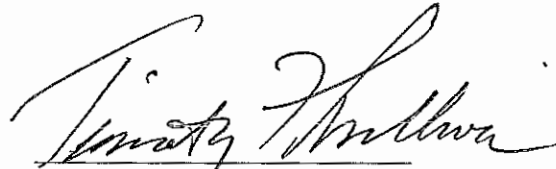
CONCLUSION

The Court finds that the Plaintiff, MTGLQ, has demonstrated that there are no genuine issues of material fact in dispute with respect to the issue of superior title and possession to the Premises in this action. The Court also finds that the Viberts failed to sustain their burden as to their counterclaims. Accordingly, the MTGLQ’s **Motion for Summary Judgment** is **ALLOWED** as to possession and as to the Viberts’ counterclaims.

ORDER FOR JUDGMENT

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

1. The Plaintiff's **Motion for Summary Judgment** on its complaint for possession is **ALLOWED**, plus costs.
2. Judgment for Plaintiff on Defendants' counterclaims.
3. Execution to issue for possession.
4. The Court shall conduct an evidentiary hearing as to the use and occupancy due by the Defendant post-foreclosure at the Taunton Housing Court on **April 24, 2018 at 11:00 A.M.**


TIMOTHY E. SULLIVAN
CHIEF JUSTICE

Date: April 7, 2018

cc: James Creed, Esq.
Jane A. Sugarman, Esq.

7

SPANG 38

COMMONWEALTH OF MASSACHUSETTS
NORTHEAST HOUSING COURT

FANNIE MAE

Plaintiff

- v. -

No. 16-SP-1923

ELAINE L. SPANG

Defendant

RULINGS AND ORDER

After hearing on January 23, 2017, of the motion and cross motion for summary judgment in this post-foreclosure summary process case, I rule and order as follows:

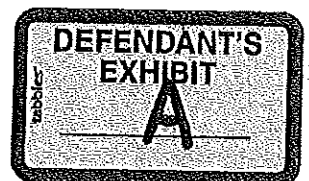
1. The pre-foreclosure notice dated March 5, 2014 ("You may also have the right to assert in the foreclosure proceeding ...") [Doc.#27 Exh.4; Doc.#29B Exh.G] did not comply with Paragraph 22 of the Mortgage, and was inherently misleading, under Pinti v. Emigrant Mortgage Co., Inc., 472 Mass. 226, 33 N.E.3d 1213 (2015) and FNMA v. Marroquin, ___ Mass. ___, ___ N.E.3d ___ (May 11, 2017), and was also "fundamentally unfair" within the meaning of U.S. Bank v. Schumacher, 467 Mass. 421, 5 N.E.3d 882 (2014), where, after the Pinti ruling was issued on July 17, 2015, the plaintiff and its predecessor had more than adequate time and opportunity to issue a new notice in proper compliance with the mortgage, but chose instead to conduct a public auction foreclosure sale on November 18, 2015, knowing that there were defects in the pre-foreclosure documents, and that such defects might chill the sale.

2. Triable issues of law and fact exist with respect to the defendant's affirmative defenses and counterclaims as to predatory loan, loan modification, and unfair and deceptive debt collection acts and practices.

3. Counsel may bring the case forward for trial or judgment within 90 days.

David D. Kerman
David D. Kerman
Associate Justice

May 17, 2017



24

COMMONWEALTH OF MASSACHUSETTS
NORTHEAST HOUSING COURT

FEDERAL HOME LOAN MORTGAGE
CORPORATION,

Plaintiff,

-v.-

NO: 17SP05525

RONALD E. SKIDGEL a/k/a RONALD E.
SKIGDEL & LAURA J. GOMEZ a/k/a
LAURA A. GOMEZ,

Defendants.

DECISION AND ORDER

This matter came before the court on cross motions for partial summary judgment on the issue of possession only. Plaintiff reserved the right to a trial or evidentiary hearing to determine damages for use and occupancy pursuant to G.L. c. 186 §3 if it prevails on its motion for summary judgment as to possession.¹ The defendants filed an opposition as well as a motion to strike certain affidavits in the plaintiff's motion. The plaintiff filed an opposition to that motion. The court denied the defendants' motion to strike after hearing.

In this action, the plaintiff seeks to evict the defendants, who are the former owners of the subject property located at 22 Arch Street in Malden, Massachusetts, after service of seventy-two hour notices to quit on April 19, 2017. The defendants filed an answer with counterclaims and requested a jury trial. On December 11, 2017 this court received the transfer of the case from Malden District Court. Both parties were represented by counsel throughout this case.

After hearing, the plaintiff's motion is **ALLOWED** and the defendants' motion is **DENIED** because the court finds that there is no genuine dispute as to any material fact and that the plaintiff is entitled to judgment as a matter of law.

SUMMARY JUDGMENT STANDARD OF REVIEW

To prevail on a motion for summary judgment, the moving party must demonstrate with

¹The plaintiff filed a later motion for use and occupancy to be paid pending final disposition of the case. That motion was heard at an evidentiary hearing on May 3, 2019 and an order entered that day that the defendants pay \$1,300 as use and occupancy each month beginning on June 1, 2019.

admissible evidence, based upon pleadings, depositions, answers to interrogatories, admissions to file, and affidavits, that there are no genuine issues as to any material facts. Additionally, the moving party must establish that it is entitled to judgment as a matter of law. Mass.R.Civ.P. 56 (c). *Community National Bank v. Dawes*, 369 Mass. 550, 553-556 (1976). 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 fact. *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). "A party moving for summary judgment in a case in which the opposing party will have the burden of proof at trial is entitled to summary judgment if he demonstrates, by reference to material described in Mass.R.Civ.P. 56(c), unmet by countervailing materials, that the party opposing the motion has not reasonable expectation of proving an essential element of that party's case. *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 716 (1991).

UNDISPUTED MATERIAL FACTS

The defendants executed a mortgage for the subject property located at 22 Arch Street in Malden, Massachusetts to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Summit Mortgage, LLC dated June 10, 2005 and recorded in the Middlesex South Registry of Deeds on June 17, 2005 at Book 45405, Page 384 (Exhibit B to Plaintiff's Motion for Summary Judgment; Exhibit 1 attached to Affidavit of defendant Laura Gomez). On the same date, they executed a corresponding note (Exhibit 1 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment). Between October 10 and November 26, 2010 the defendants and MERS by U.S. Bank National Association (authorized agent, Nominee) entered into a Home Affordable Modification Agreement as a loan modification (Exhibit 2 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment; Affidavit of defendant Laura Gomez). The defendants remained current on their modified mortgage until May 2012. U.S. Bank sent the defendants a Notice of Default dated June 12, 2012 (Exhibit 3 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment; Exhibit A to Defendants' Motion for Summary Judgment). MERS, as nominee for Summit Mortgage, Inc. assigned the mortgage to U.S. Bank, National Association and recorded it with the Registry at Book 59749, Page 468 on July 24, 2012 (Exhibit D to Plaintiff's Motion for Summary Judgment; Exhibit B to Defendants' Motion for Summary Judgment).

U.S. Bank sent the defendants an Unemployment Forbearance Agreement dated August 3, 2012 offering them a temporary reduction in the amount of the mortgage payments (Exhibit 4 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment). However, U.S. Bank declined the proposed modification because the defendants failed to make all of the required payments pursuant to the forbearance plan by notice dated October 5, 2012 (Exhibit 5 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment). U.S. Bank sent a 150 Day Right to Cure Your Mortgage Default letter dated January 14, 2013 to the defendants (Exhibit 6 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment). At the same time, it sent a Right to Request a Modified Mortgage Loan letter to the defendants (Exhibit 7 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment).

Based on the defendants' default on their mortgage payments, U.S. Bank noticed and then conducted a foreclosure auction on January 10, 2017 (Affidavit of Patrick J. Martin and exhibits

attached as Exhibit F to Plaintiff's Motion for Summary Judgment). U.S. Bank was the high bidder at the foreclosure auction and assigned its bid to the plaintiff here (Exhibit A to Plaintiff's Motion for Summary Judgment). On April 10, 2017 U.S. Bank recorded a Foreclosure Deed and Affidavit of Sale at the Registry at Book 69120, Page 393 and the Assignment of Bid at Book 69120, Page 400 (Exhibit A to Plaintiff's Motion for Summary Judgment). On the same day it also recorded an Affidavit of Continuing Noteholder Status at the Registry at Book 69120, Page 403 (Exhibit G to Plaintiff's Motion for Summary Judgment) and an Affidavit of Compliance with Conditions Precedent to Acceleration and Sale "*Pinti* Affidavit" at Book 69120, Page 406 (Exhibit H to Plaintiff's Motion for Summary Judgment).

On April 19, 2017 the plaintiff served by constable a 72 hour notice to quit on each defendant (Exhibits 1 and 2 to Affidavit of Brian Bradley attached as Exhibit I to Plaintiff's Motion for Summary Judgment). There is no dispute that they were received (Defendants' response to plaintiff's Request for Admission no. 17 attached as Exhibit J to Plaintiff's Motion for Summary Judgment). After the notices to quit expired, the plaintiff served the summons and complaint in this action, commencing the eviction case (Exhibit 3 to Affidavit of Brian Bradley attached as Exhibit I to Plaintiff's Motion for Summary Judgment). The defendants continue to occupy the property.

DISCUSSION

Plaintiff's *prima facie* case. In order to establish its *prima facie* case for possession in a summary process action, the plaintiff must show that it held both the mortgage and the underlying note at the time of the foreclosure by power of sale. *Eaton v. Federal Nat'l Mortg. Ass'n*, 462 Mass. 569, 586 (2012). It must comply with G.L. c. 183 §21 and c. 244. Any assignments of the mortgage must be executed before the notice and sale. *U.S. Bank National Association v. Ibanez*, 458 Mass. 637 (2011). The foreclosure deed and affidavit of sale showing compliance with the statutory requirements must be recorded. *Bank of New York v. Bailey*, 460 Mass. 327 (2011). Production of an attested copy of the recorded foreclosure deed and affidavit of sale establishes the plaintiff's *prima facie* case in a summary process case for possession. *Federal Nat'l Mortgage Ass'n v. Hendricks*, 463 Mass. 635 (2012); *Deutsche Bank Nat'l Trust Company v. Gabriel*, 81 Mass. App. Ct. 564 (2012). The plaintiff argues that it has met each of the requirements and supports its arguments with documents in the record, including the recorded foreclosure deed and G.L. c. 244 §15 affidavit.

***Pinti* notice.** The defendants contend that the notice of default they received did not strictly comply with paragraph 22 of their mortgage, thereby rendering the foreclosure void. Paragraph 22 of the mortgage provides as follows in relevant part:

Lender shall give notice to Borrower prior to acceleration following Borrower's breach of any covenant or agreement. . . . 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. {emphasis supplied}

The notice received by the defendants notified them that they "have the right to *assert in any foreclosure action* the non-existence of a default and any other defense you may have to

acceleration and foreclosure.” {emphasis supplied} The notice did not notify them of their right to bring an affirmative case to prevent foreclosure.

In *Pinti v. Emigrant Mortgage Co.*, 472 Mass. 226 (2015), the Court ruled that a foreclosure by statutory power of sale pursuant to G.L. c. 183 §21 and G.L. c. 244 in the non-judicial state of Massachusetts is invalid unless the notice of default strictly complies with paragraph 22, specifically notifying the mortgagors of their right to bring a court action to challenge the default or present a defense to acceleration. See, *Federal National Mortgage Ass’n v. Marroquin*, 477 Mass. 82 (2017) (the use of “may” have the right rather than “shall” have the right did not strictly comply with the terms of the mortgage). The Court found that the ruling of *Pinti* would apply prospectively only, “to mortgage foreclosure sales of properties that are the subject of a mortgage containing paragraph 22 or its equivalent and for which the notice of default required by paragraph 22 is sent after the date of this opinion.”, i.e. July 17, 2015. *Pinti* at 243. In *Aurora Loan Services, LLC v. Murphy*, 88 Mass. App. Ct. 726 (2015) the Appeals Court ruled that the *Pinti* decision applies to cases pending on appeal where the claim that the notice of default failed to strictly comply with the notice provisions in the mortgage had been “raised and preserved” before the issuance of the decision. The *Marroquin* Court ruled that the *Pinti* decision applies in any case where the issue was timely and fairly asserted in the trial court or on appeal before July 17, 2015. This is not the case here.

The default notice was sent more than three years before the Supreme Judicial Court issued its *Pinti* decision. Despite this, the defendants argue that an exemption to the *Pinti* prospectivity rule should apply here because the foreclosure itself occurred after *Pinti* and because the purchaser at the foreclosure auction was not an innocent third party purchaser. There is nothing in the record to indicate that the discrepancy in the language of the mortgage and the default notice chilled the eventual sale or that it was so “fundamentally unfair” as to render the foreclosure void. See, *US Nat’l Bank Ass’n. v. Schumacher*; 467 Mass. 421 (2014); *Santos v. U.S. Bank Nat’l Ass’n*, 89 Mass. App. Ct. 687 (2016). The court finds that there was substantial compliance. The plaintiff or its agents strictly complied with the terms of the statutory power of sale contained in the defendants’ mortgage, the statutes governing foreclosure by power of sale, and G.L. c. 244 §35A regarding the notice of default and the right to cure.

The Court’s concern in making *Pinti* prospective “was that a third party who purchases property that *had once been sold* at a foreclosure auction would not, through a title search, be able to determine whether the notice of default strictly complied with the terms of the mortgage. It would therefore be nearly impossible to eliminate the risk that the foreclosure sale would later be declared void and that the title would be returned to the foreclosed property owner.” *Marroquin*, at 86-87. {emphasis supplied} The defendants are correct that this purchaser at the foreclosure auction was not a third party purchaser. However, the protection afforded by the Court in making the *Pinti* ruling prospective must have been meant also for future purchasers who would not be able to ascertain whether clear title exists when there is a foreclosure in the chain of title.

These features of the foreclosure process here do not justify making a further exception to the *Pinti* prospective rule beyond what was outlined in *Marroquin* and *Aurora*. The court finds that the foreclosure was not void based on this ground.

U.S. Bank as noteholder. In *Eaton v. Federal Nat'l Mortg. Ass'n*, 462 Mass. 569 (2012) the Court held that in order for a foreclosure by power of sale to be valid, the foreclosing party must hold both the mortgage and the underlying mortgage note, unless the foreclosing party is acting as an authorized agent of the note holder. Defendants argue that the plaintiff has not established in the record that U.S. Bank was the note holder or the agent of the note holder at the relevant times in the foreclosure process. However, the affidavit of Katlyn E. Huff² (Exhibit C to Plaintiff's Motion for Summary Judgment) includes a Certificate Pursuant to Massachusetts 209 CMR 18.21A(2) in which U.S. Bank certifies that it has "the right to foreclose because it is: the owner of the mortgage and the authorized agent of the owner of the Note, which is Federal Home Loan Mortgage Corporation." (attached as Exhibit 8). Likewise, U.S. Bank recorded an Affidavit Pursuant to M.G.L. c. 244 §§35B and 35C at the Registry on January 8, 2015 at Book 64768, Page 518 (Exhibit E to Plaintiff's Motion for Summary Judgment). In it U.S. Bank certified that it had complied with the requirements of G.L. c. 244 §35B and that as of the date of signing (December 15, 2014) it was "the authorized agent of the holder of said promissory note for purposes, inter alia, of foreclosing said mortgage on behalf of said note holder." On April 10, 2017 U.S. Bank recorded at Book 69120, page 403 an Affidavit of Continuing Noteholder Status signed on January 27, 2017 (Exhibit G to Plaintiff's Motion for Summary Judgment).

Eaton noted that a "... a foreclosing mortgage holder. . . may establish that it either held the note or acted on behalf of the note holder at the time of a foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G.L. c. 183 §5B. The statute allows for the filing of an affidavit that is 'relevant to the title to certain land and will be of benefit and assistance in clarifying the chain of title.' Such an affidavit may state that the mortgagee either held the note or acted on behalf of the note holder at the time of the foreclosure sale. See G. L. c. 183 §54B." *Eaton*, at 589, n. 28. Based on the totality of the documents in the summary judgment record, the court finds that the plaintiff or its agent was the holder of the note at all relevant times in the foreclosure process. The court finds that the foreclosure was not defective based on this ground.

Defendants' counterclaims. The parties filed motions for partial summary judgment. However, they have briefed the issue of the defendants' G.L. c. 93A counterclaim. The court addresses the counterclaims here.

In their answer, the defendants filed a "defense and/or offset to any claim for use and occupancy", based on allegations of violations of the state Sanitary Code. The court cannot consider this as a defense or a counterclaim in this post-foreclosure eviction action against the former owners because there has never been any landlord-tenant relationship between the parties that would give rise to any responsibility of the plaintiff to the defendants in this regard. *See, Deutsche Bank Nat'l Trust Company v. Gabriel*, 81 Mass. App. Ct. 564 (2012). The parties provided testimony about and the court considered the condition of the subject property in the earlier ruling on the plaintiff's motion for use and occupancy.

The defendants also raised in their answer a counterclaim based on their allegations of

²The Huff affidavit was the subject of a motion to strike by the defendants, which was denied by this court in an earlier order.

defects in the foreclosure process and a counterclaim pursuant to M.G.L. c. 93A based on allegations of unfair and deceptive business practices with respect to the foreclosure process and the home loan modification.³ As discussed above, the record does not support the defendants' position that they were treated unfairly in the foreclosure process.

The parties agree that the defendants obtained a loan modification in 2010 after they defaulted on their mortgage payments (Exhibit 2 to Affidavit of Katlyn E. Huff attached as Exhibit C to Plaintiff's Motion for Summary Judgment; Affidavit of defendant Laura Gomez). The defendants argue that the delay in processing their modification application led them to pay substantial money to a third party company. They paid the modified mortgage amount for about one and a half years, but again defaulted. U.S. Bank offered them an Unemployment Forbearance Agreement in 2012, but did not modify the mortgage payments again because the defendants did not make the required trial payments. The defendants borrowed money and hired a second third party company to help them get another modification, but were defrauded by that company.

Courts have held that a lender has no legal duty to modify or consider modifying a mortgage loan prior to foreclosing. *See, e.g., Santos v. U.S. Bank Nat'l Ass'n*, 89 Mass. App. Ct. 687 (2016) (rejecting plaintiff's claim of "negligent loan modification processing" and noting that "neither the implied covenant nor the duties arising from foreclosure extends to preforeclosure loan modification processing where the mortgage loan documents do not themselves contemplate such modifications."). There is nothing in the record in this case identifying any provision in the mortgage imposing any obligation to negotiate or extend a preforeclosure loan modification or to stay any impending foreclosure proceeding.

The defendants here seek equitable relief to rescind the foreclosure on the basis of their 93A claims. In order to prevail on such a claim, they must show "fundamental unfairness" on the part of the foreclosing entity. *See, US Bank Nat'l Ass'n v. Schumacher*, 467 Mass. 421 (2014); *Bank of America v. Rosa*, 466 Mass. 613 (2013); *Bank of New York Mellon v. Fernandez*, 14-P-1676 Mass. App. Ct. (1:28 Order July 21, 2015). In *Fernandez*, a homeowner claimed that the plaintiff's mortgage servicer had violated the HAMP regulations and G.L. c. 244, §35B when it denied her request to modify her loan. The Appeals Court noted first that "the statute and regulations governing the loan modification program [HAMP and G.L. c. 244, §35B] are not related to the foreclosure of mortgages by the exercise of a power of sale." Any such violation does not affect the mortgage holder's title and right to possession unless there is evidence that it was fundamentally unfair. *Fernandez*, at *1. The defendants allege that there was a delay in the allowance of the modification while they were required to submit additional paperwork. However, there is nothing in this summary judgment record to establish that the plaintiff behaved in any way that rose to the level of "fundamental unfairness" with respect to the loan modification.

³The defendants raised other alleged unfair and deceptive practices in their answer, but they were not addressed in the defendants' motion for summary judgment and there is nothing else in the record regarding such allegations. The court does not consider them here. "[B]are assertions and conclusions. . . are not enough to withstand a well-pleaded motion for summary judgment", *Polaroid Corp. v. Rollins Environmental Services (NJ), Inc.*, 416 Mass. 684 (1993).

ORDER

For the reasons stated above, the plaintiff's motion for summary judgment is **ALLOWED**. The defendants' motion for summary judgment is **DENIED**. Judgment shall enter for the plaintiff for possession of the property and costs.

The defendants' counterclaims are dismissed.

Execution is stayed through July 31, 2019 pursuant to M.G.L. c. 239 §9.


Fairlie A. Dalton, J.

May 24, 2019

APPEALS COURT
Single Justice
Case Docket

M&T BANK vs. LEAH M. CONWAY
2016-J-0020

CASE HEADER

Case Status	Disposed: Case Closed	Status Date	01/22/2016
Nature	Appeal Bond c 239, s 5	Entry Date	01/13/2016
Pet Role Below	Defendant	Single Justice	Grainger, J.
Brief Status		Brief Due	
Case Type	Civil	Lower Ct Number	
Lower Court	Housing Court, Southeast	Lower Ct Judge	Anne Kenney Chaplin, J.

INVOLVED PARTY

M&T Bank
Plaintiff/Respondent

Leah M. Conway
Defendant/Petitioner

ATTORNEY APPEARANCE

Sarah Crocker, Esquire
David J. Rhein, Esquire

Jane Alexandra Sugarman, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
01/13/2016	#1	Appeal entered pursuant to M.G.L.c. 239, § 5 with attachments. ^
01/14/2016	#2	Letter notice to counsel for hearing before Grainger, J. on January 20, 2016 at 10:00 AM in Courtroom 3 ^
01/20/2016		Hearing held.
01/20/2016	#3	Appearance of Attorney David J. Rhein for M&T Bank. ^
01/20/2016	#4	Appearance of Attorney Jane Alexandra Sugarman for Leah M. Conway. ^

DOCKET ENTRIES

01/22/2016 #5

ORDER The defendant seeks review, pursuant to G. L. c. 239, § 5, of the December 17, 2015 order of the Housing Court, Southeastern Division, in docket number 15-SP-798, waiving the appeal bond and establishing use and occupancy payments of \$1,000 per month.[1] The defendant contests the amount of the use and occupancy payments, and requests a reduction to \$500 per month. Discussion. Application of Pinti. With a slight circumstantial distinction, this case falls into the exception to a purely prospective[2] application of Pinti v. Emigrant Mortgage Co., 472 Mass. 226 (2015), enunciated by Aurora Loan Services, LLC v. Murphy, 88 Mass. App. Ct. 726, 731-732 (2015). As in Aurora, the defendant asserted the defective nature of the foreclosure notice as a defense to eviction at trial, and complained specifically that the notice failed to comply with the provisions of paragraph 22 of the mortgage agreement. As in Aurora, the case was pending at the time the Pinti decision was released; however, unlike Aurora, this case was then pending in the Housing Court, rather than on appeal. I consider the distinction to have no material effect on the application of the Aurora exception to the holding in Pinti. The Housing Court judge, aware of the pendency of the decision in Pinti, purposely awaited the release of Pinti before ruling on the defendant's motion to waive appeal bond.[3] But for that sensible approach, intended to avoid a ruling that might be swiftly rendered incorrect, this case, like Aurora, would have been pending on appeal at the time the Pinti decision was released. I therefore agree with the judge's determination that the plaintiff may invoke the Pinti defense. The essential holding of Aurora is grounded in the equitable principle that similarly situated parties should have the same legal rights and benefits. Aurora Loan Services, LLC, supra at 731-732 ("Here, [the defendant] should not be deprived of the benefit of challenging the old rule, nor deterred from challenging existing precedent merely because the Supreme Judicial Court selected Pinti, and not [the defendant], to announce and to clarify the terms and statutes requiring strict compliance.") In this case, the judge found that the defendant was indigent. Accordingly she allowed the motion to waive the appeal bond. However, pursuant to G. L. c. 239, § 6, she ordered the defendant to pay use and occupancy of \$1,000 per month. Counsel for both parties agreed during oral argument that in the unusual circumstances present here, use and occupancy payments operate as the equivalent of a bond. In a conventional landlord-tenant case, the tenant's continued occupation during the time an appeal is prosecuted entitles the landlord to compensation for continued use and occupancy. By contrast, a post-foreclosure sale dispute involves competing claims of ownership. This distinction brings the analysis full circle: a bond is appropriately required under these circumstances only where (in addition to indigency) there is no meritorious claim on appeal, namely where the plaintiff will likely be entitled to compensation for the interim use of its property. The defendant has contested the order to pay use and occupancy, but complains only with respect to the monthly amount. She asserts that an order to pay in excess of \$500 monthly will lead to her eviction and the dismissal of her appeal, because she is unable to satisfy a greater amount. Insofar as she was found to be indigent, and insofar as the Supreme Judicial Court has, as yet, had no opportunity to review Aurora,[4] I consider payment of an amount that allows her to remain on the premises while providing some relief to the bank for the protracted nature of these proceedings to be an appropriate resolution at this stage. The Housing Court's December 17, 2015 order waiving the bond and establishing use and occupancy payments is amended. The defendant shall pay use and occupancy to the plaintiff on the first day of each month during which the appeal is pending in the amount of \$500.00 per month, beginning February 1, 2016.[5] In the event that the defendant ultimately prevails and the foreclosure sale is invalidated, the amounts paid for use and occupancy may, properly documented, be applied to outstanding debt. No other bond is due, and the defendant shall prosecute her appeal without delay. Footnotes [1] The defendant, unsurprisingly, does not contest the Housing Court's finding that she is indigent and that she has a non-frivolous defense to the eviction. [2] Although the defendant also contests that she received the notice of foreclosure, it is undisputed that any such notice would have been sent before the foreclosure sale in 2009. The Pinti decision was released in 2015. The application of Pinti to benefit the defendant thus depends on an exception to the generally prospective effect of that decision. [3] The judge's purposeful delay for this reason was represented to have occurred by the defendant's attorney at oral argument. The transcript has not yet been delivered; the plaintiff's attorney did not disagree with the characterization. [4] While several cases testing the extent of the application of Pinti have been brought in the immediate aftermath of that decision, I note that the issue of Pinti's prospective effect will have a limited shelf life. See McMahon v. Murphy, 2013-P-1706 (decision forthcoming); Boston Property Holdings, LLC v. Callender, 2013-P-1124 (decision forthcoming). [5] The defendant shall owe no back use and occupancy for the months of December 2015 and January 2016. *Notice/Attest/Chaplin, J.