COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. FAR-28190

TAMMY L. LARACE & MARK A. LARACE,
Plaintiffs- Applicants,

v.

WELLS FARGO BANK N.A. AS TRUSTEE, ET AL.,
Defendants- Respondents.

ON APPEAL OF A JUDGMENT OF
THE LAND COURT

PLAINTIFFS-APPLICANTS' APPLICATION FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Glenn F. Russell, Jr.
BBO# 656914
38 Rock Street, Suite #12
Fall River, MA 02720
p. (888) 400-9318
e. russ45esq@gmail.com

June 14, 2021

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CASES

STATUTES AND RULES

INTRODUCTION AND REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

In a civil action brought by the Plaintiffs-Applicants ("Plaintiffs") in the Land Court, they challenged the validity of the efforts by the Defendant-Respondent mortgagee (and its loan servicer) ("Defendants") to foreclose on the mortgage on the plaintiffs' residential home. Despite the trial court judge making much reliance upon claim preclusion related to the LaRace family try title case, the appeals court declined to even opine on the trial court judges error finding claim preclusion attached to the Plaintiffs' 2012 Try Title petition, and merely referenced this issue in a footnote. [99 Mass. App.Ct. 316, 323-326].

In making its ruling, the appeals court concluded that the defendants were entitled to summary judgment, because a 2008 assignment from Option One to the Defendant mortgagee *was recorded* and therefore was sufficient to document the mortgagee's ownership of the mortgage at the time of the foreclosure [99 Mass. App.Ct. 316, 326-328].

Indeed, in its ruling the appeals court panel made a finding that the "2008 assignment" is a *new assignment* that did not become effective until its May 7, 2008 execution date. The panel fails to explicate how this finding could coexist with defendants admissions within

its summary judgment record, as well as made under oath before the trial court judge at the second hearing on summary judgment, which admit that the 2008 assignment is "confirmatory" of an earlier May 26, 2005 assignment of the LaRace mortgage made under the PSA". In addition, defendants made these same admissions in their responses to direct questions propounded under Plaintiffs' discovery requests.

Indeed, Defendants' position in its Memorandum in Support of Summary Judgment, as well as responses to Admissions under oath, is that the LaRace Mortgage was "effectively transferred under the PSA to the Defendant Trustee on May 26, 2005." Plaintiffs also identified to the panel that this May 26, 2005 date is clearly referenced in Ibanez I as the date that Option One executed an assignment of the Plaintiffs' mortgage "in blank", [see Ibanez at p. 643]. Further, when Defendants' counsel was queried by the trial court judge at the second hearing on summary judgment about whether the earlier 2005 assignment of the LaRace Mortgage under the PSA represented an "off record" assignment", defendants' counsel replied "correct", and further stated that this 2008 assignment "confirmed and memorialized" the [earlier] assignment to Wells Fargo [under the PSA]. The 2008 assignment was not a "new

assignment", but rather a "confirmatory assignment" as admitted by Defendants.

The appeals court also found that where the loan servicer did not fail to comply with G. L. c. 244, § 35C, by not certifying a chain of title for the note, given that a foreclosing party must demonstrate an unbroken chain of assignments of the mortgage and that it held the note (or acted as authorized agent for the note holder) at the time it commenced foreclosure [99 Mass. App.Ct. 316, 328-329]. The appeals court also found that where the obsolete mortgage statute, G. L. c. 260, § 33 had no bearing on the mortgagee's ability to foreclose on the mortgage, given that the acceleration of the note after the plaintiffs defaulted on their payment obligation did not accelerate the maturity date of the mortgage. This was so despite the fact that after "acceleration" no more monthly payments are due and the "lender" had requested the entirety of the loan was due and payable [the very definition of "acceleration of the maturity date] [99 Mass. App.Ct. 316, 329]. The appeals court decision also failed to address the Plaintiffs argument related to G.L. c. 244, §35C relative to the Defendants sole reliance upon a statutory affidavit filed to comply with G.L c. 244, §35C to conclusively

prove that it was in possession of the LaRace note at the time of publication of auction.

With regard to the Plaintiffs' earlier 2014 superior court complaint that sought redress solely for ***monetary damages*** related to the 2007 foreclosure and sale of their property under the specific finding made by this Court in *Ibanez I*. It is undisputed, [and as the panel itself stated], that this Court never made any ruling as to the ultimate validity of the 2008 assignment in *Ibanez I*, nor whether the Defendants were ever properly seized of the right to enforce the Plaintiffs' note.

It is undisputed that there were only two statutory auctions published by Defendants, 1) the 2007 auction, and 2) the 2018 auction. Thus, at the time of the 2014 superior court complaint that there was no active publication seeking to utilize G.L. c. 244, §14. Thus, at the time of the filing of the 2014 complaint, the sole issues raised by the Plaintiffs were connected only to the findings made by this Court in Ibanez I. Despite this unalterable fact, the appeals court made finding that the issues involved with the 2014 superior court case were "identical" to the 2018 statutory foreclosure brought by Defendants against Plaintiff. The Panel also stated that the Plaintiffs "should have challenged the validity of

the 2008 assignment as such claim was central to their claims in the 2014 complaint". Again, the panel lost sight of the fact that under this court's 2011 decision in Ibanez, there was *never* any ultimate finding of the ultimate validity of the 2008 assignment, as this court made findings only as to a procedural misstep made by Defendants (not possessing the 2008 assignment until 10 months after the auction).

Thus, unlike the 2018 complaint, the plaintiffs' claims in their 2014 complaint were not reliant upon the ultimate validity or non-validity of the 2008 assignment. Unlike the 2018 complaint, it was immaterial to the Plaintiffs claims under their 2014 complaint that the 2008 assignment be found void. Yet the appeals court made finding that the 2014 superior court complaint and the 2018 land court complaint were "identical" for purposes of issue preclusion.

The appeals court also deemed the Plaintiffs actions as "having the earmarks of serial litigation". The panel lost sight of the fact that Massachusetts is a non-judicial foreclosure jurisdiction, and Plaintiffs were ***forced*** to file the 2018 affirmative complaint in order to defend the statutory extra judicial auction published by Defendants.

The panel also lost sight of the fact that the land court lacked the subject matter jurisdiction to opine on the claims asserted within the 2014 complaint, which required that plaintiffs bring those claims at the superior court. Thus, despite the appeals court assertion, there was no "serial litigation" by Plaintiffs or their counsel.

The appeals court ruling in this matter stands in sharp contrast with this court's finding in Ibanez regarding the same parties, fact pattern, and legal issues presented, with the additional request to make an ultimate determination of ownership of the property at issue. Further, Defendants advance the same theory they advanced in Ibanez, [reliance upon an "effective transfer of the mortgage under the PSA]. Indeed, defendants' theory is precisely identical to what this court previously found deficient.

The appeals court ruling also stands for the proposition of chilling any and/or all advancement of legal argument by counsel involving nuanced issues under esoteric areas of the law, such as foreclosure involving the highly complex fact patterns presented in fact patterns involving "securitized" mortgage loans. The citizens of this Commonwealth should be able to rely upon the fact that the court is open to all, even to those

cases that involve issues that some may deem unpalatable and destabilizing. A certain Second President of these United States would most certainly concur.

The Court should grant review here and reverse the Land Court's decision. Stare decisis, the rule of law, and the precedential value of rulings from this court, weigh in the balance.

STATEMENT OF PRIOR PROCEEDINGS AND FACTUAL BACKGROUND

I. Defendants 2008 Quiet Title Case and Subsequent Ruling By This Court in U.S. Bank v. Ibanez, 458 Mass. 637 (2011)

On October 30, 2008, defendant Wells Fargo Bank N.A. as Trustee for ABFC 2005-OP1 Trust filed an action to Quiet Title under G.L. c. 240, §§6-11 against plaintiffs [see 17 LCR 202].

Defendants filed this action due to the fact that a question arose as to the sufficiency of the publication of the auction sale of plaintiff's Springfield home that took place in the Boston Globe. G.L. c. 244, §14 requires such publication to take place in the "local paper". The trial court judge in this matter (Long, J.) determined that the circulation of the Boston Globe was actually higher in Springfield than the Springfield Republican (local paper), and therefore was sufficient to meet statutory muster.

However, Judge Long undertook further examination sua sponte to determine that, in fact, Wells Fargo Bank,

N.A., had failed to establish that it was the current "holder" of the LaRace mortgage by assignment at the time of the 2007 publication of auction sale. Judge Long did not make any ruling as to the ultimate validity or non-validity of the 2008 assignment.

The LaRace case was combined with U.S. Bank v. Ibanez [17 LCR 679] and taken up by this Court upon defendants' request for Direct Appellate Review. Thereafter the combined cases were examined by this court under U.S. Bank v Ibanez, 458 Mass. 637 (2011).

The issue in both the Ibanez and LaRace fact patterns specifically involved fact patterns where the foreclosing entities received assignments of mortgage months after the foreclosure auction sales took place. These financial entities attempted to rely upon "mortgage securitization documents" entitled "pooling and servicing agreements" ("PSA") to have made an earlier assignment prior to the foreclosure auctions.

Ultimately this court ruled for plaintiffs solely on the basis that the defendants did not possess an assignment of the LaRace mortgage at the time of the 2007 publication of sale and rejected the claim that the "securitization documents" backdated the 2008 assignment.

This court made no definitive ruling in Ibanez I as to the ultimate validity of the 2008 assignment that defendants relied upon. However, this Court did respond to the defendants' theory as to why they thought the

2008 assignment was valid, which left open questions to be addressed on another day.

During the examination of these financial entities' theory of earlier transfers, defendants admitted to this court that in these particular cases, that they created an original assignment of the LaRace and Ibanez mortgages "in blank", i.e., to no named assignee or grantee.

Under the LaRace fact pattern, this court specifically described the factual context of the transfers of the LaRace mortgage under defendants' descriptions thereof made under oath [see U.S. Bank v. Ibanez 458 Mass. 637, 643-644].

In Ibanez I, this court specifically found the following: "***On May 26, 2005, Option One executed an assignment of this [LaRace] mortgage in blank.***" [458 Mass. 637, 643]. In Ibanez, this court also found that an assignment of mortgage made out in blank conveys nothing and is void, to which defendants conceded [458 Mass. 637, 652]. This court also found that a financial entity may rely upon "securitization documents" to transfer a mortgage, however it must be shown by the party making such claim that the party transferring the mortgage under the PSA to the foreclosing entity, actually owned the mortgage being transferred thereunder, [458 Mass. 637, 651].

It is further undisputed that at the time that this court reviewed the failed 2008 statutory foreclosure auction undertaken by defendants, G.L. c. 244, §14 only

required that defendants be the "holder of the mortgage" at the time of publication.

After this court's ruling in Ibanez I, the examination of G.L. c. 244, §14 was subsequently changed to also require that the foreclosing "mortgagee" also show hat it was also the note owner and/or agent of the note owner as well as being in possession of a legally valid assignment of mortgage, see Eaton v. Fed. Nat'l Mortgage Ass'n, 462 Mass. 569 (2012). It is undisputed that this court left open for another day the question as to the ultimate validity of the 2008 assignment of mortgage that defendants relied upon.

II. The LaRace 2012 Try Title Case

After this court's ruling in Ibanez I, the LaRace family sought to have a final judicial determination as to the question of the ultimate validity of the 2008 assignment that was left open by this court in Ibanez I. Due to the extremely complex nature of the state of title, the LaRace Family made the decision to return to the land court to seek relief.

To this end, the LaRace family filed a "Petition" in the land court under G.L. c. 240, §§1-5, [in which the land court has sole subject matter jurisdiction] claiming that they were 1) in possession of land, 2) holders of the record title to that land, and 3) identified an adverse claimant to their title, [Wells Fargo Bank N.A. as Trustee et. al.]. **It is undisputed that there was no new publication of auction sale at the time the LaRace**

family filed heir 2012 try title Petition.

It is undisputed that a "Petition" under a try title case *does not* represent an "affirmative complaint" filed by the Petitioner, but rather only an identification of the three statutory requirements identified in the above paragraph. Thus, a "Petitioner" cannot allege other "claims" in a Petition as one would do in a "complaint".

Only upon satisfying all three of these elements, would a Petitioner have standing and ability to invoke the subject matter jurisdiction of the land court under the try title statute, in order that a Land Court Judge could issue an order to have the Respondent defendant file a complaint against the LaRace family to "try its title", [see Abate v. Fremont, 470 Mass. 821, 827 (2015)]. The try title statute is a two-step procedure that cannot be "compressed".

In Abate, this court examined only the "record title" prong of the three required statutory condition precedents for a Petitioner to have standing to invoke the jurisdiction of the land court under G.L. c. 240, §§1-5, and G.L. c. 185, §1(a½). However, because this court thought that the issue could arise in future cases, this court examined the "adverse claimant" prong of the statutory requirements and definitively found that a mortgagor could not establish the "adverse claimant" prong against a mortgagee unless the foreclosure auction sale had been completed [470 Mass. 821, 834-835 (2015)].

At the time, the LaRace family filed their try title

Petition, there was a split of authority at the land court as to the view as to whether a mortgagor could allege that a purported mortgagee was an "adverse clamant" prior to the auction sale, which was the major reason that this Court took Abate up on appeal [see Varian vs. Bank of N.Y. Mellon, Mass. Land Court, No. 12-MISC-462971 (Aug. 23, 2013)].

The LaRace 2012 matter also ended up entering into protracted litigation as well. Defendants removed this case to the federal forum, and which was ultimately appealed to the U.S. Court of Appeals for the First Circuit.

While this 2012 matter was pending at the First Circuit, this court issued its opinion in Abate. Thereafter the U.S. Court of Appeals dismissed the LaRace try title Petition on the basis of the findings made by this Court in Abate.

The result of such dismissal was the fact that the LaRace try title action was a nullity. This was due to the fact that as a result of this court's ruling in Ibanez I, the LaRace family could not identify an "adverse claimant" because there was never any completed foreclosure auction sale by defendants.

III. Plaintiffs 2014 Superior Court Case

Due to the fact that plaintiffs could not file any affirmative "claims" in their try title Petition, they had to file a companion civil lawsuit at the Hampden County Superior Court to address monetary damages incurred as a proximate cause from the defendants' void 2007 publication of auction and ultimate void auction

sale.

Plaintiffs' theory of liability in the 2014 complaint stemmed solely from defendants undertaking such actions prior to becoming in possession of an assignment of the LaRace mortgage. [**Note that the LaRace family did not base any claim on any theory of the ultimate invalidity of the 2008 assignment, but rather only upon defendants not being in possession of the assignment as determined by this court in Ibanez I**].

Thus, the ultimate validity of the 2008 assignment was immaterial to the claims asserted by Plaintiffs within their 2014 complaint.

It is also undisputed that there was also no new publication of auction sale at the time the LaRace family filed heir 2014 Superior Court complaint.

The LaRace family also based their G.L. c. 93A claim in their 2014 complaint on a 2009 demand letter sent to defendants' counsel.

Ultimately, the 2014 matter was dismissed on statute of limitations grounds, where the appeals court found that the LaRace family was on notice of the (2007 claims) at the time of this court's ruling in Ibanez I. **Again, the notice of those "claims" only involved this court's finding that the defendants were not in possession of the 2008 assignment of the LaRace mortgage at the time of the 2007 publication of auction, *not notice that there was any definitive ruling that the 2008 assignment was void or not void.***

IV. Plaintiffs 2018 Land Court Case

On June 12, 2018, defendants caused a second publication of auction of the LaRace property to be published in the Springfield Republican.

In the June 12, 2018 publication of auction, it now referenced a 2012 assignment by "Sand Canyon" to defendants which was "recorded" to "confirm" the earlier 2008 assignment in the name of Option One, where the name of Option One had changed. It is undisputed that defendants continue to rely upon the 2008 assignment of mortgage to have supported their claim to be a statutorily proper party to have exercised the power of sale in the LaRace mortgage contract in 2018.

Because the only way for a Massachusetts borrower to defend an impending statutory foreclosure auction sale is by filing litigation to challenge the foreclosing entity's right to utilize G.L. c. 244, §14, the Plaintiffs were ***forced*** to file the 2018 complaint before the land court.

Unlike the 2014 Superior Court Case, at the time of the June 12, 2018 publication of auction, the defendants 2008 assignment was recorded prior to the foreclosure auction sale.

Thus, unlike the 2014 Superior Court case, Plaintiff's claims were not foundationally based upon the 2008

assignment not being recorded prior to the publication, but rather upon the land court judge making a finding that the 2008 assignment was ultimately void, which would extend backwards in time as this analysis was never previously undertaken by this court in Ibanez I.

Again, the ultimate determination of the validity of the 2008 assignment was never examined in Ibanez I, the 2012 try title case, or the 2014 Superior Court case.

Additionally, there were no publications of auction at the time of the filing of the LaRace 2012 try title Petition or at the time of the 2014 Superior Court case. The only two publications of auction in this matter took place in 2007 and June of 2018.

With regard to "issue preclusion", the land court judge purported to issue final ruling over matters beyond the subject matter jurisdiction of the court. Plaintiffs identified within their 2018 complaint that two counts (93A and Slander of Title) were beyond the jurisdiction of the court, and that they would request that the land court judge site as a superior court judge on those two counts.

At the initial case management hearing, undersigned raised this issue, to which the land court judge flatly refused to sit as a superior court judge and dismissed these two claims without prejudice.

Unlike the 2014 Superior Court case that included a 93A claim, the 2018 93A count was not reliant upon a 2009 demand letter (which was found to be beyond the statute of limitations). Under their 2018 93A claim, the Plaintiffs did not even send a demand letter, but relied upon the exception stated in G.L. c. 93A, §3, that the demand letter requirement is obviated where the defendant does not maintain a pace of business, nor maintains any assets within the Commonwealth, [see Moronta v. Nationstar, 88 Mass.App.Ct. 621, [at n. 11] (2015)].

The land court judge made much of the wording of the paragraphs of the 2018 93A claim being almost identical to those within the 2014 complaint. However, in so doing the land court judge lost sight of the fact that the underlying theory of relief in the 2018 complaint is completely different than 2014 as the 2018 claim did not rely on the expired 2009 demand letter, but rather the entirety of the actions of defendants under a theory that the 2008 was void from day 1 [a claim never examined in any of the previous litigation between the parties].

The land court judge was engrossed in a form over substance error in viewing the 2018 complaint.

The land court judge jettisoned the rest of the Plaintiff's claims based upon his own subjective view of the law, which included the LaRace claim under the

Obsolete Mortgage Statute, claim under 209 CMR 18.21 A(2)(C), and claim for Quiet Tile. All of these claims, save the claim under the Obsolete Mortgage Statute derive from the judge's findings relative to the 2008 assignment of mortgage.

V. Plaintiffs Appeal That is The Subject of The Instant Petition to This Court

After the decision was enter in the 218 land court case Plaintiffs' timely filed, and perfected, their notice of appeal to the Massachusetts Appeals Court.[1]

The Plaintiffs set forth a detailed statement of issues within their opening brief, which were **1)** was the 2012 try title Petition a "complaint" that created claim preclusion under the 2018 complaint, **2)** did the land court judge err in finding the 2012 confirmatory assignment and 2008 confirmatory assignment legally effective to have confirmed "off record assignments" under the PSA for the Defendant to have validly exercised G.L. c. 244, §14; **3)** Did the Land Court Judge err in allowing the admission into evidence a purported, redacted, and unauthenticated "Mortgage Loan Schedule" that was submitted over three months after discovery had closed; **4)** did the land court judge err in solely accepting Defendant's proffer of a "G.L. c. 244, §35C Affidavit" as admissible evidence to prove the

[1]

truth of the matter asserted where Defendant's Affidavit failed to meet requirements of R. 56(e); **5)** did the land court judge err in finding that the language of 209 CMR 18.21A(2)(c) would be "ultra vires" to the SJC holding in Eaton to require notice to a borrower requiring certification of the chain of title to the mortgage and chain of ownership of the note; **6)** did the land court judge err by not finding that the Plaintiffs mortgage was obsolete as a matter of law, where the date when the Plaintiff's debt fell due was accelerated in 2007 from its pre default contractual maturity date of 2035; **7)** did the Land Court Judge err in not finding for Plaintiffs' under their Count for Quiet Title?; and **8)** did the land court judge err in finding undersigned violated Rule 11 by acting in "bad faith"?.

In its ruling the Appeals Court either declined or refused to opine on issues 1) [try title preclusion], 3) [evidentiary issue re mortgage loan schedule], and 4) 35C Affidavit under MRCP, R. 56(e)]. The Panel also acted under de novo review to issue a completely different basis than the trial court judge to opine on issue 2) above [2008 assignment].

The Panel fashioned a ruling to support judgment to defendants on the plaintiffs' claims, which clearly misstated history of the plaintiff's litigation and theory

of relief thereon, as well as misstated plaintiffs' specific claim for relief under the 2018 complaint.

The Panel also utilized the term "serial litigation" with regard to the plaintiffs' previous litigation but failed to actually review [or ignored] the previous litigation as to its actual legal basis. The panel also failed to appreciate that due to the draconian "non-judicial" foreclosure process in the Commonwealth a borrower is forced to file litigation to defend their title from an improper statutory foreclosure action.

With regard to issue #2) [the 2008 assignment], the panel clearly erred in its analysis by finding that the 2008 assignment was a "new assignment" that somehow "ripened" after the 2007 auction sale. Such finding is directly inapposite of this court's examination of the history of transfer of the LaRace Mortgage in Ibanez I. Such finding was also in direct contradiction to the defendants' pleadings, statements made in discovery responses, and statements made at the second hearing on summary judgment, where defendants' position as that the 2008 assignment was only "put on record" to memorialize an earlier transfer under the PSA that was "effective" on May 26, 2005. This is the same argument defendant relied upon in Ibanez I.

The above was the precise reason the defendants

scrambled at the 13th hour to attempt to circumvent the tracking order deadlines to submit an unverified "mortgage loan schedule" after the discovery deadline had passed, and without any leave from the court.[2] Neither the trial court judge, nor the panel ever examined this evidentiary issue raised by plaintiffs. Indeed, the Panel completely ignored issue #3) raised by plaintiffs regarding this attempt.

The panel also erred by stating that the plaintiffs' 2014 complaint "relied upon finding the 2008 assignment void", which therefore presented "issue preclusion to the 2018 claims [to which the land court judge had no jurisdiction over]. In fact, the ultimate validity or invalidity the 2008 assignment was immaterial for purposes of the plaintiffs' claims under the 2014 complaint as they were based upon the defendants not being in possession of the 2008 assignment at the time of auction (as found by this Court in Ibanez).

Indeed, the issue to determine the ultimate validity of the 2008 assignment was raised for the first time under the 2018 complaint, to which the trial court never truly

[2] Plaintiffs vociferously objected to this proffer by defendants, both in a Motion to Strike, and at oral argument, on an "evidentiary basis", as well as the fact that it was sent to undersigned and filed well after the discovery window had closed, and without request for leave to amend tracking deadlines.

reached due to his position that plaintiffs were subject to res judicate from the 2012 try title action [which the panel backhandedly conceded was error by failing to opine].

The panel also erred in the acceptance of defendants' theory that somehow a statutory affidavit filed only to comply with G.L. c. 244, §35C, in which the affiant relies upon unattached "business records" would somehow comply with MRCP, R. 56(e).

The panel also erred in finding that the obsolete mortgage statute did not apply to the instant fact pattern, which finding contradicted itself within the very same sentence. The panel correctly identified this court's finding in *Deutsche Bank v. Fitchburg Capital* that the maturity date of the note controls the maturity date of the mortgage, but confusingly then states that the acceleration of the maturity date of the note did not accelerate the maturity date of the mortgage.

STATEMENT OF POINTS WITH RESPECT TO FURTHER APPELLATE REVIEW

1. Whether the Appeals Court legally erred in finding that it could affirm judgment made by the land court judge on claims beyond the subject matter jurisdiction of the land court.

2. Whether the Appeals Court legally erred in finding that the 2008 assignment represented a "new

assignment" that was not "confirmatory" of an earlier assignment, which also supported Plaintiffs' claim for Quiet Title.

3. Whether the Appeals Court legally erred in finding that there was "issue preclusion" was presented under plaintiffs' claims in their 2014 complaint.

4. Whether the Appeals Court erred in accepting defendants claim that the statutory affidavit filed upon the plaintiffs' title at the registry of deeds definitively established defendants' "physical possession" of the plaintiffs' bearer note at the time of the June 12,2018 publication of auction.

STATEMENT WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

I. FURTHER APPELLATE REVIEW IS WARRANTED TO RESOLVE THE CONFLICT AT THE TRIAL COURT LEVEL REGARDING THE ACCEPTANCE OF THE EXTRA-JUDICIAL STATUTORY G.L. c. 244, §35C AFFIDAVITS TO CONCLUSIVELY PROVE THE FORECLOSING ENTITY'S POSSESSION OF BEARER INSTRUMENTS AT THE TIME OF THE FIRST PUBLICATION OF AUCTION

The Appeals Court failed to even acknowledge plaintiffs' submission of supplemental authority on the docket at paper #25 [corrected] that identifies that there is a current split of authority at the trial court level regarding the sufficiency of the G.L. c. 244, §35C Affidavit to conclusively establish that a foreclosing entity has met its MRCP, R. 56(e) burden of proof that it was in possession of the a borrowers' note at the time of the first publication of auction as required under G.L.

c. 244, §14.[3]

Defendants solely relied upon this G.L c. 244, §35C affidavit to met its burden under MRCP, R. 56.[4] In the specific context of a MRCP, R. 56 proceeding, this statutory affidavit fails to meet requirements under MRCP, R. 56(e), where the 35C affiant refers to "business records" to glean personal knowledge to testify that the financial entity was in possession of the borrower's note at the time of publication.[5]

The split of authority at the trial court level creates uncertainty for residents of this Commonwealth challenging a statutory foreclosure sale, either pre foreclosure, or post foreclosure in the Housing Court.[6]

---

[3] [see *Deutsche Bank National Trust Co. et. al. v. Scanlan*, 19H82SP01496,(Metro-South Housing Court 2020), [attached hereto in Addendum, at Document 3, pp. 5-8].

[4] Subsequent to this court's ruling in Ibanez I, on June 22, 2012, this court issued its ruling in Eaton v. Fed. Nat'l Mortgage Ass'n 462 Mass. 569 (2012) that held prospectively that a foreclosing entity must show proof that it either owns the borrowers' note or is an agent thereof at the time of publication under G.L. c. 244, §14.

[5] G.L. c. 244, §35C(b) specifically states these affidavits are filed to comply with "this section", not that they establish compliance with G.L. c. 244, §14. Indeed, the blanket acceptance of these affidavits by the trial court to satisfy a foreclosing entity's compliance with G.L. c. 244, §14, precludes the borrower from ever challenging the assertions made therein. These affidavits are filed extra-judicially upon a borrower's title without notice to the borrower. Then in a contested foreclosure matter, the financial entity then uses these same uncontested affidavits to offensively assert statutory compliance with G.L. c. 244, §14.

[6] In this matter, nowhere does the 35C affiant state that she saw the LaRace note or identified what specific "business record" provided her personal knowledge to

It is exceptionally important that this court resolve this existing dichotomy.

II. THE APPEALS COURT ERRED IN FINDING THAT THE 2008 ASSIGNMENT WAS NOT "CONFIRMAORY" OF AN EARLIER ASSIGNMENT WHERE DEFENDANTS ADMITTED THAT IT WAS, WHICH ALSO SUPPORTED PLAINTIFFS' CLAIM FOR QUIET TITLE

Further appellate review is also warranted on this issue because the Appeals Court ruling directly contradicts this court's guidance in Ibanez I regarding *this same particular fact pattern* and *these same particular litigants*, as the law of the case.

A. Ibanez I

While Ibanez I only involved the defendants' failure to actually possess the 2008 assignment at the time of the 2007 publication of sale [not its ultimate validity], the defendants stated their position on the record under oath, which was that the 2008 assignment did not actually take place in 2008, but the 2008 assignment on record only purported to have "confirmed" an earlier assignment under the "PSA", [see Ibanez I at p. 650].

"Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA"

The above constitutes an admission by defendants that the 2008 assignment was not contemporaneous with any

---

testify as to who currently holds/owns plaintiffs' note. [see RAII-024,last para., and RAII-072,073]. Further, there are no records attached to this affidavit, which relies upon purported out of court document(s), which clearly violates MRCP, R. 56(e), and would preclude the affiant from being a competent witness to testify at trial.

actual assignment of the LaRace mortgage, but rather was merely "confirmatory". Further, this court in Ibanez I [unlike the Appeals Court here] acknowledged the defendants' position that Option One made a May 26, 2005 assignment of the LaRace mortgage in "blank", and then [only according to defendants] Option One purportedly later also made a July 28, 2005 assignment of the LaRace Mortgage to Bank of America [not to defendants and not in 2008], see Ibanez I at p. 643-643

"The LaRace mortgage. On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a $103,200 loan; the mortgage was recorded that same day. **On May 26, 2005, Option One executed an assignment of this mortgage in blank. According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement.** Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement (PSA)."

In Ibanez I, defendants never proffered the "Flow Sale agreement" purportedly "assigning" the LaRace Mortgage to Bank of America on July 28, 2005. This left only the May 26, 2005 assignment from Option One "in blank" as the only operative "earlier assignment under the PSA" that 2008 assignment could "confirm", [see RAIII-141]. Nowhere in Ibanez I do the defendants ever state that there was ever an actual assignment that took place in 2008. Indeed, defendants current position remains the same.

B. The 2018 complaint

Because the LaRace try title petition was deemed a nullity where [under guidance from this court in Abate] undersigned made good faith arguments utilizing this fact to form the foundational basis for all of the claims made within the 2018 complaint, which differ significantly from the earlier 2014 claims related to lack of possession of the 2008 assignment.[7], [8]

After filing the 2018 complaint, and attending the land court case management conference, plaintiffs submitted discovery requests to defendants, asking specific and pointed questions about the 2008 assignment of mortgage, as well as other issues [see RAIII-161 to RAIII-465]. Specifically, the defendants responded to admissions stating that there was no original assignment made to Wells Fargo Bank, N.A. in 2008, or the "effective date of April 18, 2007" stated on the face of the 208 assignment, [see RAIII-185][9] In defendants memorandum in

[7] Before filing the 2018 complaint undersigned spent a significant amount of time reviewing the issues raised in previous litigation, admissions made by defendants in Ibanez, conducted a review of all relevant case law, and ratio decidendi examination thereof, and determined that in fact, there had never been any examination undertaken with regard to the purported ultimate validity of the 2008 assignment.

[8] During the time leading up to the filing of the 2018 complaint, undersigned was also the sole caregiver for a close family member who was terminally ill which required significant time to be spent at a Rhode Island hospital to make healthcare decisions.

[9] **REQUEST NO. 24:** The original assignment of Plaintiffs' Mortgage was dated April 18, 2007. **No.24 RESPONSE:** Denied; **REQUEST NO. 25:** The original assignment of Plaintiffs'

support of their summary judgment they stated as follows under oath:

"Notwithstanding, the 2012 Confirmatory Assignment is also valid **because the Mortgage was transferred to Wells Fargo as Trustee on or about May 26, 2005**, pursuant to the terms of the pooling and servicing agreement for the securitized trust for which Wells Fargo is Trustee." [RAII-017, 018]

The PSA is publicly available through the SEC and available on their website. In a July 28, 2005, sale, and servicing agreement Option One assigned the Mortgage to Bank of America. Bank of America assigned the mortgage to ABFC on October 1, 2005, in a mortgage loan purchase agreement. As part of PSA, ABFC pooled the mortgage with others and assigned it to Wells Fargo as Trustee. As such, **the [LaRace] Mortgage was effectually transferred to Wells Fargo as Trustee on or about May 26, 2005 and was no longer in the possession of Option One and/or Sand Canyon as of that date." [RAII-018].**

At the second hearing on summary judgment defendants counsel explicated the following admissions:

THE COURT: **So the loan was sent from Option One into this PSA [2005], and then in 2008, Option One executed an assignment** MS. LAKE: **Yes. To clarify the chain of record, so chain of title because** --THE COURT: And the assignment referred to the PSA? I'm not really --14 MS. LAKE: The assignment does not refer to the PSA. The -- because, as the record at the registry stands that the mortgage was in the name of Option One, **Option One had to execute an assignment in compliance with Massachusetts law *to confirm and memorialize* that Wells Fargo was now the holder.** RAV-186, 187

THE COURT: So you're saying that putting it into the PSA was essentially like an off record assignment --MS. LAKE: Correct.

Mortgage was dated May 07, 2008. **No.25 RESPONSE:** Denied. **REQUEST NO. 26:** The original assignment of Plaintiffs' Mortgage was dated March 07, 2012. **No.26 RESPONSE:** Denied. **REQUEST NO. 27:** The original assignment of Plaintiffs' Mortgage was dated October 31, 2005. **No.27 RESPONSE:** Denied

Thus, unlike the Appeals Court finding, and as stated in the plaintiffs' 2008 complaint and opposition to summary judgment, the defendants continue to claim that the 2008 assignment is "confirmatory" of an "off-record" assignment of the LaRace mortgage with an "effective date" of May 26, 2005.[10],[11],[12]

Despite the above admissions made by defendants, the panel, on de novo review, the Appeals Court made finding that the 2008 assignment "became a new assignment" on the date of its 2008 execution, [see LaRace v. WF, 99 Mass.App.Ct. 316, 327].[13] Further, even more curiously, the Appeals Court erred in stating that:

"The LaRaces argue that the 2008 assignment is invalid because it is "confirmatory" of the 2005 assignment in blank held invalid in Ibanez. **Neither the record, nor Ibanez support this argument.** First, the 2008 assignment neither states that it is "confirmatory," nor refers to

[10] The date of the blank assignment is indisputably dated May 26, 2005 [see Ibanez I, at 643]. The above cannot be credibly disputed by defendants.

[11] Plaintiffs identified all of the above to the panel in their opening brief at p. 25*; ["See also Defendants' counsel description of the chain of ownership [RAV-176 to RAV-187].*

[12] G.L. c. 183, §54B does not apply, due to the fact that there must first be established an actual [legally valid] "holder" of the mortgage, and plaintiffs do not make any challenge based upon any lack of signatory "authority" to make the 2008 assignment, but rather claim that the 2008 assignment itself is void, see Sullivan v. Kondaur Capital, 85 Mass.App.Ct. 202, 205-206, and at n. 8.

[13] Here, the defendants made the same argument in 2018, provided no new admissible evidence of any earlier document, but repeatedly stated that they continue to rely upon a transfer under the PSA, and the May 26, 2005, assignment.

the 2005 assignment in blank. This in and of itself is reason to deem the 2008 assignment a new assignment. The LaRaces appear to argue, however, that the 2008 assignment was tainted by the invalid 2005 assignment. For this proposition the LaRaces rely on Ibanez. This reliance is misplaced. In Ibanez, the court explained that the 2008 assignment was not confirmatory. Ibanez, 458 Mass. at 654. , [99 Mass.App.Ct. 316, 327]

The above finding by the Appeals Court is directly contradicted by the defendants' admissions as outlined above. Further, the Appeals Court reads the statement in Ibanez I at p. 654 out of context.[14], [15]

Defendants specifically sought to add an unauthenticated redacted "mortgage loan schedule" to the record in a purported "SUPPLEMENTAL DISCOVERY RESPONSE" filed at the land court on **April 19, 2019**, [see RAIV-527 to RAIV-548]. Defendants never sought leave to expand the existing January 09, 2019 discovery deadline [RAI-417 to RAI-425]. Indeed, defendants thereafter bootstrapped such improper fling, which included the unauthenticated

[14] In fact, what this court actually stated in Ibanez at p, 654 was that; where defendants relied upon an "earlier assignment under the PSA", that particular claim would fail, as defendants relied upon the earlier May 26, 2005 assignment that was made in blank.

[15] This was why defendants scrambled at the 13th hour to ambush plaintiff by an April 19, 2019 attempt to introduce documents to the record, over three (3) months after discovery had closed on January 09, 2017, [see RAI-417 to 425].

"mortgage loan schedule", through addition to their filed reply brief in reliance thereon, see RAIV-549, 552-553].[16]

Both the trial court and Appeals Court never discussed this issue.

III. THE APPEALS COURT ERRED IN FINDING THAT THE LEGAL BASIS OF CLAIMS MADE BY PLAINTIFFS IN THEIR 2014 COMPLAINT WERE "IDENTICAL" TO THE LEGAL BASIS FOR PLAINTIFFS' CLAIMS IN THEIR 2018 COMPLAINT AND THEREFORE SUBJECT TO ISSUE PRECLUSION

The Appeals Court carried over its incorrect findings relative to the 2008 assignment with regard to the trial court judges finding of issue preclusion under the plaintiffs' 2014 complaint. The panel's error can clearly be identified in this statement:

"The claims in the 2014 Superior Court action sought redress for the improper 2007 foreclosure, **but at the heart of the claims was the contention that the 2008 assignment was "void."** Accordingly, Wells Fargo and Ocwen maintain, to avoid impermissible claim splitting, the LaRaces should have raised all claims challenging the validity of the 2008 assignment in the action that they chose to bring in 2014." [99 Mass.App.Ct. 316, 325]

Plaintiffs' 2014 claims never sought relief on the legal basis that the 2008 assignment was void, [because this court never made any such pronouncement in Ibanez

[16] Plaintiffs moved to strike such filing on the basis that 1) it was prejudicial, and not properly authenticated where defendants' attorney did not have personal knowledge to testify as to this redacted document [RAV-001-006]; as well as a supplemental response as a result of the trial court judge's order in the first summary judgment hearing, [RAV-011 to RAV-020].

I]. Plaintiffs clearly only sought redress ***because the defendants were not in possession of the assignment in 2008 at the time of the 2007 publication of auction***.[17] As the panel notes in the opening of its ruling this Court in Ibanez I never made any finding of the invalidity of the assignment.

Unlike the 2014 complaint, the foundational legal basis of the 2018 complaint was to undertake the examination left open by this court as to the validity of the 2008 assignment.[18], [19]

A. The Appeals Court Erred By Affirming The Land Court Judgment on Claims To Which He Lacked Subject Matter Jurisdiction

The Appeals Court also affirmed the land court judge entry of judgment, with prejudice, on claims made under G.L. c. 93A and Slander of Title, where 1) the land court judge lacked the subject matter jurisdiction to even opine, and "judicial economy" cannot change this unalterable fact, and 2) unlike the panel's findings, the

[17] The panel clearly lost sight of the fact that the validity or invalidity of the 2008 assignment was immaterial for purposes of the 2014 complaint.
[18] The cause of the unartfulness of the pleadings can be found in footnote 8.
[19] While plaintiffs may have in artfully drafted pleadings resembling the 2014 complaint, the trial court and the panel failed to examine the underlying legal foundational basis for the 2018 complaint allegations, which were indisputably distinct from the 2017 "possession claims".

2014 claims are not preclusive of the 2018 claims as they are indisputably premised on a completely different underlying legal foundational basis.

B. Sanctions Were Clearly Not Warranted Under R. 11, Where Undersigned Advanced Good Faith Legal Argument In A Largely Undeveloped Area of The Law

Thus, where the causes of action between the 2014 complaint and the 2018 complaint are indisputably distinct from each other [insufficient identicality], the judicial rulings on the 2014 claims cannot be preclusive to the 2018 claims, as contrary to the panel finding, under the claims made in the 2014 complaint, there was never the need to prove that the 2008 assignment was void.[20],[21] Additionally, assertions of "serial litigation" by the panel misconstrues what took place. First, the plaintiffs filed a try title petition in the land court, which is not a complaint, and plaintiffs could not allege other "claims" thereunder. Second, because the plaintiffs could not allege these claims they were forced to file a separate superior court case to address monetary damages only. While the panel states that plaintiffs should have filed

[20] Indeed, there was no publication of auction at the time of the 2012 try title Petition or the 2014 complaint.

[21] Contrasted with the 2018 complaint to which the plaintiffs were forced to file to defend their title, which required invalidating the 2008 assignment, not merely that defendants were not in possession of it.

claims to void the mortgage in the 2014 action, besides being immaterial to the money damages action, ***the try title case was still active and pending at the time of the 2014 filing of this complaint***. To find that plaintiffs' counsel acted in bad faith in these particular circumstances would stand for the proposition of imposing sanctions on counsel merely to chill argument on an unpopular cause, as there is absolutely no basis in law or fact to have done so.[22] [23]

CONCLUSION

This Court should grant further appellate review and reverse the judgment of the Land Court.

June 14, 2021 Respectfully submitted,

/s/ Glenn F. Russell, Jr.
Glenn F. Russell, Jr.
(BBO No. 656918)
38 Rock Street
Fall River, MA 02720
(888) 400-9318
russ45esq@gmail.com

Counsel for Plaintiffs-Applicants

[22] Undersigned hired Morrison & Mahoney to defend the R. 11 Order to Show Cause. [see brief in support against sanctions at RAV-045 to RAV-069, and transcript of hearing at RAV-232 to RAV-254].

[23] The Appeals Court panel also sidestepped the land court judge's legal error regarding trial title petitions being synonymous with a "complaint", which supported almost fifty percent of his ruling.

ADDENDUM

ADDENDUM

MARK A. LaRACE & another [Note 1] vs. WELLS FARGO BANK, N.A., trustee, [Note 2] & another. [Note 3]

99 Mass. App. Ct. 316

November 16, 2020 - March 22, 2021

Court Below: Land Court

Present: Wolohojian, Milkey, & Sullivan, JJ.

Real Property, Mortgage. Mortgage, Assignment, Foreclosure, Validity. Jurisdiction, Land Court. Land Court, Jurisdiction. Res Judicata. Judgment, Preclusive effect. Practice, Civil, Conduct of counsel.

In the interest of judicial economy, this court declined to remand claims alleging violations of G. L. c. 93A and slander of title brought in a civil action in the Land Court over which that court lacked subject matter jurisdiction, where, although the judge could have either requested a transfer to the Superior Court and designation as a Superior Court judge to hear the claims or sought reassignment of the matter to a trial court department that had subject matter jurisdiction, a judge with jurisdiction over the claims would nonetheless be constrained to dismiss them once they were transferred [321-322], in that the doctrine of issue preclusion barred the claims (given that they involved the same parties as an earlier action that was dismissed on statute of limitations grounds and resulted in a final judgment upheld by this court on appeal) [322-323].

In a civil action brought in the Land Court challenging the validity of the efforts by the defendant mortgagee (and its loan servicer) to foreclose on the mortgage on the plaintiffs' home, this court declined to determine whether the doctrine of claim preclusion barred the plaintiffs' claims [323-326]; rather, this court concluded that the defendants were entitled to summary judgment, where an assignment from the record holder of the mortgage to the mortgagee was sufficient to document the mortgagee's ownership of the mortgage at the time of the foreclosure [326-328]; where the loan servicer did not fail to comply with G. L. c. 244, § 35C, by not certifying a chain of title for the note, given that a foreclosing party must demonstrate an unbroken chain of assignments of the mortgage and that it held the note (or acted as authorized agent for the note holder) at the time it commenced foreclosure [328-329]; and where the obsolete mortgage statute, G. L. c. 260, § 33, had no bearing on the mortgagee's ability to foreclose on the mortgage, given that the acceleration of the note after the plaintiffs defaulted on their payment obligation did not accelerate the maturity date of the mortgage [329].

A Land Court judge did not abuse his discretion in finding that counsel for the plaintiffs in a civil action violated Mass. R. Civ. P. 11 (a), where counsel acted in bad faith by intentionally reasserting claims that had already been dismissed on statute of limitations grounds, a matter that had been fully and finally adjudicated. [329-331]

CIVIL ACTION commenced in the Land Court Department on June 29, 2018.

The case was heard by Howard P. Speicher, J., on a motion for summary judgment.

Glenn F. Russell, Jr., for the plaintiffs.

Marissa I. Delinks for the defendants.

SULLIVAN, J. This is the third in a series of lawsuits brought by Mark A. LaRace and Tammy L. LaRace challenging the validity of Wells Fargo Bank, N.A.'s (Wells Fargo), efforts to foreclose on the mortgage on the LaRaces' home. [Note 4] On appeal the LaRaces contend, among other things, that the 2008 mortgage assignment upon which Wells Fargo relies is void because it merely confirms a prior invalid blank assignment. On the defendants' motion for summary judgment, a judge of the Land Court concluded that the LaRaces' claims were barred in part by res judicata and were also properly dismissed as a matter of law. On appeal, the LaRaces contend that the judge erred by concluding that: (1) res judicata barred their claims where the claims arose from a foreclosure commenced after the LaRaces' prior actions were dismissed; and (2) Wells Fargo established that, at the time of foreclosure, it held and had the right to enforce both the mortgage and the note. The LaRaces also appeal from an order sanctioning their counsel under Mass. R. Civ. P. 11, as amended, 456 Mass. 1401 (2010). We affirm, albeit for reasons which differ in some respects from those of the motion judge.

Background. 1. Mortgage default and 2007 foreclosure. The LaRaces borrowed money from Option One Mortgage Corporation (Option One) in 2005. The debt was evidenced by an adjustable rate note and secured by a mortgage on their home in Springfield. The note was "due and payable on June 01, 2035." The mortgage referenced this maturity date.

In 2005, Option One executed an assignment of the mortgage in blank, meaning that the assignment did not specify the assignee. The mortgage subsequently was pooled with others and securitized. Wells Fargo was designated in the pooling and servicing agreement as the trustee of a trust fund consisting of a pool of mortgages. Ocwen Loan Servicing, LLC (Ocwen), was the loan servicer and attorney-in-fact for Wells Fargo.

In August 2006, the LaRaces defaulted on their payment obligations. In 2007, Wells Fargo commenced a nonjudicial foreclosure sale of the property, which was completed on July 5, 2007. At the time it foreclosed, Wells Fargo did not hold the mortgage. It was not until May 7, 2008, that Option One executed an assignment of the mortgage to Wells Fargo. The

assignment, which stated it was effective as of April 18, 2007, was recorded on May 12, 2008. The foreclosure deed was recorded on the same date.

Wells Fargo then brought a quiet title action in the Land Court in October of 2008. The judge entered judgment against Wells Fargo, holding that the 2007 foreclosure was invalid because Wells Fargo could not establish that it held the mortgage at the time of the foreclosure. The Supreme Judicial Court affirmed the judgment against Wells Fargo in one of three companion cases decided in U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 654 (2011) (Ibanez).

On March 7, 2012, Option One executed a confirmatory assignment of the mortgage to Wells Fargo. The confirmatory assignment stated it was "intended to clarify the assignor in the [2008 a]ssignment." The confirmatory assignment was recorded on March 14, 2012.

2. 2012 try title action. Wells Fargo issued a default notice to the LaRaces in 2012. The LaRaces responded by filing a try title action, see G. L. c. 240, §§ 1-6, in the Land Court against Wells Fargo, Option One, and a mortgage servicing company. The defendants removed the action to the United States District Court for the District of Massachusetts. A United States District Court judge dismissed the action pursuant to Fed. R. Civ. P. 12 (b) (6). The judge found that, although the LaRaces were in default on their mortgage, Wells Fargo had not made any attempts to foreclose since 2007. Because "[u]ncertainty as to who holds a valid mortgage does not provide the requisite adversity to cloud a mortgagor's claim of equitable title," the judge held that the LaRaces complaint had not alleged an essential element of a try title claim: an adverse claim clouding record title to the property

(citation omitted). LaRace v. Wells Fargo Bank, N.A., 972 F. Supp. 2d 147, 153 (2013). The action was therefore dismissed. Id. at 154.

3. 2014 Superior Court action. In 2014, the LaRaces filed an action in Hampden County Superior Court against Wells Fargo, Ocwen, and other entities for wrongful foreclosure, violation of G. L. c. 93A, and slander of title. All three claims arose from the failed 2007 foreclosure; they alleged that Wells Fargo and Ocwen made false statements and engaged in deceptive practices between 2007 and 2014 by representing they had the right to foreclose based upon the 2008 assignment, an assignment the LaRaces contended was void. The judge granted the defendants' motion to dismiss on the grounds that the claims were barred by the statute of limitations. The judge's decision was affirmed in an unpublished decision on appeal. See LaRace v. Wells Fargo Bank, N.A., 92 Mass. App. Ct. 1126 (2018).

4. 2018 foreclosure. On or about February 17, 2017, Ocwen mailed the LaRaces another default notice. Thereafter, Wells Fargo again took the first steps in the nonjudicial foreclosure process.

On August 23, 2017, Ocwen executed an affidavit regarding compliance with G. L. c. 244, § 35B, and an affidavit regarding the note, pursuant to G. L. c. 244, § 35C. Both affidavits were later recorded. On or about June 5, 2018, Wells Fargo sent the LaRaces notice of its intent to foreclose. A foreclosure by power of sale and by entry was conducted on July 3, 2018. Wells Fargo purchased the property and a foreclosure deed was recorded.

After the sale, Ocwen recorded an affidavit certifying that Wells Fargo was the holder of the note and mortgage at the time of the foreclosure, and an affidavit certifying that the contents of the notice of default strictly complied with the notice provisions of the mortgage.

5. This action. On June 29, 2018, before the foreclosure sale, the LaRaces filed this action in the Land Court against Wells Fargo, Ocwen, and others. [Note 5] The LaRaces alleged seven causes of action against Wells Fargo or Ocwen: (1) count I, seeking a declaratory judgment that Wells Fargo and Ocwen did not have the right to foreclose because the 2008 assignment was void; (2) count II, seeking a declaratory judgment that Wells Fargo and Ocwen violated G. L. c. 244, § 35C, by failing to certify a chain

of title for the note; (3) count III, against Wells Fargo, seeking a declaratory judgment that the mortgage was obsolete pursuant to G. L. c. 260, § 33; (4) count IV, alleging that Wells Fargo violated G. L. c. 93A by initiating foreclosure in 2007 and 2018, allegedly because the 2008 assignment was not valid; (5) count V, alleging that Wells Fargo's publication of the 2008 mortgage assignment, foreclosure deeds, and other foreclosure documents constituted slander of title because there was no valid assignment of the mortgage; (6) count VI, [Note 6] seeking a declaratory judgment that Wells Fargo did not have the legal right to enforce the note; and (7) count VII to quiet title under G. L. c. 240, §§ 6-10, on the grounds that the 2008 assignment was void.

Initially, the judge declined to take jurisdiction over counts IV and V for violation of G. L. c. 93A and slander of title and dismissed those counts without prejudice. Wells Fargo and Ocwen moved for summary judgment on the remaining counts.

After oral argument, a judge allowed the defendants' motion for summary judgment. The judge held that the doctrines of claim preclusion and issue preclusion barred all of the

LaRaces' claims in this action -- including counts IV and V, over which he had previously declined jurisdiction -- because the same issues and claims were, or could have been, adjudicated in the 2012 try title action and the 2014 Superior Court action. The judge also ruled that (1) the 2008 assignment "demonstrate[d] the successful transfer of the mortgage to Wells Fargo"; (2) Wells Fargo was not required to establish a chain of title for the note; and (3) acceleration of the note when the LaRaces defaulted on their payment obligations did not accelerate the maturity date of the mortgage for purposes of the obsolete mortgage statute, G. L. c. 260, § 33.

The judge also issued an order to show cause why the LaRaces' attorney should not be sanctioned under Mass. R. Civ. P. 11 for filing slander of title and wrongful foreclosure claims arising from the 2007 foreclosure when those claims had already been adjudicated in the 2014 Hampden County Superior Court action. Following briefing and oral argument, the judge ordered counsel to pay the attorney's fees in the amount of $3,768.45 that Wells Fargo and Ocwen incurred to defend counts IV and V through the initial dismissal. The LaRaces appealed from both the judgment and the decision on the order to show cause.

Discussion. "We review a grant of summary judgment de novo to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" Pinti v. Emigrant Mtge. Co., 472 Mass. 226, 231 (2015), quoting Juliano v. Simpson, 461 Mass. 527, 529-530 (2012). Here, for the reasons discussed below, Wells Fargo and Ocwen were entitled to judgment as a matter of law on all claims, either on the grounds of res judicata or on the merits.

1. Subject matter jurisdiction. As a preliminary matter, the judge's initial conclusion that he lacked jurisdiction over counts IV and V, the G. L. c. 93A and slander of title claims, was correct. See G. L. c. 185, § 1 (k) (Land Court jurisdiction includes jurisdiction over "[a]ll cases and matters cognizable under the general principles of equity jurisprudence where any right, title or interest in land is involved"); G. L. c. 93A, § 9 (Superior Court and Housing Court have exclusive jurisdiction over G. L. c. 93A claims). See also Isakson v. Vincequere, 33 Mass. App. Ct. 281, 285 (1992) (court of limited jurisdiction could not "acquire" subject matter jurisdiction over claims outside delineated jurisdiction). Before changing course and reaching the merits of the claims, the judge could have requested a transfer to the Superior Court and designation as a Superior Court judge. Alternatively, the judge could have sought reassignment of the matter to a trial court department that had subject matter jurisdiction.

See G. L. c. 211B, § 9; St. Joseph's Polish Nat'l Catholic Church v. Lawn Care Assocs., Inc., 414 Mass. 1003, 1004 (1993). In circumstances like this, we would ordinarily remand so that the judge could cure the subject matter jurisdiction issue by, for example, seeking an appropriate cross-departmental assignment. See Sullivan v. Lawlis, 93 Mass. App. Ct. 409, 416 & n.13 (2018) (remanding with instructions that judge seek "cross-departmental" assignment of case because certain claims were in exclusive jurisdiction of Land Court, while others were within Superior Court's jurisdiction). See also Patry v. Liberty Mobilhome Sales, Inc., 15 Mass. App. Ct. 701, 703 (1983) (nunc pro tunc transfer of case or judge to department with jurisdiction is permitted). However, remand would not further the interests that reassignment of a case ordinarily serves. See Lowery v. Resca, 75 Mass. App. Ct. 726, 728 (2009) (transfer of case to proper trial court department allows claims to relate back to date complaint was initially filed in incorrect department for statute of limitations

purposes). See also Konstantopoulos v. Whately, 384 Mass. 123, 129 (1981) (statutory provisions authorizing transfer of case or judge to different trial court department are based on legislative intent to "promote the orderly and efficient administration of the judicial system" [citation omitted]). As discussed infra; a trial court judge with jurisdiction over counts IV and V would be constrained to dismiss the claims once they were transferred. In the interest of judicial economy, we therefore affirm the judge's dismissal of counts IV and V.

2. Res judicata. With the exception of count II, the LaRaces' claims bear many of the earmarks of serial litigation barred by the doctrine of res judicata. "'Res judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another. It comprises 'claim preclusion' and 'issue preclusion'" (citation omitted). Duross v. Scudder Bay Capital, LLC, 96 Mass. App. Ct. 833, 836 (2020). We address each in turn.

a. Issue preclusion. Counts IV and V, alleging violations of G. L. c. 93A and slander of title, are barred by the doctrine of issue preclusion. "The doctrine of issue preclusion provides that when an issue has been 'actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties whether on the same or different claim.'" Jarosz v. Palmer, 436 Mass. 526, 530-531 (2002), quoting Cousineau v. Laramee, 388 Mass. 859, 863 n.4 (1983). Issue preclusion requires that "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; (3) the issue in the prior adjudication was identical to the issue in the current adjudication; and (4) "the issue decided in the prior

adjudication must have been essential to the earlier judgment" (citations omitted). Duross, 96 Mass. App. Ct. at 836-837.

Each of these elements is met here. The 2018 case involved the same parties as the 2014 action. The 2014 Superior Court action was dismissed on statute of limitations grounds and resulted in a final judgment, and the dismissal was upheld by this court on appeal. Whether the LaRaces' G. L. c. 93A and slander of title claims were barred by the statute of limitations was not only essential to the 2014 action, it was dispositive. See Jarosz, 436 Mass. at 532-534.

The LaRaces contend that the issues litigated in the 2014 Superior Court action do not have preclusive effect because they have revised their G. L. c. 93A and slander of title claims in this action to include reference to the 2018 foreclosure. However, as the judge noted when he sanctioned the LaRaces' attorney, both counts IV and V of the present complaint make claims for damages based solely on the 2008 assignment and the 2007 foreclosure, and "thus are an attempt to re-litigate claims already fully adjudicated in the [2014] Superior Court action." The reference to the 2018 foreclosure added nothing to the issue already litigated - that is, when the statute of limitations began to run. [Note 7] The judge permissibly concluded that the LaRaces had attempted to litigate anew claims that they were barred from relitigating. Cf. Fidler v. E.M. Parker Co., 394 Mass. 534, 546 (1985).

b. Claim preclusion. Wells Fargo and Ocwen further contend that the doctrine of claim preclusion bars all of the remaining claims save count II, because these claims could have been litigated in the 2014 case. [Note 8] Claim preclusion "makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or *should have been*

adjudicated in the action" (emphasis added). Duross, 96 Mass. App. Ct. at 836, quoting Heacock v. Heacock, 402 Mass. 21, 23 (1988). "The invocation of claim preclusion requires three elements: (1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." Santos v. U.S. Bank Nat'l Ass'n, 89 Mass. App. Ct. 687, 692 (2016), quoting Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005).

Here again, the parties in the 2014 Superior Court action and this action are the same and the 2014 Superior Court action resulted in a final judgment on the merits. See TLT Constr. Corp. v. A. Anthony Tappe & Assocs., 48 Mass. App. Ct. 1, 10 n.8 (1999) ("dismissal of an action on the basis of . . . statute of limitations . . . [has] been considered sufficiently on the merits to bar a subsequent suit under the doctrine of claim preclusion"). See also Massaro v. Walsh, 71 Mass. App. Ct. 562, 565 (2008), quoting Bagley v. Moxley, 407 Mass. 633, 637 (1990) (dismissal with prejudice is dismissal on merits for purposes of claim preclusion). [Note 9] The question remains whether there was a prior final judgment on the merits.

Causes of action are the same for the purposes of res judicata when they "grow[] out of the same transaction, act, or agreement, and seek[] redress for the same wrong." Fassas v. First Bank & Trust Co. of Chelmsford, 353 Mass. 628, 629 (1968), quoting Mackintosh v. Chambers, 285 Mass. 594, 596 (1934). "[S]eeking an alternative remedy or . . . raising the claim from a different posture or in a different procedural form" does not allow a party to avoid the doctrine of claim preclusion and get a proverbial second bite at the apple. Wright Mach. Corp. v. Seaman-Andwall Corp., 364 Mass. 683, 688 (1974).

The claims in the 2014 Superior Court action sought redress for the improper 2007 foreclosure, but at the heart of the claims was the contention that the 2008 assignment was "void." Accordingly, Wells Fargo and Ocwen maintain, to avoid impermissible claim splitting, the LaRaces should have raised all claims challenging the validity of the 2008 assignment in the action that they chose to bring in 2014. See Santos, 89 Mass. App. Ct. at 693, quoting Bagley, 407 Mass. at 638 ("res judicata principles prohibit parties from proceeding by way of 'piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first theory prove unsuccessful'"). The LaRaces' claims in this action, other than count II, rely upon the theory that Wells Fargo lacks standing to foreclose because the 2008 assignment is a void "confirmatory" assignment. The defendants therefore submit that the claims should have been brought in the 2014 Superior Court action.

The LaRaces reply that they could not have challenged Wells Fargo's ownership of the mortgage and note in 2014 because their claims did not ripen until Wells Fargo initiated foreclosure proceedings in 2018, and that claim preclusion therefore does not apply. But while it is true that the LaRaces' efforts in 2012 to bring a try title action were dismissed as premature in Federal court, other methods of challenging the validity of the 2008 assignment were available to them in 2014. See Abate v. Fremont Inv. & Loan, 470 Mass. 821, 835 (2015) ("property owner seeking to prevent the obvious harm that may result

when a foreclosure proceeds without challenge [cannot bring try title claim before foreclosure, but] has other, and perhaps more suitable, remedies available to him or her," including quiet title action, or seeking declaratory judgment or injunction). Indeed, the judge who dismissed the try title action in 2013 noted the availability of a declaratory judgment action at that time. LaRace, 972 F. Supp. 2d at 154 n.3.

Page 326

Further, with the exception of count II, [Note 10] none of the LaRaces' claims point to any alleged misconduct during the 2018 foreclosure process. Instead, the LaRaces' only theory is that the 2018 foreclosure was wrongful because Wells Fargo relied upon the 2008 assignment to establish its standing to foreclose -- the very same claim of the invalidity of the 2008 assignment made in the now dismissed 2014 Superior Court action.

Nonetheless, it is indisputably true that the 2018 foreclosure was a new foreclosure, and that the issue of the validity of the 2008 assignment was not decided in the prior actions. [Note 11] We are also mindful of the fact that applying the doctrine of claim preclusion in the context of serial foreclosures would present a trap for the unwary for the scores of pro se litigants who crowd the Housing Court docket. While we caution counsel to approach this kind of serial litigation sparingly, if ever, we need not ultimately rely on claim preclusion to resolve this case. We turn instead to the merits of the remaining claims and rest the remainder of our decision on that basis.

3. Validity of 2008 assignment. There are no facts in dispute as to the validity of the 2008 mortgage assignment, and summary judgment was properly granted as to counts I, III, VI, and VII [Note 12] as a matter of law. To exercise the mortgage's power of sale, Wells Fargo needed to hold the mortgage and the note (or demonstrate that it was acting on behalf of the note holder) "at the time of the notice of sale and the subsequent foreclosure." Ibanez, 458 Mass. at 648. See G. L. c. 244, § 35C; Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 571 (2012). To establish that it held the mortgage at the relevant times, Wells Fargo could either "provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage." Ibanez, supra at 651. It did the latter. The 2008 assignment and 2012 confirmatory assignment, both of which were recorded, evidence a single assignment from Option One -- the record holder of the mortgage -- to Wells Fargo.

Page 327

The LaRaces argue that the 2008 assignment is invalid because it is "confirmatory" of the 2005 assignment in blank held invalid in Ibanez. Neither the record, nor Ibanez support this argument. First, the 2008 assignment neither states that it is "confirmatory," nor refers to the 2005 assignment in blank. This in and of itself is reason to deem the 2008 assignment a new assignment. The LaRaces appear to argue, however, that the 2008 assignment was tainted by the invalid 2005 assignment. For this proposition the LaRaces rely on Ibanez. This reliance is misplaced. In Ibanez, the court explained that the 2008 assignment was not confirmatory. Ibanez, 458 Mass. at 654. For an assignment to be "confirmatory," it must confirm a "validly made earlier" assignment, and there was no such prior valid assignment for the 2008 assignment to "confirm." Id. Accordingly, the 2008 assignment is a new assignment that did not become effective until its May 7, 2008 execution date. Id.

The LaRaces also argue that the 2008 assignment does not establish a complete chain of title for the mortgage. They base this argument on Wells Fargo's failed attempt in Ibanez to use mortgage securitization documents to establish it held the LaRaces' mortgage in 2007. [Note 13] Because Wells Fargo contended at that time that the mortgage passed from Option One to two other entities before arriving at Wells Fargo, [Note 14] the LaRaces argue that Wells Fargo must now document all of the assignments in this chain. This argument is inconsistent with Ibanez, where the court stated that a foreclosing entity may establish that it holds a mortgage via "a single assignment from the record holder of the mortgage." Ibanez, 458 Mass. at 651. That is precisely what Wells Fargo has done here. Rather than relying on mortgage pooling documents as a substitute for a written assignment as it attempted to do in Ibanez, Wells Fargo relies on a recorded assignment directly from the original mortgagee. "As such, it does not have to provide a 'chain of assignments linking it to the record holder' of [the LaRaces'] mortgage, because such a 'chain' contains only one link" (citation omitted). Strawbridge v. Bank of N.Y. Mellon,

91 Mass. App. Ct. 827, 832 (2017). In short, the 2008 assignment is sufficient to document Wells Fargo's ownership of the mortgage at the time of the 2018 foreclosure, and counts I, III, VI, and VII fail.

4. Chain of title for note. Count II alleges that Ocwen failed to comply with G. L. c. 244, § 35C, because it did not certify [Note 15] a chain of title for the note, a certification that the LaRaces argue 209 Code Mass. Regs. § 18.21A requires. Title 209 Code Mass. Regs. § 18.21A(2)(c) states: "A third party loan servicer shall certify in writing the basis for asserting that the foreclosing party has the right to foreclose, including but not limited to,

certification of the chain of title and ownership of the note and mortgage from the date of the recording of the mortgage being foreclosed upon." For the reasons stated below, we construe this language, consistent with the regulation's stated purpose and with Massachusetts foreclosure law, to require certification of an unbroken chain of title for the mortgage and that the foreclosing party held the note (or acted as authorized agent for the note holder) at the time it commenced foreclosure.

The text of the regulation states that its purpose is to provide a borrower "the [servicer's] basis for asserting that the foreclosing party has the right to foreclose." 209 Code Mass. Regs. § 18.21A(2)(c). Under Massachusetts foreclosure law, a "mortgagee must demonstrate an unbroken chain of assignments [of the mortgage] in order to foreclose a mortgage, and . . . must also demonstrate that it holds the note (or acts as authorized agent for the note holder) at the time it commences foreclosure" (citation omitted). Sullivan v. Kondaur Capital Corp., 85 Mass. App. Ct. 202, 210 (2014). See Ibanez, 458 Mass. at 651. There is no case holding that a foreclosing party must demonstrate an unbroken chain of assignments of the mortgage note. Indeed, such a requirement would be inconsistent with the proposition that "[w]hen indorsed in blank, [a note] becomes payable to bearer and may be negotiated by transfer of possession alone."

G. L. c. 106, § 3-205 (b). "[N]othing in Massachusetts law requires a foreclosing mortgagee to demonstrate that prior holders of the record legal interest in the mortgage also held the note at the time each assigned its interest in the mortgage to the next holder in the chain." Sullivan, supra. The judge properly dismissed count II on the merits.

5. Applicability of obsolete mortgage statute. Count III seeks a judgment declaring that the obsolete mortgage statute, G. L. c. 260, § 33, rendered the LaRaces' mortgage unenforceable because the 2007 acceleration of the note secured by the mortgage accelerated the maturity date of the mortgage. This precise argument was considered and rejected in Nims v. Bank of N.Y. Mellon, 97 Mass. App. Ct. 123, 124 (2020), which this court decided after the LaRaces filed their appeal.

"The obsolete mortgage statute sets time periods after which a 'mortgage shall be considered discharged for all purposes without the necessity of further action by the owner of the equity of redemption or any other persons having an interest in the mortgaged property.'" Nims, 97 Mass. App. Ct. at 126, quoting G. L. c. 260, § 33. If a mortgage has a maturity date, the lender generally must exercise its power of sale within five years of that

maturity date. Id. In Nims, we explained that where, as here, a mortgage does not state its maturity date, but does refer on its face to the note, and states the date by which the obligation must be paid in full, "the term or maturity date of the underlying obligation (i.e., the note) is considered the term or maturity date of the mortgage." Nims, supra at 128. Thus, the maturity date of the LaRaces' mortgage is June 1, 2035. Because the acceleration of the note after the LaRaces defaulted on their payment obligation did not accelerate the maturity date of the mortgage, id., the obsolete mortgage statute has no bearing on Wells Fargo's ability to enforce the mortgage.

6. Rule 11 sanctions. The LaRaces also appeal from the judge's decision finding that their attorney violated Mass. R. Civ. P. 11 (a) by raising two claims in this action that were "nearly verbatim" recitations of claims dismissed on statute of limitations grounds in the 2014 Superior Court action. On appeal, counsel concedes that he was aware of the judgment in the 2014 Superior Court action when he filed the complaint in this action, but argues that the judge erred in finding that he acted in bad faith when he had "nothing but the best intentions of making the allegations in the

2018 complaint in good faith." [Note 16] We review the imposition of rule 11 sanctions for an abuse of discretion. Worcester v. AME Realty Corp., 77 Mass. App. Ct. 64, 72 (2010).

Under rule 11, counsel's signature on the complaint was a "certificate . . . that to the best of his knowledge, information, and belief there [was] a good ground to support it." Mass. R. Civ. P. 11 (a). "Good ground" for pleading under rule 11 "requires that the pleadings be based on 'reasonable inquiry and an absence of bad faith'" on counsel's part. Doe v. Nutter, McClennen & Fish, 41 Mass. App. Ct. 137, 142 (1996), quoting Bird v. Bird, 24 Mass. App. Ct. 362, 368 (1987). This is a subjective standard. However, "[i]t is up to the judge to decide whether to credit the attorney's profession of good faith," Psy-Ed Corp. v. Klein, 62 Mass. App. Ct. 110, 114 (2004), taking into account "the circumstances of [the attorney's] performance," Worcester, 77 Mass. App. Ct. at 72.

Here, we discern no abuse of discretion in the judge's decision that counsel acted in bad faith by intentionally reasserting claims that had already been dismissed on statute of limitations grounds - a matter which had been fully and finally adjudicated. See Kobrin, 444 Mass. at 843. The complaint contained a near verbatim recitation of the allegations in the 2014 complaint. [Note 17] The addition of the words "and 2018" in reference to the most recent attempt to foreclose added nothing to change the statute of limitations analysis.

The judge awarded $3,768.45 in fees for the defense of counts IV and V. The fees requested were modest, and counsel did not seek fees after the point that the counts were dismissed. While it is true that the judge did not follow the prescribed procedure for obtaining jurisdiction over counts IV and V, counts IV and V of the LaRaces' complaint were in fact barred, and the judge's analysis of the lack of good faith was fully supported. The judge was not required to credit counsel's profession of good faith where the circumstances of his performance -- including knowingly reasserting claims that had been dismissed in a prior action

-- were indicative of a lack of good faith.

Judgment affirmed.

Decision on order to show cause affirmed.

FOOTNOTES

[Note 1] Tammy L. LaRace.

[Note 2] Of the ABFC 2005-OPT1 Trust.

[Note 3] Ocwen Loan Servicing, LLC.

[Note 4] A fourth lawsuit, brought by Wells Fargo against the LaRaces in connection with its first attempt to foreclose on the LaRace property in 2007, was one of several cases ultimately decided by the Supreme Judicial Court in U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 654 (2011).

[Note 5] The claims against the other defendants were dismissed for lack of service; those defendants are not parties to this appeal.

[Note 6] The complaint included a second count labeled "count VI." The second count VI was pleaded against one of the defendants who was not served. The LaRaces do not appeal from its dismissal.

[Note 7] The LaRaces alleged that Wells Fargo and Ocwen made false statements and engaged in deceptive practices by representing that the 2008 assignment gave them the right to foreclose on the LaRaces' home. The judge ruled that the LaRaces were on notice of these claims when the Land Court judge issued his ruling, and that the claims were therefore untimely.

[Note 8] The defendants also argue that the 2012 try title action bars this action. The try title action was dismissed for failure to state a claim, perhaps because the judge viewed standing as nonjurisdictional in Federal court. LaRace, 972 F. Supp. 2d at 154. In State court a dismissal for

lack of standing is often described as jurisdictional, see Abate v. Fremont Inv. & Loan, 470 Mass. 821, 836 (2015), and a dismissal for lack of jurisdiction does not necessarily result in claim preclusion, see Mass. R. Civ. P. 41 (b) (3), as amended, 454 Mass. 1403 (2009) ("a dismissal . . . *other than* a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, or for improper amount of damages . . . operates as an adjudication upon the merits" [emphasis added]); Kobrin v. Board of Registration in Med., 444 Mass. 837, 843 (2005) (claim preclusion requires "prior final judgment on the merits"). We need not consider whether such a dismissal might result in issue preclusion because the judge who dismissed the try title action did so on the grounds that there was not an "adverse claim" clouding the LaRaces' record title in 2013. LaRace, supra at 153. The question whether there was an adverse claim clouding record title in 2013 is not an issue in this action, so any issue preclusive effect the judgment in the try title action might have does not impact our analysis. Cf. Abate, supra (judge "considered the merits of [plaintiffs'] claims as a necessary step in determining the absence of . . . record title").

[Note 9] While the Massachusetts authority on this issue is limited, we note that a majority of jurisdictions that have considered whether a statute of limitations dismissal is on the merits for res judicata purposes have concluded that such a dismissal has res judicata effect. See, e.g., Clothier v. Counseling, Inc., 875 So. 2d 1198, 1200 (Ala. Civ. App. 2003); Hall v. Gulaid, 165 Conn. App. 857, 864 (2016); Carnival Corp. v. Middleton, 941 So. 2d 421, 424 (Fla. Dist. Ct. App. 2006), citing Allie v. Ionata, 503 So. 2d 1237, 1242 (Fla. 1987); Montague v. Godfrey, 289 Ga. App. 552, 557 (2008); Greenfield v. Ray Stamm, Inc., 242 Ill. App. 3d 320, 327 (1993); Creech v. Walkerton, Ind., 472 N.E.2d 226, 228-229 (Ind. Ct. App. 1984); Penn v. Iowa State Bd. of Regents, 577 N.W.2d 393, 399 (Iowa 1998); Dennis v. Fiscal Court of Bullitt County, 784 S.W.2d 608, 609 (Ky. Ct. App. 1990); Beegan v. Schmidt, 451 A.2d 642, 644 (Me. 1982); North Am. Specialty Ins. Co. v. Boston Med. Group, 906 A.2d 1042, 1052 (Md. Ct. Spec. App. 2006); Washington v. Sinai Hosp. of Greater Detroit, 478 Mich. 412, 419 (2007); Nitz v. Nitz, 456 N.W.2d 450, 452 (Minn. Ct. App. 1990); Jordan v. Kansas City, Mo., 929 S.W.2d 882, 886 (Mo. Ct. App. 1996); Schweitzer v. Whitefish, 385 Mont. 142, 146 (2016); Hill v. AMMC, Inc., 300 Neb. 412, 420-421 (2018); Opinion of the Justices, 131 N.H. 573, 580 (1989); Webb v. Greater N.Y. Auto. Dealers Ass'n, 42 N.Y.S.3d 324, 326 (2016); LaBarbera v. Batsch, 10 Ohio St. 2d 106, 116 (1967); Campbell v. Fernandez, 14 Wash. App. 2d 769, 777 (2020); Gillespie v. Johnson, 157 W. Va. 904, 909 (1974). Just a handful of jurisdictions have come to the opposite conclusion. See Boyd v. Freeman, 18 Cal. App. 5th 847, 856 (2017); Weinar v. Lex, 176 A.3d 907, 916 (Penn. Super. Ct. 2017). See also Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 499 (2001) (to deter forum shopping, in diversity cases, Federal courts will apply rule of forum State on this issue).

[Note 10] Count II alleges that Ocwen violated G. L. c. 244, § 35C, by failing to certify a chain of title for the note in its 2017 affidavits setting out Wells Fargo's authority to foreclose. Because this claim depends upon conduct that occurred after 2014, it is not barred by res judicata. However, the judge properly dismissed the claim on the merits, as discussed infra.

[Note 11] Because the claims based on the 2008 assignment were not decided on the merits, issue preclusion does not apply. See Kobrin, 444 Mass. at 844.

[Note 12] The same reasoning is equally applicable to counts IV and V.

[Note 13] To the extent that the LaRaces are arguing that a direct transfer from Option One to Wells Fargo violates the terms of the pooling and services agreement, they lack standing to raise such an argument. See Bank of N.Y. Mellon Corp. v. Wain, 85 Mass. App. Ct. 498, 502 (2014).

[Note 14] The court rejected Wells Fargo's argument because Wells Fargo could not produce assignments establishing a chain of title that matched the transfers Wells Fargo contended had taken place. Ibanez, 458 Mass. at 644.

[Note 15] The LaRaces also argue that the § 35C affidavit is insufficient because it states that it is based on Ocwen's review of Wells Fargo's "business records" without specific reference to the note. The affidavit language is consistent with G. L. c. 244, § 35C, which provides that a servicer shall "certify compliance with this subsection in an affidavit based upon a review of the creditor's business records." Moreover, the LaRaces concede that they received a copy of the note from Wells Fargo and were offered the opportunity to inspect the original note. They have therefore provided us with no basis to question the representation in the affidavit that Wells Fargo possessed the original note.

[Note 16] Counsel also argues that the judge improperly found that he had intentionally failed to disclose the 2014 Superior Court action. In fact, the judge found that counsel did disclose the earlier claims, but that he nonetheless violated rule 11.

[Note 17] Indeed, the judge identified nine paragraphs in counts IV and V that not only related solely to the 2007 foreclosure, but appeared, based upon the presence of identical typographical errors in the two documents, to have been cut and pasted from the complaint in the 2014 Superior Court action.

Home/Search Table of Cases by Citation Table of Cases by Name

Commonwealth of Massachusetts. Trial Court Law Libraries. Questions about legal information? Contact Reference Librarians.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

MISCELLANEOUS CASE
No. 18 MISC 000327 (HPS)

MARK A. LaRACE and TAMMY L. LaRACE,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., as TRUSTEE for ABFC 2005-OPT1 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2005-OPT1 and the CERTIFICATE HOLDERS THEREOF, ET AL.,

Defendants.

DECISION ON MOTION FOR SUMMARY JUDGMENT AND ORDER TO SHOW CAUSE

PRIOR RELATED CASES AND RELEVANT PROCEDURAL HISTORY

This is the fourth legal action involving disputes over attempts to foreclose on the defaulted mortgage obligations incurred by Mark and Tammy LaRace pursuant to a 2005 mortgage loan on property in Springfield. It is the third legal action in which the present plaintiffs have sued the present defendant Wells Fargo Bank, N.A., as Trustee for ABFC 2005-Opt1 Trust, ABFC Asset-Backed Certificates, Series 2005-Opt1 ("Wells Fargo"), concerning the same mortgage.

In the first action, the Supreme Judicial Court affirmed a Land Court judgment invalidating a 2005 foreclosure sale of the LaRaces' property because at the time of the

foreclosure sale, the mortgagee did not hold both the mortgage and the promissory note secured by the mortgage. *U.S. Bank National Association v. Ibanez*, 458 Mass. 637 (2011). ("*Ibanez*") The LaRaces, although the successful defendants in that action, defaulted and did not participate.

In the second action, the LaRaces filed a try title action in Land Court pursuant to G. L. c. 240, §§ 1-5, seeking to require Wells Fargo to demonstrate that it had good title to the property, in light of the LaRaces' claim that Wells Fargo did not hold the mortgage due to a defective chain of assignments. That case was removed to the U. S. District Court, which dismissed the action on the grounds that the try title petition failed to state a claim upon which relief could be granted. *LaRace v. Wells Fargo Bank , as Trustee for ABFC 2005-Opt1 Trust, ABFC Asset-Backed Certificates, Series 2005-Opt1*, 972 F.Supp.2d 147 (D. Mass. 2013), aff'd *LaRace v. Homeward Residential Inc., et al.* No 13-2316, July 21, 2015. (the "try title action")

In the third action, the LaRaces again sued the present defendant Wells Fargo and its loan servicer, Ocwen Loan Servicing, LLC, ("Ocwen") this time in Superior Court, seeking damages for wrongful foreclosure, violation of G. L. c. 93A, and slander of title. (the "Superior Court action") The LaRaces' three-count complaint was dismissed by the Superior Court on statute of limitations grounds, and that decision was affirmed by the Appeals Court on February 5, 2018. *LaRace v. Wells Fargo Bank, N.A., Trustee*, 92 Mass. App. Ct. 1126 (2018) (Rule 1:28 Decision).

On June 29, 2018, the LaRaces filed the present action, repeating their failed claims against Wells Fargo and Ocwen, among others,[1] for violation of G. L. c. 93A and for slander of title (counts IV and V); and also asserting (1) a declaratory judgment count seeking a determination that Wells Fargo did not establish a proper chain of title to the assignments to show that it was the holder of the mortgage at the time of the foreclosure and that it should be

[1] None of the other defendants have been served, and the complaint will be dismissed with respect to them pursuant to Mass. R. Civ. P. 4(j).

required to seek a judicial determination concerning its status as holder of the mortgage before it could go forward with a foreclosure (count I); (2) a count claiming that Wells Fargo had failed to certify its chain of title to the *note* as well as to the mortgage (count II); (3) a count seeking a determination that the mortgage was an obsolete mortgage beyond the statutory limitations period set forth in G. L. c. 260, § 33 (count III); (4) a count seeking a determination that Wells Fargo does not hold the note and therefore cannot foreclose on the mortgage (second count VI)[2]; and finally, (5) count VII, which seeks to quiet the plaintiffs' title pursuant to G. L. c. 240, §§ 6-10, alleging the same deficiencies in the chain of assignments to the mortgage alleged in the other counts.

The plaintiffs (and their present counsel), who were aware at least several weeks earlier of the foreclosure sale scheduled for their property for July 3, 2018, filed this action on June 29, 2019, and asked for a hearing on July 3, 2019, the same date as the scheduled sale, on their prayer for a preliminary injunction to enjoin the foreclosure sale. The court denied their request for injunctive relief when they failed to make service on Wells Fargo prior to the hearing.

At a case management conference held on August 18, 2018, I dismissed counts IV and V of the complaint, making claims for damages pursuant to G. L. c. 93A and for slander of title, on subject matter jurisdiction grounds. Counsel for the plaintiffs did not disclose to the court, nor was present counsel for Wells Fargo apparently aware, that the same claims by the same plaintiffs against the same defendant had been disposed of finally by the Appeals Court on statute of limitations grounds just a few months earlier.

On May 10, 2019, I heard the parties' arguments on Wells Fargo's and Ocwen's motion for summary judgment and took the matter under advisement. For the reasons stated below,

---

[2] There are two counts labelled "Count VI"; the first purports to state a claim against another defendant, Marty's Real Estate, which was never served, for "negligence and trespass." This count will be dismissed for failure to make service within the time permitted by Mass. R. Civ. P. 4(j), and also for lack of subject matter jurisdiction.

Wells Fargo's and Ocwen's motion for summary judgment will be ALLOWED, and the plaintiffs' request that summary judgment be entered in their favor will be DENIED. Also for reasons discussed below, plaintiffs' counsel will be ordered to show cause why he should not be sanctioned for violation of Mass. R. Civ. P. 11 in connection with the refiling of the G. L. c. 93A and slander of title claims that had been fully adjudicated in the Superior Court action.

FACTS

The material undisputed facts pertinent to this motion for summary judgment are as follows:

1. The LaRaces purchased 6 Brookburn Street in Springfield (the "Property") pursuant to a deed dated May 16, 2005, recorded in the Hampden County Registry of Deeds ("Registry") on May 19, 2005 in Book 15029, Page 504.
2. In connection with their purchase of the Property, the LaRaces executed two promissory notes and two mortgages securing the notes: a note for $103,200 payable to Option One Mortgage Corporation ("Option One") dated May 19, 2005, secured by a mortgage with the same date granted to Option One, encumbering the Property, and recorded with the Registry in Book 15029, Page 507; ("first mortgage") and a note for $25,800.00 payable to Option One, secured by a mortgage dated May 19, 2005, recorded with the Registry in Book 15029, Page 517.
3. The first mortgage includes the following language on its first page: "This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on June 01, 2035."

4. Through two off-record assignments, from Option One to Bank of America, and then from Bank of America to Wells Fargo, the first mortgage was transferred into a pooling and servicing agreement, of which Wells Fargo was the trustee, on October 1, 2005.

5. On July 5, 2007, Wells Fargo conducted the foreclosure sale of the Property at which it purchased the Property. This is the foreclosure sale that was later invalidated by the Land Court and was the subject of *Ibanez*.

6. On May 7, 2008, Option One executed an assignment of the first mortgage on the Property to Wells Fargo, which stated on its face that it had an "effective date" of April 18, 2007. This assignment was recorded with the Registry on May 12, 2008 in Book 17291, Page 84. It was this assignment that the Land Court ruled, as affirmed by the SJC in *Ibanez*, could not retroactively serve as a basis for Wells Fargo's assertion that it held the first mortgage as of the date of the July 5, 2007 foreclosure sale.

7. On March 7, 2012, Sand Canyon Corporation, f/k/a Option One Mortgage Corporation, executed a "Confirmatory Assignment" of the first mortgage on the Property to Wells Fargo. The Confirmatory Assignment was recorded with the Registry on March 14, 2012 in Book 19162, Page 129.

8. On August 24, 2017 Wells Fargo filed an action under the Servicemembers Civil Relief Act and received a judgment declaring that Mark LaRace was not entitled to the benefits of the Act on December 12, 2017.

9. On September 1, 2017, Wells Fargo recorded a facially compliant and valid affidavit of compliance with G. L. c. 244, § 35B, with the Registry in Book 21843, Page 477.

10. On September 1, 2017, Wells Fargo recorded a facially compliant and valid affidavit regarding the note secured by the mortgage to be foreclosed pursuant to G. L. c. 244, § 35C.

11. Wells Fargo conducted a foreclosure sale of the Property on July 3, 2018, and purchased the Property pursuant to a foreclosure deed dated August 28, 2018 and recorded with the Registry on August 28, 2018 in Book 22333, Page 260.

12. On August 28, 2018, Wells Fargo recorded a facially compliant and valid affidavit certifying that on the relevant dates, Wells Fargo was the holder of the promissory note secured by the first mortgage on the Property.

DISCUSSION

"Summary judgment is granted where there are no issues of genuine material fact, and the moving party is entitled to judgment as a matter of law." *Ng Bros. Constr. v. Cranney*, 436 Mass. 638, 643-644 (2002); Mass. R. Civ. P. 56 (c). "The moving party bears the burden of affirmatively showing that there is no triable issue of fact." *Ng Bros. Constr.*, supra, 436 Mass. at 644. In determining whether genuine issues of fact exist, the court must draw all inferences from the underlying facts in the light most favorable to the party opposing the motion. See *Attorney Gen. v. Bailey*, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982). Whether a fact is material or not is determined by the substantive law, and "an adverse party may not manufacture disputes by conclusory factual assertions." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Ng Bros. Constr.*, supra, 436 Mass. at 648. When appropriate, summary judgment may be entered against the moving party and may be limited to certain issues. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553 (1976); Mass. R. Civ. P. 56 (c).

I. THE PLAINTIFFS' CLAIMS ARE BARRED BY THE DOCTRINE OF RES JUDICATA.

As is noted above, in 2012, the LaRaces filed a try title action in Land Court, later removed to U. S. District Court, in which they sought to compel Wells Fargo to defend the validity of the assignments pursuant to which it claimed to hold the first mortgage to the Property. The LaRaces claimed, among other arguments, that an assignment of the mortgage on the Property to Wells Fargo had been declared invalid by the Supreme Judicial Court in *Ibanez*, In dismissing the LaRaces' claims, the court pointed out that the SJC had done no such thing: "The SJC did *not* rule on the question of whether the assignment *after* the [original] foreclosure was invalid." *LaRace v. Wells Fargo Bank, N.A.*, supra, 972 F. Supp. 2d at 153 (emphasis in original). This dismissal was issued on September 24, 2013.

Barely waiting for the ink to dry on the U. S. District Court dismissal, and without waiting for the resolution of the case on appeal, which resulted in an affirmance of the dismissal, on January 4, 2014 the LaRaces, through their present counsel, filed an action seeking damages for three enumerated torts arising from the same facts, against Wells Fargo in Superior Court.[3] These were claims for wrongful foreclosure, violation of G. L. c. 93A, and slander of title, all based on the earlier foreclosure that the SJC had declared invalid in *Ibanez* because Wells Fargo did not hold the mortgage at the time of the foreclosure. These claims were dismissed by the Superior Court on the grounds that they were barred by the applicable statute of limitations. The dismissal was affirmed by the Appeals Court on February 5, 2018. *LaRace v. Wells Fargo Bank, N.A., Trustee*, 92 Mass. App. Ct. 1126 (Rule 1:28 Decision).

The LaRaces, with the same counsel, filed the present complaint on June 29, 2018, making a series of claims relating to the invalidity of the assignments through which Wells Fargo

[3] Hampden County Superior Court Civil Action No. 1479-CV-00012.

claimed ownership of the mortgage on the Property, and also making G. L. c. 93A and slander of title claims. The G. L. c. 93A and slander of title claims were based on assertions that the LaRaces were damaged by Wells Fargo's having proceeded with the original foreclosure, later determined to be invalid by the SJC in *Ibanez.* These are the same assertions dismissed by the Superior Court, later affirmed by the Appeals Court, on statute of limitations grounds. The G. L. c. 93A and slander of title claims in the present complaint were also based at least in part on the LaRaces' allegations that the assignment through which Wells Fargo claims to be the holder of the mortgage was "a legally invalid 'assignment of mortgage,'" declared to be so by the SJC in *Ibanez*. These allegations were made despite the U. S. District Court having explicitly held (as did the SJC) that the SJC did not rule that the assignment was invalid, but rather that the original foreclosure was invalid because the assignment post-dated the foreclosure.

A. Issue Preclusion

"Res judicata is the generic term for various doctrines by which a judgment in one action has a binding effect in another." *Heacock v. Heacock*, 402 Mass. 21, 23, n. 2 (1988). The doctrines of "issue preclusion" and "claim preclusion" are encompassed within the term "res judicata." *Kobrin v. Bd. of Registration in Med.*, 444 Mass. 837, 843 (2005). Issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." *Heacock v. Heacock*, supra, 402 Mass. at 23, n.2. "In order to preclude a party from relitigating an issue the court must conclude that (1) there was a final judgment on the merits in the prior action, (2) the party against whom preclusion is asserted was a party to that final judgment, (3) the issue in the prior litigation was identical to the current issue, and (4) the issue in the prior litigation was essential to the judgment and actually litigated." *Hauer v. Casper*, 20 LCR 125, 129 (Mass. Land

Court 2012) (Grossman, J.), quoting *Kobrin v. Bd. of Registration in Medicine*, supra, 444 Mass. at 843-844; see also *Petrillo v. Zoning Bd. of Appeals of Cohasset*, 65 Mass. App. Ct. 453, 457 (2006).

"The doctrine of res judicata precludes relitigating not only the issues raised in the prior action, but the issues that could have been raised." *Brennan v. Harmon Law Offices, P.C.*, 81 Mass. App. Ct. 1125 (2012), citing *Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 449 (1982); *Baby Furniture Warehouse Store, Inc. v. Muebles D&F Ltée*, 75 Mass. App. Ct. 27, 35 (2009). "The rule of res judicata is designed to forestall a plaintiff from getting 'two bites at the apple.'" *Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, supra, 387 Mass. at 452. To the extent the plaintiffs failed to assert legal claims or theories that could have been asserted in the try title action or the Superior Court action, the court "cannot countenance a plaintiff's action in failing to plead a theory in [one case] in the hope of later litigating the theory in [another case]." *Id.*

Identity of the parties and issues. There is no dispute that the parties in all three cases, the try title action, the Superior Court action, and the present action, are exactly the same. In all three cases, the LaRaces were the plaintiffs, and Wells Fargo, in its same capacity as trustee of the same pooling and servicing trust, was one of the defendants.

The common thread running through all three of the cases following the *Ibanez* decision is the LaRaces' claim that Wells Fargo does not hold the mortgage to their property because of claimed defects in the chain of assignments of the mortgage. This issue is the basis for the LaRaces' claims in both the try title action ultimately decided in the federal courts, and the later Superior Court action, and it is the basis of the LaRaces' claims in the present action. In addition, the LaRaces, in the present action, have repeated tort claims that are identical to claims they

made in the Superior Court action. Under these circumstances, identity of both the parties and the issues is established. To the extent the LaRaces formulated different legal theories to advance their claim based on this issue, they are barred from advancing new legal theories that could have been asserted in the earlier actions by the holdings of *Brennan v. Harmon Law Offices, P.C.*, 81 Mass. App. Ct. 1125 (2012), and *Anderson v. Phoenix Inv. Counsel of Boston, Inc.*, 387 Mass. 444, 449 (1982), both cited above.

Whether the issue was essential and was actually litigated. "In determining whether an issue was actually litigated for preclusion purposes, courts ask whether the issue was 'subject to an adversary presentation and consequent judgment that was not a product of the parties' consent.'" *Martinez v. Waldstein*, 89 Mass. App. Ct. 341, 345 (2016), quoting *Jarosz v. Palmer*, 436 Mass. 526, 531 (2002). The appropriate question is whether the issue was presented to the adverse party with a full and fair opportunity to litigate the issue the first time, or whether other circumstances justify affording the party an opportunity to relitigate the issue. See *Comm'r of the Dep't of Employment & Training v. Dugan*, 428 Mass. 138, 143 (1998); *Green v. Brookline*, 53 Mass. App. Ct. 120, 123 (2001); *Alba v. Raytheon Co.*, 441 Mass. 836, 844 (2004).

As long as the party who should have had an interest in litigating the issue in the first case had an ample opportunity to do so, that party may not relitigate the issue in a later case. "[I]t (is) unnecessary...to determine whether [the] claim was actually presented in [the earlier case] because...we believe that this claim was capable of being raised in [the earlier case] and should have been raised in the context of that case." *Bagley v. Moxley*, 407 Mass. 633, 638 (1990). That is the case here, with respect to legal claims actually raised by the LaRaces in the two earlier cases in which they were the plaintiffs, and with respect to claims they could have raised in those cases. In the earlier try title action, for instance, the LaRaces could have, but failed to, assert a

count for declaratory judgment in addition to the try title count with respect to their claim that Wells Fargo failed to prove that it legitimately held the mortgage. The court even pointed this out in its decision. *LaRace v. Wells Fargo Bank, N.A.*, supra, 972 F. Supp. 2d at 154, n. 3.

There was also nothing preventing the LaRaces from asserting in the try title action other counts to advance the various other legal theories they have asserted in the present action. The only explanation for their failure to do so is that they wished to impermissibly hedge their bets so that they could, if necessary, seek a second (or even third) bite at the apple.

"[I]t was incumbent on the plaintiffs to present to the court [in the earlier case] all of the legal theories on which they based their claim...The plaintiffs were not entitled to pursue their claim...through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first theory prove unsuccessful." *Bagley v. Moxley,* supra, 407 Mass. at 638. Like the plaintiffs in *Bagley v. Moxley,* who impermissibly sought to litigate their claims of ownership of a private way one theory at a time in successive lawsuits, the plaintiffs in the present action have impermissibly sought to reserve different theories of their successive challenges to the validity of the chain of assignments of the mortgage.

Finality of the two earlier decisions. In order for res judicata to apply, the prior action must be a final judgment on the merits. *Kobrin v. Bd. of Registration in Med.*, supra, at 843-844. Both the try title action, after removal to U. S. District Court, and the Superior Court action, were dismissed, one for failure to state a claim under the try title statute, and the other on statute of limitations grounds. Both dismissals were appealed by the LaRaces and resulted in appellate decisions affirming the dismissals. There is no question but that these were adjudications resulting in final judgments and constituted judgments on the merits.

B. Claim Preclusion

The related doctrine of claim preclusion also bars the present assertion of the tort counts already dismissed by the court on subject matter jurisdiction grounds. As is noted above, the counts asserting claims of violation of G. L. c. 93A and slander of title are the same as the claims raised and dismissed in the Superior Court action.[4] "Three elements are essential for invocation of claim preclusion: (1) the identity or privity of the parties to the present and prior actions, (2) identity of the cause of action, and (3) prior final judgment on the merits." *DaLuz v. Dep't of Correction*, 434 Mass. 40, 45 (2001); *Franklin v. North Weymouth Coop. Bank*, 283 Mass. 275, 280 (1933). However, the present cause of action "need not be a clone of the earlier cause of action" to invoke claim preclusion. *Mancuso v. Kinchla*, 60 Mass. 558, 571 (2004); *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Assn.*, 142 F. 3d 26, 38 (1st Cir. 1998).

For the reasons stated above, the doctrine of claim preclusion bars relitigation of the LaRaces' counts for violations of G. L. c. 93A and for slander of title. Accordingly, those counts will be dismissed with prejudice, and not without prejudice as would be the case if they had been dismissed solely for lack of subject matter jurisdiction.

II. THE PLAINTIFFS' CLAIMS FAIL ON THE MERITS.

A. *Wells Fargo Holds the Mortgage Pursuant to a Clear and Unbroken Chain of Assignments.*

The LaRaces' theory of liability in Counts I and VII of their complaint appears to be that Wells Fargo did not hold the mortgage at the time of the July 3, 2018 foreclosure sale of the

[4] Count IV of the present complaint, asserting a claim of violation of G. L. c. 93A, and Count V, asserting a slander of title claim, are nearly verbatim "cut and paste" copies, complete with misspellings, ("asservation") of Counts II and III of the complaint in the Superior Court action. The following is a pairing of the verbatim or nearly verbatim paragraphs in the present complaint (starting with paragraph 216) with the corresponding paragraphs in the Superior Court complaint (starting with paragraph 111); 216/111; 217/112; 218/113; 219/114; 220/115; 221/116; 227/117; 228/118; 229/119; 230/120; 231/121; 232/122; 233/123; 234/125; 235/126; 236/127; 237/128; 238/133; 239/134; 240/135; 241/136; 242/137; 243/138; 244/139; 247/141; 248/142; 249/143; 250/144; 251/145252/146; 253/147; 254/151.

Property. First of all, as is noted above, the plaintiffs misconstrue the holding in *Ibanez* when they assert that the Land Court and SJC held in *Ibanez* that the 2008 assignment was void. The holding in *Ibanez* was that the 2008 assignment could not support a finding that Wells Fargo held the mortgage at the time of the 2007 foreclosure sale because it post-dated the sale. This did not mean that the assignment would be invalid to effect a transfer of the mortgage to Wells Fargo for a future foreclosure. At the time of the 2008 assignment, Option One could validly assign the mortgage to Wells Fargo (in effect, recognizing the off-record assignment that had already taken place by placing the mortgage into the pooling and servicing agreement) and could validly issue a confirmatory assignment in 2012. Those assignments can and do demonstrate the successful transfer of the mortgage to Wells Fargo.

The LaRaces' argument that the assignments were ineffective to transfer title to the mortgage to Wells Fargo is the only argument that, if established, would potentially support plaintiffs' claim. "[A] mortgagor's standing [is] limited to claims that a defect in the assignment rendered it void, not merely voidable." *Bank of New York Mellon Corp. v. Wain,* 85 Mass App. Ct. 498, 502 (2014). Plaintiffs' remaining claims are of the variety that, if established, would render the foreclosure voidable, and do not affect the validity of a foreclosure, like the one in the present action, that has already occurred.

B. *Wells Fargo Need Not Establish a Chain of Title for the Note.*

The gravamen of Count II of the complaint is that Wells Fargo, in addition to not having a valid chain of title to the first mortgage, has failed to show an unbroken chain of title to the promissory note secured by the first mortgage. As this court has ruled in another case involving the same argument made by plaintiffs' present counsel, no such showing is necessary. In Count VI (the second Count VI), the LaRaces argue as well that Wells Fargo either does not have

possession of the note or otherwise lacks the authority to enforce the note, and therefore could not foreclose on the mortgage.

"[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." This was done by way of the affidavit filed with the Registry on August 28, 2018, and this disposes of both Counts II and VI.

The LaRaces' nevertheless argue, that under 209 C.M.R. § 18.21A(2)(c),[5] and G. L. c. 183, § 21 and G. L. c. 244, § 14, Wells Fargo must show not only that it held the note at the time of foreclosure, but that it must also demonstrate the chain of title for the promissory note in order to have the legal authority to foreclose. With respect to the mortgage, as opposed to the promissory note, a mortgagee must show "a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage." *U.S. Bank Nat'l Assn. v. Ibanez*, supra, 458 Mass. at 637.

However, there is no such requirement to show a full chain of title for the promissory note secured by the mortgage. In *Sullivan v. Kondaur Capital Corp.*, the court held, "nothing in Massachusetts law requires a foreclosing mortgagee to demonstrate that prior holders of the record legal interest in the mortgage also held the note at the time each assigned its interest in the mortgage to the next holder in the chain." 85 Mass. App. Ct. 202, 210 (2014). Moreover, accepting plaintiff's argument would represent a "significant expansion of the *Eaton* rule, insofar as [it would] suggest that a 'mortgagee' must hold both legal and equitable interest in the loan

[5] 18 C.M.R. 21A(2)(c) provides as follows:

> A third party loan servicer shall certify in writing the basis for asserting that the foreclosing party has the right to foreclose, including but not limited to, certification of the chain of title and ownership of the note and mortgage from the date of the recording of the mortgage being foreclosed upon. The third party loan servicer shall provide such certification to the borrower with the notice of foreclosure, provided pursuant to M.G.L. c. 244, § 14 and shall also include a copy of the note with all required endorsements.

not only at the time of foreclosure but at the time of any previous transfers of the recorded mortgage interest." *Id.* at 209-210.

The LaRaces argue that 209 C.M.R § 18.21A, 2C, which contains language requiring "certification of the chain of title and ownership of the note and mortgage," requires that a chain of title must be demonstrated for both the note and mortgage. But "certification of the chain of title" and "ownership of the note and mortgage" are two separate concepts; chain of title is necessarily a reference to showing the chain of title only to the mortgage, because only mortgage assignments are recorded, and showing the chain of title of assignments of the mortgage is the only way to demonstrate that the foreclosing entity is the current holder of the mortgage. Promissory notes, on the other hand, are never recorded, and ownership of a note is demonstrated by an endorsement on the note itself; it is not necessary to demonstrate a chain of title or to even identify past holders of a note in order to provide evidence that one is the current holder of the note, because the chain is demonstrated by the endorsements on the note itself and are self-evident. Physically holding the note, along with an endorsement of the note either in blank or to the holder, is sufficient. The *Eaton* court noted the impractibility of requiring disclosure of a chain of title for promissory notes, by pointing out that "there are no...provisions for recording mortgage notes; and as a result, clear record title cannot be ascertained because the validity of any prior foreclosure sale is not ascertainable by examining documents of record." *Eaton,* supra, 462 Mass. at 586. In its holding, the *Eaton* court did not change this reality or the rules relating to proof of ownership of a promissory note. Accordingly, the provision in 209 C.M.R § 18.21A(2)(c) for "certification of the chain of title and ownership of the note and mortgage," cannot be construed reasonably to require demonstration of a chain of title for a promissory note

where the Supreme Judicial Court has acknowledged that under our system no such requirement is required or even possible, let alone necessary.

The court thus construes the regulation as requiring, consistent with *Eaton*, certification of the chain of title of mortgage assignments, and certification of ownership of the note. To the extent the regulation could be construed to require more than that with respect to the note, it would be *ultra vires*. See *Massachusetts Federation of Teachers, AFT, AFL-CIO v. Bd. of Education*, 436 Mass. 763, 773 (2002) (noting that in promulgating regulations, "the agency may not exceed those powers and obligations expressly conferred on it by statute or reasonably necessary to carry out the purposes for which the statute was enacted").

C. *The Obsolete Mortgage Statute Does Not Render the Mortgage Unenforceable.*

Count III of the complaint is a claim that the limitations periods in G. L. c. 260, § 33, the "Obsolete Mortgage Statute," render the first mortgage unenforceable. G. L. c. 260, § 33 provides in relevant part:

> A power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of, in the case of a mortgage in which no term of the mortgage is stated, thirty-five years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, five years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgment or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period.

The statutory language is unambiguous, and whether there is a maturity date stated in the mortgage is crucial in determining which limitations period, five years or thirty-five years, applies to the mortgage. See *Harvard 45 Assocs., LLC v. Allied Props. & Mtges., Inc.*, 80 Mass. App. Ct. 203, 208 (2011) (holding that mortgage providing on its face that it was to be due and payable on August 31, 2001 is subject to a 5-year limitations period). Any change in the maturity date, to effect a change in the statutory enforceability period, must be recorded. See *Housman v.*

LBM Fin., LLC, 80 Mass. App. Ct. 213, 216 (2011) (extension in maturity date must be recorded to be effective).

The LaRaces acknowledge that the mortgage states a maturity date on the face of the mortgage as follows: "This debt is evidenced by Borrower's note dated the same date as this Security Instrument ("Note"), which provides for monthly payments, with the full debt, if not paid earlier, due and payable on June 01, 2035." The LaRaces do not assert that any amendment to the mortgage or other change in this stated maturity date was recorded at the Registry. However, the LaRaces argue that by accelerating the note upon the LaRaces' default sometime prior to the 2007 foreclosure sale, the maturity date was changed for purposes of G. L. c. 260, § 33. There is no support for the LaRaces' argument, and the law is otherwise.

The term or maturity date of an underlying obligation can become the term or maturity date of the mortgage *only when* "stated on the face of the mortgage." *Deutsche Bank v. Fitchburg Capital, LLC,* supra471 Mass. 248, 257 (2015). The idea of forcing a mortgage holder or others to search for off-record sources of the maturity date of the mortgage, as urged by the LaRaces, was rejected in the decision affirmed by the SJC in *Deutsche Bank.* Basing a maturity date, for statute of limitations purposes, only on a date that is clearly set forth on the face of the mortgage itself, instead of forcing the mortgage holder to search for this information outside the record title, creates "a greater level of certainty and consistency for members of the public." *Deutsche Bank Nat'l Trust Co. v. Fitchburg Capital, LLC*, 21 LCR 559, 563 (Mass. Land Ct. 2013) (Foster, J.), aff'd *Deutsche Bank v. Fitchburg Capital, LLC,* supra, 471 Mass. 248. Furthermore, the requirement that the term be stated on the face of the mortgage "ensures that the enforcement period is clear from the record, affording the discharge process greater efficiency." *Id.*

III. ORDER TO SHOW CAUSE REGARDING G. l. c. 93A AND SLANDER OF TITLE COUNTS.

Mass. R. Civ. P. 11 provides in relevant part as follows: "The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay... For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." "'Good ground' requires that the pleadings be based on 'reasonable inquiry and an absence of bad faith.'" *Doe v. Nutter, McClennan & Fish,* 41 Mass. App. Ct. 137, 142 (1996), quoting in part *Bird v. Bird*, 24 Mass. App. Ct. 362, 368 (1987). It is within the proper exercise of the trial judge's discretion, "applying his sense of the entire case," to decide whether there has been "bad faith misuse of a court paper which could bring down sanctions." *Id.* at 369.

As is discussed above, I have found that counts IV and V of the complaint in the present action, stating purported claims for violation of G. L. c. 93A and slander of title, are the same claims fully litigated in the Superior Court action. These claims were litigated through a dispositive appeal to the Appeals Court, resulting in an appellate decision affirming the dismissal of the claims on statute of limitations grounds. Furthermore, the claims are not only the same claims legally and factually, but the present counts IV and V are nearly verbatim copies of the dismissed claims in the earlier Superior Court action. Present counsel for the LaRaces, who signed the complaint in the present action, was also counsel for the LaRaces who signed the complaint in the Superior Court action. Accordingly, it appears that counsel, being aware of a final adjudication of these claims adversely to his clients, chose to assert them in a new action notwithstanding their final adverse adjudication. Furthermore, counsel failed to disclose to the

court that these claims had been the subject of previous litigation. This is not the first time that present counsel has engaged in similar conduct.[6]

Upon a finding of a violation of Mass. R. Civ. P. 11, a court is authorized to impose an award of attorneys' fees against counsel committing the violation. *Tilman v. Brink*, 74 Mass. 845, 851 (2009). See also, *Van Christo Advertising, Inc v. M/A-COM/LCS*, 426 Mass. 410, 416 (1998) (Rule 11 authorizes the court "to impose attorney's fees and costs where an attorney has failed to show a subjective good faith belief that the pleading was supported in both fact and law."). Accordingly, counsel will be ordered to show cause why he should not be sanctioned for violating Rule 11 as outlined above.

[6] In *Ressler v. Deutsche Bank Trust Company*, 92 Mass. App. Ct. 502, 509-510 (2017), the Appeals Court made the following observations about present counsel's conduct of that litigation: "Here, this appeal comes perilously close to being frivolous. Counsel, who also represented the borrowers in the unsuccessful appeals in the *Woods*, *Bolling*, and *Strawbridge* cases we rely upon supra, as well as other appeals unsuccessfully presenting variants of the theories advanced here, likely should have known better than to pursue it, particularly after the decision in *Strawbridge*. We have carefully considered all of the arguments made in the borrower's brief, even those not rising to the level of appellate argument under Mass.R.A.P. 16(a)(4), as amended, 367 Mass. 921 (1975), and determined that none of them has merit. We decline to hold the appeal so utterly without basis as to warrant an award of fees and costs against either counsel or his client. We caution, however, that '[r]epetitive pursuit of unmeritorious appeals after prior warnings from trial and appellate courts will increase counsel's exposure to the assessment of financial sanctions.'" [citation omitted]

CONCLUSION

For the reasons stated above, Wells Fargo's and Ocwen's motion for summary judgment is **ALLOWED**, and the plaintiffs' request that summary judgment be entered in their favor is **DENIED**.

It is further **ORDERED** that counsel for the plaintiffs appear before the court on Monday, June 3, 2019 at 10:00 to show cause why he should not be sanctioned pursuant to Rule 11 for the reasons described herein. Any written submissions in connection with the order to show cause are to be filed no later than May 29, 2019.

Judgment will enter in accordance with this Decision.

Howard P. Speicher
Justice

Dated: May 17, 2019.

(SEAL)

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

MISCELLANEOUS CASE
No. 18 MISC 000327 (HPS)

MARK A. LaRACE and TAMMY L. LaRACE,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., as TRUSTEE for ABFC 2005-OPT1 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2005-OPT1 and the CERTIFICATE HOLDERS THEREOF, ET AL.,

Defendants.

JUDGMENT

This action commenced June 29, 2018 with the filing of a Verified Complaint by Mark A. LaRace and Tammy L. LaRace, asserting claims for declaratory judgment pursuant to G. L. c. 231A, quiet title pursuant to G. L. c. 240, §§ 6-10, and other claims, all with respect to the foreclosure of property of the plaintiffs at 6 Brookburn Street, Springfield, Hampden County ("Property").

This case came on for hearing on the Motion for Summary Judgment of defendants Wells Fargo Bank, N.A., as Trustee for ABFC 2005-Opt1 Trust, ABFC Asset-Backed Certificates, Series 2005-Opt1 ("Wells Fargo") and Ocwen Loan Servicing, LLC ("Ocwen"). In a decision of even date, the court (Speicher, J.) has determined that judgment shall enter in favor of the defendants on all counts.

In accordance with the court's decision, it is

ORDERED and ADJUDGED, that Counts I through VII[1] of the Verified Complaint are **DISMISSED WITH PREJUDICE** with respect to defendants Wells Fargo and Ocwen;

It is further

ORDERED and ADJUDGED, that the Verified Complaint is **DISMISSED WITHOUT PREJUDICE** as to all defendants other than Wells Fargo and Ocwen for failure of the plaintiffs to effect service of process as required by Mass. R. Civ. P. 4(j);

It is further

ORDERED and ADJUDGED, that the first count of the Verified Complaint labelled as Count VI, purporting to make claims for "Negligence and Trespass" against Marty's Real Estate is **DISMISSED WITHOUT PREJUDICE** for lack of subject matter jurisdiction.

It is further

ORDERED and ADJUDGED that this Judgment is a full adjudication of all the parties' claims in this case, and all prayers for relief by any party in this action which are not granted in the preceding paragraphs are DENIED.

NPA. By the Court. (Speicher, J.)

Attest:

Deborah J. Patterson
Recorder

Dated: May 17, 2019.

A TRUE COPY
ATTEST:
Deborah J. Patterson
RECORDER

[1] Including the second count labelled as "Count VI," but not the first count so labelled.

COMMONWEALTH OF MASSACHUSETTS
LAND COURT
DEPARTMENT OF THE TRIAL COURT

HAMPDEN, ss.

MISCELLANEOUS CASE
No. 18 MISC 000327 (HPS)

MARK A. LaRACE and TAMMY L. LaRACE,

Plaintiffs,

v.

WELLS FARGO BANK, N.A., as TRUSTEE for ABFC 2005-OPT1 TRUST, ABFC ASSET-BACKED CERTIFICATES, SERIES 2005-OPT1 and the CERTIFICATE HOLDERS THEREOF, ET AL.,

Defendants.

DECISION ON ORDER TO SHOW CAUSE

On May 17, 2017, I granted summary judgment dismissing the plaintiffs' multiple-count complaint making claims with respect to the validity of a mortgage on their property. I noted that two of the counts, for violation of G. L. c. 93A and for slander of title (counts IV and V) appeared to be virtually identical to two of three counts in an earlier Superior Court action between the same parties. The plaintiffs' claims in that case had been dismissed on statute of limitations grounds, and the dismissal had been affirmed by the Appeals Court. I ordered plaintiffs' counsel, Glenn F. Russell, to show cause why he should not be sanctioned for violation of Mass. R. Civ. P. 11. Attorney Russell, represented by his own counsel, appeared at a hearing before me on June 13, 2019, and filed a response to the order to show cause. Following

the hearing, I took the matter under advisement. For the reasons stated below, I find and rule that Attorney Russell violated Rule 11 and is subject to appropriate sanctions.

FACTS

The facts material to the present matter are not in dispute. On January 4, 2014, in the third of four actions involving the plaintiffs' property, Attorney Russell filed on behalf of the plaintiffs, Mark LaRace and Tammy LaRace, a complaint in Superior Court in which the LaRaces sued the present defendant Wells Fargo Bank, N.A. ("Wells Fargo") and its loan servicer, Ocwen Loan Servicing, LLC, ("Ocwen"), seeking damages for wrongful foreclosure, violation of G. L. c. 93A, and slander of title.[1] (the "Superior Court action") The LaRaces' three-count complaint was dismissed by the Superior Court on statute of limitations grounds. Attorney Russell appealed the dismissal on behalf of the LaRaces, and the dismissal was affirmed by the Appeals Court on February 5, 2018. *LaRace v. Wells Fargo Bank, N.A., Trustee*, 92 Mass. App. Ct. 1126 (2018) (Rule 1:28 Decision).

Following the February, 2018 affirmance of the dismissal of the Superior Court complaint, the LaRaces, again represented by Attorney Russell, filed the present complaint on June 29, 2018, making a series of claims relating to the invalidity of the assignments through which Wells Fargo claimed ownership of the mortgage on the Property, and also making G. L. c. 93A and slander of title claims. The G. L. c. 93A and slander of title claims were based on assertions that the LaRaces were damaged by Wells Fargo and Ocwen having proceeded with the original foreclosure in 2008, later determined to be invalid by the SJC in *U.S. Bank National Association v. Ibanez*, 458 Mass. 637 (2011). ("*Ibanez*") As I noted in the summary judgment decision, the counts in the present action asserting claims of violation of G. L. c. 93A and slander

[1] *Mark A. LaRace and Tammy L. LaRace v. Wells Fargo Bank, N.A., as Trustee, et al.*, Hampden Superior Court Civil Action No. 2014-00012.

of title are nearly verbatim copies of the claims raised and dismissed in the Superior Court action.[2] In the summary judgment decision, having determined that the G. L. c. 93A and slander of title counts were, for res judicata purposes, the same as the two counts dismissed in the Superior Court action, I dismissed those counts with prejudice.

DISCUSSION

Mass. R. Civ. P. 11 provides in relevant part as follows: "The signature of an attorney to a pleading constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is a good ground to support it; and that it is not interposed for delay... For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action." "'Good ground' requires that the pleadings be based on 'reasonable inquiry and an absence of bad faith.'" *Doe v. Nutter, McClennan & Fish,* 41 Mass. App. Ct. 137, 142 (1996), quoting in part *Bird v. Bird*, 24 Mass. App. Ct. 362, 368 (1987). It is within the proper exercise of the trial judge's discretion, "applying his sense of the entire case," to decide whether there has been "bad faith misuse of a court paper which could bring down sanctions." *Id.* at 369.

In my show cause order, I ordered counsel for the LaRaces to show cause why he should not be sanctioned for re-asserting the already-litigated Superior Court claims, and why he should not be sanctioned for failing to disclose to the court the existence of the earlier claims. For the reasons stated below, I find and rule that counsel did not fail to disclose the earlier claims, but he

---

[2] Count IV of the present complaint, asserting a claim of violation of G. L. c. 93A, and Count V, asserting a slander of title claim, are nearly verbatim "cut and paste" copies, complete with misspellings, ("asservation") of Counts II and III of the complaint in the Superior Court action. The following is a pairing of the verbatim or nearly verbatim paragraphs in the present complaint (starting with paragraph 216) with the corresponding paragraphs in the Superior Court complaint (starting with paragraph 111); 216/111; 217/112; 218/113; 219/114; 220/115; 221/116; 227/117; 228/118; 229/119; 230/120; 231/121; 232/122; 233/123; 234/125; 235/126; 236/127; 237/128; 238/133; 239/134; 240/135; 241/136; 242/137; 243/138; 244/139; 247/141; 248/142; 249/143; 250/144; 251/145252/146; 253/147; 254/151.

did violate Rule 11 by re-asserting the G. L. c. 93A and slander of title claims in the present action.

Failure to Disclose.

In the show cause order, I required counsel to show cause why he should not be sanctioned for failing to disclose to the court that the G. L. c. 93A and slander of title counts in the present action had been the subject of previous litigation. This order was based on the fact that at the case management conference, at which these counts were discussed, but only with respect to the court's subject matter jurisdiction over them, counsel did not disclose the previous litigation. However, counsel has pointed out in response to the show cause order, that the Superior Court action was disclosed by reference to it in paragraph 85 of the present complaint, and by inclusion of a copy of the Superior Court complaint as part of Exhibit W to the present complaint. I note that an oblique reference to "litigation solely related to damages" in paragraph 85 of a 293 paragraph complaint is hardly a forthright disclosure of the identical claims in the previous action. I further note that burying a copy of the Superior Court complaint as the fifth of five other documents collectively labelled as "Exhibit W," and following hundreds of other pages of un-indexed exhibits, without mentioning their significance at a case management conference, is also, at best, a technical disclosure.

Like counsel's verbose writing style, his over-inclusion of hundreds of exhibits appears intended more to obfuscate than to elucidate the claims in his complaint. Nevertheless, as the Superior Court complaint was at least technically disclosed, it would not be appropriate to base a finding of violation of Rule 11 on a failure to disclose the earlier complaint or the claims. In this circumstance, counsel may have violated the spirit of Rule 11, but he has avoided a violation of the letter of the rule.

Identity of the Claims in the Superior Court Action and the Present Action

I have already determined, in the summary judgment decision, that Counts IV and V in the present case, making claims pursuant to G. L. c/ 93A and for slander of title, are identical claims for res judicata purposes to the claims dismissed in the Superior Court action. I have also pointed out that they are not just the same claims, but that they are nearly verbatim copies of the earlier claims, including the same misspellings. As I pointed out in the order to show cause, the common thread running through the claims in both of these actions, as well as in the try title action dismissed by the United States District Court, (the second action involving these parties) is the LaRaces' claim that Wells Fargo did not hold the mortgage to the LaRaces' property because of claimed defects in the chain of title of assignments of the mortgage. In the Superior Court action, the LaRaces based their G. L. c. 93A claim and their slander of title claims on this failure of Wells Fargo to hold the mortgage at the time of the 2008 foreclosure of their property, later ruled invalid in the *Ibanez* decision.

Attorney Russell argues that he did not repeat these claims in the present action, notwithstanding the nearly verbatim repetition of almost every paragraph from two counts of the Superior Court complaint. Rather, he argues that in the present action, the G. L. c. 93A count and the slander of title count purported to make claims for damages based on Wells Fargo's intended 2018 foreclosure, and not for damages resulting from the 2008 foreclosure. However, while the new complaint may have added some factual allegations relating to Wells Fargo's intended 2018 foreclosure, both counts IV and V of the present complaint plainly make claims for damages based on facts relating to the 2008 foreclosure, and thus are an attempt to re-litigate claims already fully adjudicated in the Superior Court action.

Even a cursory examination of the present complaint belies counsel's argument that the present complaint does not repeat the fully adjudicated claims with respect to the 2008 foreclosure:

> Paragraph 215 of the present complaint: "Defendants have violated G. L. c. 93A and its implementing regulations by making intentionally unfair and deceptive statements related to the assertion of being a proper party to act under statute, at the time of the publication of June 2007 mandatory publication..."
>
> Paragraph 218: "Defendants have violated G. L. c. 93A and its implementing regulations by Defendants(s) intentional, unfair, and deceptive; assertions to Plaintiffs (and the world), that it/they were and are the unquestioned defeasible fee title holder to the Premises, at the time of the void purported June 2007 publication(s) of foreclosure auction..." (emphasis and grammatical errors in original)
>
> Paragraph 219: "Defendants have violated G. L. c. 93A and its implementing regulations by Defendants(s) intentional, unfair, and deceptive; assertions to Plaintiffs (and the world), that it was the unquestioned fee title holder to the Premises, at the completion of the purported July 05, 2008 void foreclosure auction sale."
>
> Paragraph 220: "Defendants have further violated G. L. c. 93A and its implementing regulations by Defendants(s) repeated intentionally deceptive asservations [sic] to the Land Court, Appeals Court, and SJC that it was the unquestioned fee title holder to the Premises, at the completion of the purported July 05, 2008 foreclosure auction sale, and which foreclosure deed remains encumbering the title to Plaintiffs' real property."
>
> Paragraph 228: "Defendants have further violated G. L. c. 93A and its implementing regulations by Defendants(s) intentionally failing to fully research the historical ratio decidendi related to the purported 2008 exercise of the power of sale under statute..."
>
> Paragraph 232: "Defendants have violated G. L. c. 93A and its implementing regulations by Defendants(s) Defendants(s) [sic] intentional and continued wrongful possession, dominion, and/or control over the Premises from the time the Plaintiffs' [sic] vacated the Premises in June of 2007, until Plaintiffs returned to the same in January 2010, solely upon their own initiative." (emphasis in original)

> Paragraph 237: "Plaintiffs further relied upon Defendant(s) deceptive assertions to their detriment where Plaintiffs were thereafter unnecessarily forced to hire present counsel to defend the Plaintiffs' right(s) in Defendant(s) 2008 wrongful action to "Quiet Title" to the Premises, in the Land Court."
>
> Paragraph 249: "(a) Publication of false statement. Here it is unquestioned that the Defendant has caused a false publication by way of a legally invalid 'assignment of mortgage', 'foreclosure deed' and 'certificate of entry' to remain publicly recorded upon the Hampden County Registry of Deeds where Defendant(s) remain subject to the Law of the Case as stated in Ibanez. Defendant has also recorded two legally inoperative documents upon the title to the Plaintiffs' real property which wrongfully assert Defendant's defeasible fee interest in said title."
>
> Paragraph 250: "(b) Harm to Plaintiff. It is unquestioned that Defendant(s) [sic] publication of the false assertion that it was the current defeasible fee title holder of the Plaintiff's residence, and conducted a proper auction under statute, caused significant financial, and devastating emotional harm to the Plaintiffs, through their reliance upon these materially false asservations." [sic]

The paragraphs quoted above are not only verbatim copies of paragraphs in the Superior Court complaint, but they all constitute explicit assertions that the LaRaces have suffered damages as a result of Wells Fargo's improper publication of notice of the 2008 foreclosure sale, its conduct of the 2008 foreclosure auction, and its recording of the foreclosure deed resulting from the 2008 foreclosure auction. These are the claims that the Superior Court and the Appeals Court have already ruled are barred by the statute of limitations. The allegations in the quoted paragraphs do not even arguably make claims with respect to the 2018 foreclosure. These paragraphs explicitly refer to and make claims of damages resulting from Wells Fargo's alleged improper conduct in 2007 and 2008. Paragraphs 249 and 250 rely on Wells Fargo's alleged tortious recording of a foreclosure deed, which can only mean the foreclosure deed resulting from the 2008 foreclosure auction. At the time the present complaint was filed in 2018, there had been no other foreclosure deed, as the 2018 foreclosure auction had not yet taken place.

Other paragraphs in Counts IV and V also repeat the LaRaces' claims made in the earlier Superior Court action, but the paragraphs quoted above make it explicitly clear that Attorney Russell was attempting in the present action to recover damages for his clients on the basis of claims that he knew had been dismissed by the Superior Court, and that had been affirmed as properly dismissed by the Appeals Court. The same counsel knowingly asserting identical claims against the same defendants after a full and final adjudication had resulted in the final dismissal of those claims is a violation of Rule 11. The intentional re-assertion of claims that had already been fully adjudicated constituted a violation of the requirement that an attorney, by signing his name to a pleading, certifies that he believes there is "a good ground to support it..." Mr. Russell, whom this court has witnessed repeatedly make the same legally dubious claims, but on behalf of different clients in different actions, crossed a line when he made the same claims for a second time on behalf of the same clients against the same defendants.

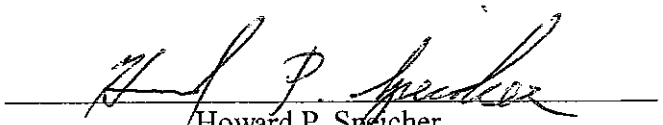
Sanctions

I find and rule that Attorney Russell did not have a subjective good faith belief that Counts IV and V of the complaint in the present action were properly asserted, as he was the attorney of record for the LaRaces in the Superior Court action, he represented them both in the Superior Court and at the Appeals Court on appeal of the dismissal of the Superior Court action, and as he intentionally re-asserted in the present action claims, largely verbatim, that the Appeals Court had upheld the dismissal of only a few months earlier. Attorney Russell has not offered any facts, by affidavit or otherwise, that would lead me to conclude other than that he has acted with an absence of good faith in asserting the present claims. See *City of Worcester, v. AME Realty Corp.*, 77 Mass. App. Ct. 64, 71-72 (2010).

Upon a finding of a violation of Mass. R. Civ. P. 11, a court is authorized to impose an award of attorneys' fees against counsel committing the violation. *Tilman v. Brink*, 74 Mass. 845, 851 (2009). See also, *Van Christo Advertising, Inc v. M/A-COM/LCS*, 426 Mass. 410, 416 (1998) (Rule 11 authorizes the court "to impose attorney's fees and costs where an attorney has failed to show a subjective good faith belief that the pleading was supported in both fact and law.").

Accordingly, the court hereby ORDERS Attorney Russell to pay attorneys' fees, in an amount to be determined by the court, to the defendants Wells Fargo and Ocwen.

The court further ORDERS the defendants Wells Fargo and Ocwen to submit affidavits supported by contemporaneous detailed billing records concerning attorneys' fees incurred in responding to Counts IV and V of the complaint in the present action, with every effort to be made, to the extent possible, to isolate time spent with respect to those two counts of the complaint. Such affidavits and any supporting material are to be filed no later than July 10, 2019, and any opposition or response is to be filed no later than July 17, 2019. The court will thereafter act on the papers submitted without further hearing, unless otherwise ordered.



Howard P. Speicher
Justice

Dated: June 28, 2019.

U.S. BANK NATIONAL ASSOCIATION, trustee, [Note 1] vs. ANTONIO IBANEZ (and a consolidated case [Note 2], [Note 3]).

458 Mass. 637

October 7, 2010 - January 7, 2011

Court Below: Land Court

Present: MARSHALL, C.J., IRELAND, SPINA, CORDY, BOTSFORD, & GANTS, JJ. [Note 4]

Related Cases:

- 17 LCR 202
- 17 LCR 679

Records And Briefs:

(1) SJC-10694 01 Appellant US Bank Brief
(2) SJC-10694 02 Appellee Ibanez Brief
(3) SJC-10694 03 Appellees LaRace Brief
(4) SJC-10694 04 Appellant Wells Fargo Reply Brief
(5) SJC-10694 05 Appellant US Bank Reply Brief
(6) SJC-10694 06 Amicus Attorney General Brief
(7) SJC-10694 07 Amicus Manson Brief
(8) SJC-10694 08 Amicus Real Estate Brief
(9) SJC-10694 09 Amicus McDonnell Brief

Real Property, Mortgage, Ownership, Record title. Mortgage, Real estate, Foreclosure, Assignment. Notice, Foreclosure of mortgage.

In two separate civil actions brought in the Land Court pursuant to G. L. c. 240, § 6, by the plaintiff banks, as trustees, seeking judgments declaring that they held clear title in fee simple to properties that they had foreclosed on (having claimed the authority to foreclose as the eventual assignees of the mortgages) and purchased back at foreclosure sales, the judge did not err in concluding that the securitization documents submitted by the plaintiffs failed to demonstrate that they were holders of the mortgages at the times of the publication of the notices of the foreclosure sales and of the sales themselves, and the judge therefore did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments. [645-655] Cordy, J., concurring, with whom Botsford, J., joined.

CIVIL ACTIONS commenced in the Land Court Department on September 16 and October 30, 2008.

Motions for entry of default judgment and to vacate judgment were heard by Keith C. Long, J.

The Supreme Judicial Court granted an application for direct appellate review.

R. Bruce Allensworth (Phoebe S. Winder & Robert W. Sparkes, III, with him) for U.S. Bank National Association & another.

Paul R. Collier, III (Max W. Weinstein with him) for Antonio Ibanez.

Glenn F. Russell, Jr., for Mark A. LaRace & another.

Page 638

The following submitted briefs for amici curiae:

Martha Coakley, Attorney General, & John M. Stephan, Assistant Attorney General, for the Commonwealth.

Kevin Costello, Gary Klein, Shennan Kavanagh & Stuart Rossman for National Consumer Law Center & others.

Ward P. Graham & Robert J. Moriarty, Jr., for Real Estate Bar Association for Massachusetts, Inc.

Marie McDonnell, pro se.

GANTS, J. After foreclosing on two properties and purchasing the properties back at the foreclosure sales, U.S. Bank National Association (U.S. Bank), as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z; and Wells Fargo Bank, N.A. (Wells Fargo), as trustee for ABFC 2005-OPT 1 Trust, ABFC Asset Backed Certificates, Series 2005- OPT 1 (plaintiffs), filed separate complaints in the Land Court asking a judge to declare that they held clear title to the properties in fee simple. We agree with the judge that the plaintiffs, who were not the original mortgagees, failed to make the required showing that they were the holders of the mortgages at the time of foreclosure. As a result, they did not demonstrate that the foreclosure sales were valid to convey title to the subject properties, and their requests for a declaration of clear title were properly denied. [Note 5]

Procedural history. On July 5, 2007, U.S. Bank, as trustee, foreclosed on the mortgage of Antonio Ibanez, and purchased the Ibanez property at the foreclosure sale. On the same day, Wells Fargo, as trustee, foreclosed on the mortgage of Mark and Tammy LaRace, and purchased the LaRace property at that foreclosure sale.

In September and October of 2008, U.S. Bank and Wells Fargo brought separate actions in the Land Court under G. L. c. 240, § 6, which authorizes actions "to quiet or establish the title to land situated in the commonwealth or to remove a cloud from the title thereto." The two complaints sought identical relief: (1) a judgment that the right, title, and interest of the mortgagor (Ibanez or the LaRaces) in the property was extinguished

by the foreclosure; (2) a declaration that there was no cloud on title arising from publication of the notice of sale in the Boston Globe; and (3) a declaration that title was vested in the plaintiff trustee in fee simple. U.S. Bank and Wells Fargo each asserted in its complaint that it had become the holder of the respective mortgage through an assignment made after the foreclosure sale.

In both cases, the mortgagors -- Ibanez and the LaRaces -- did not initially answer the complaints, and the plaintiffs moved for entry of default judgment. In their motions for entry of default judgment, the plaintiffs addressed two issues: (1) whether the Boston Globe, in which the required notices of the foreclosure sales were published, is a newspaper of "general circulation" in Springfield, the town where the foreclosed properties lay. See G. L. c. 244, § 14 (requiring publication every week for three weeks in newspaper published in town where foreclosed property lies, or of general circulation in that town); and (2) whether the plaintiffs were legally entitled to foreclose on the properties where the assignments of the mortgages to the plaintiffs were neither executed nor recorded in the registry of deeds until after the foreclosure sales. [Note 6] The two cases were heard together by the Land Court, along with a third case that raised the same issues.

On March 26, 2009, judgment was entered against the plaintiffs. The judge ruled that the foreclosure sales were invalid because, in violation of G. L. c. 244, § 14, the notices of the foreclosure sales named U.S. Bank (in the Ibanez foreclosure) and Wells Fargo (in the LaRace foreclosure) as the mortgage holders where they had not yet been assigned the mortgages. [Note 7] The judge found, based on each plaintiff's assertions in its complaint, that the plaintiffs acquired the mortgages by assignment only after the foreclosure sales and thus had no interest in the mortgages being foreclosed at the time of the publication of the notices of sale or at the time of the foreclosure sales. [Note 8]

The plaintiffs then moved to vacate the judgments. At a hearing on the motions on April 17, 2009, the plaintiffs conceded that each complaint alleged a postnotice, postforeclosure sale assignment of the mortgage at issue, but they now represented to the judge that documents might exist that could show a prenotice, preforeclosure sale assignment of the mortgages. The judge granted the plaintiffs leave to produce such documents, provided they were produced in the form they existed in at the time the foreclosure sale was noticed and conducted. In response, the plaintiffs submitted hundreds of pages of documents to the

judge, which they claimed established that the mortgages had been assigned to them before the foreclosures. Many of these documents related to the creation of the securitized mortgage pools in which the Ibanez and LaRace mortgages were purportedly included. [Note 9]

The judge denied the plaintiffs' motions to vacate judgment on October 14, 2009, concluding that the newly submitted documents did not alter the conclusion that the plaintiffs were not the holders of the respective mortgages at the time of foreclosure. We granted the parties' applications for direct appellate review.

Factual background. We discuss each mortgage separately, describing when appropriate what the plaintiffs allege to have happened and what the documents in the record demonstrate. [Note 10]

The Ibanez mortgage. On December 1, 2005, Antonio Ibanez took out a $103,500 loan for the purchase of property at 20 Crosby Street in Springfield, secured by a mortgage to the lender, Rose Mortgage, Inc. (Rose Mortgage). The mortgage was recorded the following day. Several days later, Rose Mortgage

executed an assignment of this mortgage in blank, that is, an assignment that did not specify the name of the assignee. [Note 11] The blank space in the assignment was at some point stamped with the name of Option One Mortgage Corporation (Option One) as the assignee, and that assignment was recorded on June 7, 2006. Before the recording, on January 23, 2006, Option One executed an assignment of the Ibanez mortgage in blank.

According to U.S. Bank, Option One assigned the Ibanez mortgage to Lehman Brothers Bank, FSB, which assigned it to Lehman Brothers Holdings Inc., which then assigned it to the Structured Asset Securities Corporation, [Note 12] which then assigned the mortgage, pooled with approximately 1,220 other mortgage loans, to U.S. Bank, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z. With this last assignment, the Ibanez and other loans were pooled into a trust and converted into mortgage-backed securities that can be bought and sold by investors -- a process known as securitization.

For ease of reference, the chain of entities through which the Ibanez mortgage allegedly passed before the foreclosure sale is:

Rose Mortgage, Inc. (originator)

Option One Mortgage Corporation (record holder)

Lehman Brothers Bank, FSB

Lehman Brothers Holdings Inc. (seller)

Structured Asset Securities Corporation (depositor)

U.S. Bank National Association, as trustee for the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z

According to U.S. Bank, the assignment of the Ibanez mortgage to U.S. Bank occurred pursuant to a December 1, 2006, trust agreement, which is not in the record. What is in the record is the private placement memorandum (PPM), dated December 26, 2006, a 273-page, unsigned offer of mortgage-backed securities to potential investors. The PPM describes the mortgage pools and the entities involved, and summarizes the provisions of the trust agreement, including the representation that mortgages "will be" assigned into the trust. According to the PPM, "[e]ach transfer of a Mortgage Loan from the Seller [Lehman Brothers Holdings Inc.] to the Depositor [Structured Asset Securities Corporation] and from the Depositor to the Trustee [U.S. Bank] will be intended to be a sale of that Mortgage Loan and will be reflected as such in the Sale and Assignment Agreement and the Trust Agreement, respectively." The PPM also specifies that "[e]ach Mortgage Loan will be identified in a schedule appearing as an exhibit to the Trust Agreement." However, U.S. Bank did not provide the judge with any mortgage schedule identifying the Ibanez loan as among the mortgages that were assigned in the trust agreement.

On April 17, 2007, U.S. Bank filed a complaint to foreclose on the Ibanez mortgage in the Land Court under the Servicemembers Civil Relief Act (Servicemembers Act), which restricts foreclosures against active duty members of the uniformed services. See 50 U.S.C. Appendix §§ 501, 511, 533 (2006 & Supp. II 2008). [Note 13] In the complaint, U.S. Bank represented that it was the "owner (or assignee) and holder" of the mortgage given by Ibanez for the property. A judgment issued on behalf of U.S. Bank on June 26, 2007, declaring that the mortgagor was not entitled to protection from foreclosure under the Servicemembers Act. In June, 2007, U.S. Bank also caused to be published in the Boston

Globe the notice of the foreclosure sale required by G. L. c. 244, § 14. The notice identified U.S. Bank as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, the Ibanez property

was purchased by U.S. Bank, as trustee for the securitization trust, for $94,350, a value significantly less than the outstanding debt and the estimated market value of the property. The foreclosure deed (from U.S. Bank, trustee, as the purported holder of the mortgage, to U.S. Bank, trustee, as the purchaser) and the statutory foreclosure affidavit were recorded on May 23, 2008. On September 2, 2008, more than one year after the sale, and more than five months after recording of the sale, American Home Mortgage Servicing, Inc., "as successor-in-interest" to Option One, which was until then the record holder of the Ibanez mortgage, executed a written assignment of that mortgage to U.S. Bank, as trustee for the securitization trust. [Note 14] This assignment was recorded on September 11, 2008.

The LaRace mortgage. On May 19, 2005, Mark and Tammy LaRace gave a mortgage for the property at 6 Brookburn Street in Springfield to Option One as security for a $103,200 loan; the mortgage was recorded that same day. On May 26, 2005, Option One executed an assignment of this mortgage in blank.

According to Wells Fargo, Option One later assigned the LaRace mortgage to Bank of America in a July 28, 2005, flow sale and servicing agreement. Bank of America then assigned it to Asset Backed Funding Corporation (ABFC) in an October 1, 2005, mortgage loan purchase agreement. Finally, ABFC pooled the mortgage with others and assigned it to Wells Fargo, as trustee for the ABFC 2005-OPT 1 Trust, ABFC Asset-Backed Certificates, Series 2005-OPT 1, pursuant to a pooling and servicing agreement (PSA).

For ease of reference, the chain of entities through which the LaRace mortgage allegedly passed before the foreclosure sale is:

Option One Mortgage Corporation (originator and record holder)

Bank of America

Asset Backed Funding Corporation (depositor)

Wells Fargo, as trustee for the ABFC 2005-OPT 1, ABFC Asset-Backed Certificates, Series 2005-OPT 1

Wells Fargo did not provide the judge with a copy of the flow sale and servicing agreement, so there is no document in the record reflecting an assignment of the LaRace mortgage by Option One to Bank of America. The plaintiff did produce an unexecuted copy of the mortgage loan purchase agreement, which was an exhibit to the PSA. The mortgage loan purchase agreement provides that Bank of America, as seller, "does hereby agree to and does hereby sell, assign, set over, and otherwise convey to the Purchaser [ABFC], without recourse, on the Closing Date . . . all of its right, title and interest in and to each Mortgage Loan." The agreement makes reference to a schedule listing the assigned mortgage loans, but this schedule is not in the record, so there was no document before the judge showing that the LaRace mortgage was among the mortgage loans assigned to the ABFC.

Wells Fargo did provide the judge with a copy of the PSA, which is an agreement between the ABFC (as depositor), Option One (as servicer), and Wells Fargo (as trustee), but this copy was downloaded from the Securities and Exchange Commission Web site and was not signed. The PSA provides that the depositor "does hereby transfer, assign, set over and otherwise convey to the Trustee, on behalf of the Trust . . . all the right, title and interest of the Depositor . . . in and to . . . each Mortgage Loan identified on the Mortgage Loan Schedules," and "does hereby deliver" to the trustee the original mortgage note, an original mortgage assignment "in form and substance acceptable for recording," and other documents pertaining to each mortgage.

The copy of the PSA provided to the judge did not contain the loan schedules referenced in the agreement. Instead, Wells Fargo submitted a schedule that it represented identified the loans assigned in the PSA, which did not include property addresses, names of mortgagors, or any number that corresponds to the loan number or servicing number on the LaRace mortgage. Wells Fargo contends that a loan with the LaRace property's zip

code and city is the LaRace mortgage loan because the payment history and loan amount matches the LaRace loan.

On April 27, 2007, Wells Fargo filed a complaint under the Servicemembers Act in the Land Court to foreclose on the LaRace mortgage. The complaint represented Wells Fargo as the "owner (or assignee) and holder" of the mortgage given by the LaRaces for the property. A

judgment issued on behalf of Wells Fargo on July 3, 2007, indicating that the LaRaces were not beneficiaries of the Servicemembers Act and that foreclosure could proceed in accordance with the terms of the power of sale. In June, 2007, Wells Fargo caused to be published in the Boston Globe the statutory notice of sale, identifying itself as the "present holder" of the mortgage.

At the foreclosure sale on July 5, 2007, Wells Fargo, as trustee, purchased the LaRace property for $120,397.03, a value significantly below its estimated market value. Wells Fargo did not execute a statutory foreclosure affidavit or foreclosure deed until May 7, 2008. That same day, Option One, which was still the record holder of the LaRace mortgage, executed an assignment of the mortgage to Wells Fargo as trustee; the assignment was recorded on May 12, 2008. Although executed ten months after the foreclosure sale, the assignment declared an effective date of April 18, 2007, a date that preceded the publication of the notice of sale and the foreclosure sale.

Discussion. The plaintiffs brought actions under G. L. c. 240, § 6, seeking declarations that the defendant mortgagors' titles had been extinguished and that the plaintiffs were the fee simple owners of the foreclosed properties. As such, the plaintiffs bore the burden of establishing their entitlement to the relief sought. Sheriff's Meadow Found., Inc. v. Bay-Courte Edgartown, Inc., 401 Mass. 267, 269 (1987). To meet this burden, they were required "not merely to demonstrate better title . . . than the defendants possess, but . . . to prove sufficient title to succeed in [the] action." Id. See NationsBanc Mtge. Corp. v. Eisenhauer, 49 Mass. App. Ct. 727, 730 (2000). There is no question that the relief the plaintiffs sought required them to establish the validity of the foreclosure sales on which their claim to clear title rested.

Massachusetts does not require a mortgage holder to obtain

judicial authorization to foreclose on a mortgaged property. See G. L. c. 183, § 21; G. L. c. 244, § 14. With the exception of the limited judicial procedure aimed at certifying that the mortgagor is not a beneficiary of the Servicemembers Act, a mortgage holder can foreclose on a property, as the plaintiffs did here, by exercise of the statutory power of sale, if such a power is granted by the mortgage itself. See Beaton v. Land Court, 367 Mass. 385, 390-391, 393, appeal dismissed, 423 U.S. 806 (1975).

Where a mortgage grants a mortgage holder the power of sale, as did both the Ibanez and LaRace mortgages, it includes by reference the power of sale set out in G. L. c. 183, § 21, and further regulated by G. L. c. 244, §§ 11-17C. Under G. L. c. 183, § 21, after a mortgagor defaults in the performance of the underlying note, the mortgage holder may sell the property at a public auction and convey the property to the purchaser in fee simple, "and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity." Even where there is a dispute as to whether the mortgagor was in default or whether the party claiming to be the mortgage holder is the true mortgage holder, the foreclosure goes forward unless the mortgagor files an action and obtains a court order enjoining the foreclosure. [Note 15] See Beaton v. Land Court, supra at 393.

Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that "one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void." Moore v. Dick, 187 Mass. 207, 211 (1905). See Roche v. Farnsworth, 106 Mass. 509, 513 (1871) (power of

sale contained in mortgage "must be executed in strict compliance with its terms"). See also McGreevey v. Charlestown Five Cents Sav. Bank, 294 Mass. 480, 484 (1936). [Note 16]

One of the terms of the power of sale that must be strictly adhered to is the restriction on who is entitled to foreclose. The "statutory power of sale" can be exercised by "the mortgagee or his executors, administrators, successors or assigns." G. L. c. 183, § 21. Under G. L. c. 244, § 14, "[t]he mortgagee or person having his estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal, or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person" is empowered to exercise the statutory power of sale. Any effort to foreclose by a party lacking "jurisdiction and authority" to carry out a foreclosure under these statutes is void. Chace v. Morse, 189 Mass. 559, 561 (1905), citing Moore v. Dick, supra. See Davenport v. HSBC Bank USA, 275 Mich. App. 344, 347-348 (2007) (attempt to foreclose by party that had not yet been assigned mortgage results in "structural defect that goes to the very heart of defendant's ability to foreclose by advertisement," and renders foreclosure sale void).

A related statutory requirement that must be strictly adhered to in a foreclosure by power of sale is the notice requirement articulated in G. L. c. 244, § 14. That statute provides that "no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale," advance notice of the foreclosure sale has been provided to the mortgagor, to other interested parties, and by publication in a newspaper published in the town where the mortgaged land lies or of general circulation in that town. Id. "The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a

strict compliance with it is essential to the valid exercise of the power." Moore v. Dick, supra at 212. See Chace v. Morse, supra ("where a certain notice is prescribed, a sale without any notice, or upon a notice lacking the essential requirements of the written power, would be void as a proceeding for foreclosure"). See also McGreevey v. Charlestown Five Cents Sav. Bank, supra. 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. [Note 17] See Roche v. Farnsworth, supra (mortgage sale void where notice of sale identified original mortgagee but not mortgage holder at time of notice and sale). See also Bottomly v. Kabachnick, 13 Mass. App. Ct. 480, 483-484 (1982) (foreclosure void where holder of mortgage not identified in notice of sale).

For the plaintiffs to obtain the judicial declaration of clear title that they seek, they had to prove their authority to foreclose under the power of sale and show their compliance with the requirements on which this authority rests. Here, the plaintiffs were not the original mortgagees to whom the power of sale was granted; rather, they claimed the authority to foreclose as the eventual assignees of the original mortgagees. Under the plain language of G. L. c. 183, § 21, and G. L. c. 244, § 14, the plaintiffs had the authority to exercise the power of sale contained in the Ibanez and LaRace mortgages only if they were the assignees of the mortgages at the time of the notice of sale and the subsequent foreclosure sale. See In re Schwartz, 366 B.R. 265, 269 (Bankr. D. Mass. 2007) ("Acquiring the mortgage after the entry and foreclosure sale does not satisfy the Massachusetts statute"). [Note 18] See also Jeff-Ray Corp. v. Jacobson, 566 So. 2d 885, 886 (Fla. Dist. Ct. App. 1990) (per curiam) (foreclosure

action could not be based on assignment of mortgage dated four months after commencement of foreclosure proceeding).

The plaintiffs claim that the securitization documents they submitted establish valid assignments that made them the holders of the Ibanez and LaRace mortgages before the notice of sale and the foreclosure sale. We turn, then, to the documentation submitted by the plaintiffs to determine whether it met the requirements of a valid assignment.

Like a sale of land itself, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor. See G. L. c. 183, § 3; Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175, 177 (1917). In a "title theory state" like Massachusetts, a mortgage is a transfer of legal title in a property to secure a debt. See Faneuil Investors Group, Ltd. Partnership v. Selectmen of Dennis, 458 Mass. 1, 6 (2010). Therefore, when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the legal title is held by the mortgagee. See Vee Jay Realty Trust Co. v. DiCroce, 360 Mass. 751, 753 (1972), quoting Dolliver v. St. Joseph Fire & Marine Ins. Co., 128 Mass. 315, 316 (1880) (although "as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands," mortgagee has legal title to property); Maglione v. BancBoston Mtge. Corp., 29 Mass. App. Ct. 88, 90 (1990). Where, as here, mortgage loans are pooled together in a trust and converted into mortgage-backed securities, the underlying promissory notes serve as financial instruments generating a potential income stream for investors, but the mortgages securing these notes are still legal title to someone's home or farm and must be treated as such.

Focusing first on the Ibanez mortgage, U.S. Bank argues that it was assigned the mortgage under the trust agreement described in the PPM, but it did not submit a copy of this trust agreement to the judge. The PPM, however, described the trust agreement as an agreement to be executed in the future, so it only furnished evidence of an intent to assign mortgages to U.S. Bank, not

proof of their actual assignment. Even if there were an executed trust agreement with language of present assignment, U.S. Bank did not produce the schedule of loans and mortgages that was an exhibit to that agreement, so it failed to show that the Ibanez mortgage was among the mortgages to be assigned by that agreement. Finally, even if there were an executed trust agreement with the required schedule, U.S. Bank failed to furnish

any evidence that the entity assigning the mortgage -- Structured Asset Securities Corporation -- ever held the mortgage to be assigned. The last assignment of the mortgage on record was from Rose Mortgage to Option One; nothing was submitted to the judge indicating that Option One ever assigned the mortgage to anyone before the foreclosure sale. [Note 19] Thus, based on the documents submitted to the judge, Option One, not U.S. Bank, was the mortgage holder at the time of the foreclosure, and U.S. Bank did not have the authority to foreclose the mortgage.

Turning to the LaRace mortgage, Wells Fargo claims that, before it issued the foreclosure notice, it was assigned the LaRace mortgage under the PSA. The PSA, in contrast with U.S. Bank's PPM, uses the language of a present assignment ("does hereby . . . assign" and "does hereby deliver") rather than an intent to assign in the future. But the mortgage loan schedule Wells Fargo submitted failed to identify with adequate specificity the LaRace mortgage as one of the mortgages assigned in the PSA. Moreover, Wells Fargo provided the judge with no document that reflected that the ABFC (depositor) held the LaRace mortgage that it was purportedly assigning in the PSA. As with the Ibanez loan, the record holder of the LaRace loan was Option One, and nothing was submitted to the judge which demonstrated that the LaRace loan was ever assigned by Option One to another entity before the publication of the notice and the sale.

Where a plaintiff files a complaint asking for a declaration of clear title after a mortgage foreclosure, a judge is entitled to ask for proof that the foreclosing entity was the mortgage holder at

the time of the notice of sale and foreclosure, or was one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14. A plaintiff that cannot make this modest showing cannot justly proclaim that it was unfairly denied a declaration of clear title. See In re Schwartz, supra at 266 ("When HomEq [Servicing Corporation] was required to prove its authority to conduct the sale, and despite having been given ample opportunity to do so, what it produced instead was a jumble of documents and conclusory statements, some of which are not supported by the documents and indeed even contradicted by them"). See also Bayview Loan Servicing, LLC v. Nelson, 382 Ill. App. 3d 1184, 1188 (2008) (reversing grant of summary judgment in favor of financial entity in foreclosure action, where there was "no evidence that [the entity] ever obtained any legal interest in the subject property").

We do not suggest that an assignment must be in recordable form at the time of the notice of sale or the subsequent foreclosure sale, although recording is likely the better practice. Where a pool of mortgages is assigned to a securitized trust, the executed agreement that assigns the pool of mortgages, with a schedule of the pooled mortgage loans that clearly and specifically identifies the mortgage at issue as among those assigned, may suffice to establish the trustee as the mortgage holder. However, there must be proof that the assignment was made by a party that itself held the mortgage. See In re Samuels, 415 B.R. 8, 20 (Bankr. D. Mass. 2009). A foreclosing entity may provide a complete chain of assignments linking it to the record holder of the mortgage, or a single assignment from the record holder of the mortgage. See In re Parrish, 326 B.R. 708, 720 (Bankr. N.D. Ohio 2005) ("If the claimant acquired the note and mortgage from the original lender or from another party who acquired it from the original lender, the claimant can meet its burden through evidence that traces the loan from the original lender to the claimant"). The key in either case is that the foreclosing entity must hold the mortgage at the time of the notice and sale in order accurately to identify itself as the present holder in the notice and in order to have the authority to foreclose under the power of sale (or the foreclosing entity must be one of the parties authorized to foreclose under G. L. c. 183, § 21, and G. L. c. 244, § 14).

The judge did not err in concluding that the securitization documents submitted by the plaintiffs failed to demonstrate that they were the holders of the Ibanez and LaRace mortgages, respectively, at the time of the publication of the notices and the sales. The judge, therefore, did not err in rendering judgments against the plaintiffs and in denying the plaintiffs' motions to vacate the judgments. [Note 20]

We now turn briefly to three other arguments raised by the plaintiffs on appeal. First, the plaintiffs initially contended that the assignments in blank executed by Option One, identifying the assignor but not the assignee, not only "evidence[] and confirm[] the assignments that occurred by virtue of the securitization agreements," but "are effective assignments in their own right." But in their reply briefs they conceded that the assignments in blank did not constitute a lawful assignment of the mortgages. Their concession is appropriate. We have long held that a conveyance of real property, such as a mortgage, that does not name the assignee conveys nothing and is void; we do not regard an assignment of land in blank as giving legal title in land to the bearer of the assignment. See Flavin v. Morrissey, 327 Mass. 217, 219 (1951); Macurda v. Fuller, 225 Mass. 341, 344 (1916). See also G. L. c. 183, § 3.

Second, the plaintiffs contend that, because they held the mortgage note, they had a sufficient financial interest in the mortgage to allow them to foreclose. In Massachusetts, where a note has been assigned but there is no written assignment of the mortgage underlying the note, the assignment of the note does not carry with it the assignment of the mortgage. Barnes v. Boardman, 149 Mass. 106, 114 (1889). Rather, the holder of the mortgage holds the mortgage in trust for the purchaser of the note, who has an equitable right to obtain an assignment of the mortgage, which may be accomplished by filing an action in court and obtaining an equitable order of assignment. Id. ("In some jurisdictions it is held that the mere transfer of the debt, without any assignment or even mention of the mortgage, carries the mortgage with it, so as to enable the assignee to assert his title in an action at law. . . .

This doctrine has not prevailed in Massachusetts, and the tendency of the decisions here has been, that in such cases the mortgagee would hold the legal title in trust for the purchaser of the debt, and that the latter might obtain a conveyance by a bill in equity"). See Young v. Miller, 6 Gray 152, 154 (1856). In the absence of a valid written assignment of a mortgage or a court order of assignment, the mortgage holder remains unchanged. This common-law principle was later incorporated in the statute enacted in 1912 establishing the statutory power of sale, which grants such a power to "the mortgagee or his executors, administrators, successors or assigns," but not to a party that is the equitable beneficiary of a mortgage held by another. G. L. c. 183, § 21, inserted by St. 1912, c. 502, § 6.

Third, the plaintiffs initially argued that postsale assignments were sufficient to establish their authority to foreclose, and now argue that these assignments are sufficient when taken in conjunction with the evidence of a presale assignment. They argue that the use of postsale assignments was customary in the industry, and point to Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts, which declares: "A title is not defective by reason of . . . [t]he recording of an Assignment of Mortgage executed either prior, or subsequent, to foreclosure where said Mortgage has been foreclosed, of record, by the Assignee." [Note 21] To the extent that the plaintiffs rely on this title standard for the proposition that an entity that does not hold a mortgage may foreclose on a property, and then cure the cloud on title by a later assignment of a mortgage, their reliance is misplaced, because this proposition is contrary to G. L. c. 183, § 21, and G. L. c. 244, § 14. If the plaintiffs did not have their assignments to the Ibanez and LaRace mortgages at the time of the publication of the notices and the sales, they lacked authority to foreclose under G. L. c.

183, § 21, and G. L. c. 244, § 14, and their published claims to be the present holders of the mortgages were false. Nor may a postforeclosure assignment be treated as a preforeclosure assignment simply by declaring an

"effective date" that precedes the notice of sale and foreclosure, as did Option One's assignment of the LaRace mortgage to Wells Fargo. Because an assignment of a mortgage is a transfer of legal title, it becomes effective with respect to the power of sale only on the transfer; it cannot become effective before the transfer. See In re Schwartz, supra at 269.

However, we do not disagree with Title Standard No. 58 (3) that, where an assignment is confirmatory of an earlier, valid assignment made prior to the publication of notice and execution of the sale, that confirmatory assignment may be executed and recorded after the foreclosure, and doing so will not make the title defective. A valid assignment of a mortgage gives the holder of that mortgage the statutory power to sell after a default regardless whether the assignment has been recorded. See G. L. c. 183, § 21; MacFarlane v. Thompson, 241 Mass. 486, 489 (1922). Where the earlier assignment is not in recordable form or bears some defect, a written assignment executed after foreclosure that confirms the earlier assignment may be properly recorded. See Bon v. Graves, 216 Mass. 440, 444-445 (1914). A confirmatory assignment, however, cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time. See Scaplen v. Blanchard, 187 Mass. 73, 76 (1904) (confirmatory deed "creates no title" but "takes the place of the original deed, and is evidence of the making of the former conveyance as of the time when it was made"). Where there is no prior valid assignment, a subsequent assignment by the mortgage holder to the note holder is not a confirmatory assignment because there is no earlier written assignment to confirm. In this case, based on the record before the judge, the plaintiffs failed to prove that they obtained valid written assignments of the Ibanez and LaRace mortgages before their foreclosures, so the postforeclosure assignments were not confirmatory of earlier valid assignments.

Finally, we reject the plaintiffs' request that our ruling be prospective in its application. A prospective ruling is only appropriate, in limited circumstances, when we make a significant change in the common law. See Papadopoulos v. Target Corp., 457 Mass. 368, 384 (2010) (noting "normal rule of retroactivity"); Payton v. Abbott Labs, 386 Mass. 540, 565 (1982). We have not

done so here. The legal principles and requirements we set forth are well established in our case law and our statutes. All that has changed is the plaintiffs' apparent failure to abide by those principles and requirements in the rush to sell mortgage-backed securities.

Conclusion. For the reasons stated, we agree with the judge that the plaintiffs did not demonstrate that they were the holders of the Ibanez and LaRace mortgages at the time that they foreclosed these properties, and therefore failed to demonstrate that they acquired fee simple title to these properties by purchasing them at the foreclosure sale.

Judgments affirmed.

CORDY, J. (concurring, with whom Botsford, J., joins). I concur fully in the opinion of the court, and write separately only to underscore that what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it. As the opinion of the court notes, such strict compliance is necessary because Massachusetts both is a title theory State and allows for extrajudicial foreclosure.

The type of sophisticated transactions leading up to the accumulation of the notes and mortgages in question in these cases and their securitization, and, ultimately the sale of mortgaged-backed securities, are not barred nor even burdened by the requirements of Massachusetts law. The plaintiff banks, who brought

these cases to clear the titles that they acquired at their own foreclosure sales, have simply failed to prove that the underlying assignments of the mortgages that they allege (and would have) entitled them to foreclose ever existed in any legally cognizable form before they exercised the power of sale that accompanies those assignments. The court's opinion

clearly states that such assignments do not need to be in recordable form or recorded before the foreclosure, but they do have to have been effectuated.

What is more complicated, and not addressed in this opinion, because the issue was not before us, is the effect of the conduct of banks such as the plaintiffs here, on a bona fide third-party purchaser who may have relied on the foreclosure title of the bank and the confirmative assignment and affidavit of foreclosure recorded by the bank subsequent to that foreclosure but prior to the purchase by the third party, especially where the party whose property was foreclosed was in fact in violation of the mortgage covenants, had notice of the foreclosure, and took no action to contest it.

FOOTNOTES

[Note 1] For the Structured Asset Securities Corporation Mortgage Pass-Through Certificates, Series 2006-Z.

[Note 2] Wells Fargo Bank, N.A., trustee, vs. Mark A. LaRace & another.

[Note 3] The Appeals Court granted the plaintiffs' motion to consolidate these cases.

[Note 4] Chief Justice Marshall participated in the deliberation on this case prior to her retirement.

[Note 5] We acknowledge the amicus briefs filed by the Attorney General; the Real Estate Bar Association for Massachusetts, Inc.; Marie McDonnell; and the National Consumer Law Center, together with Darlene Manson, Germano DePina, Robert Lane, Ann Coiley, Roberto Szumik, and Geraldo Dosanjos.

[Note 6] The uncertainty surrounding the first issue was the reason the plaintiffs sought a declaration of clear title in order to obtain title insurance for these properties. The second issue was raised by the judge in the LaRace case at a January 5, 2009, case management conference.

[Note 7] The judge also concluded that the Boston Globe was a newspaper of general circulation in Springfield, so the foreclosures were not rendered invalid on that ground because notice was published in that newspaper.

[Note 8] In the third case, LaSalle Bank National Association, trustee for the certificate holders of Bear Stearns Asset Backed Securities I, LLC Asset-Backed Certificates, Series 2007-HE2 vs. Freddy Rosario, the judge concluded that the mortgage foreclosure "was not rendered invalid by its failure to record the assignment reflecting its status as holder of the mortgage prior to the foreclosure since it was, in fact, the holder by assignment at the time of the foreclosure, it truthfully claimed that status in the notice, and it could have produced proof of that status (the unrecorded assignment) if asked."

[Note 9] On June 1, 2009, attorneys for the defendant mortgagors filed their appearance in the cases for the first time.

[Note 10] The LaRace defendants allege that the documents submitted to the judge following the plaintiffs' motions to vacate judgment are not properly in the record before us. They also allege that several of these documents are not properly authenticated. Because we affirm the judgment on other grounds, we do not address these concerns, and assume that these documents are properly before us and were adequately authenticated.

[Note 11] This signed and notarized document states: "FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to _____ all beneficial interest under that certain Mortgage dated December 1, 2005 executed by Antonio Ibanez . . . ."

[Note 12] The Structured Asset Securities Corporation is a wholly owned direct subsidiary of Lehman Commercial Paper Inc., which is in turn a wholly owned, direct subsidiary of Lehman Brothers Holdings Inc.

[Note 13] As implemented in Massachusetts, a mortgage holder is required to go to court to obtain a judgment declaring that the mortgagor is not a beneficiary of the Servicemembers Act before proceeding to foreclosure. St. 1943, c. 57, as amended through St. 1998, c. 142.

[Note 14] The Land Court judge questioned whether American Home Mortgage Servicing, Inc., was in fact a successor in interest to Option One. Given our affirmance of the judgment on other grounds, we need not address this question.

[Note 15] An alternative to foreclosure through the right of statutory sale is foreclosure by entry, by which a mortgage holder who peaceably enters a property and remains for three years after recording a certificate or memorandum of entry forecloses the mortgagor's right of redemption. See G. L. c. 244, §§ 1, 2; Joyner v. Lenox Sav. Bank, 322 Mass. 46, 52-53 (1947). A foreclosure by entry may provide a separate ground for a claim of clear title apart from the foreclosure by execution of the power of sale. See, e.g., Grabiel v. Michelson, 297 Mass. 227, 228-229 (1937). Because the plaintiffs do not claim clear title based on foreclosure by entry, we do not discuss it further.

[Note 16] We recognize that a mortgage holder must not only act in strict compliance with its power of sale but must also "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor," and this responsibility is "more exacting" where the mortgage holder becomes the buyer at the foreclosure sale, as occurred here. See Williams v. Resolution GGF Oy, 417 Mass. 377, 382-383 (1994), quoting Seppala & Aho Constr. Co. v. Petersen, 373 Mass. 316, 320 (1977). Because the issue was not raised by the defendant mortgagors or the judge, we do not consider whether the plaintiffs committed a breach of this obligation.

[Note 17] The form of foreclosure notice provided in G. L. c. 244, § 14, calls for the present holder of the mortgage to identify itself and sign the notice. While the statute permits other forms to be used and allows the statutory form to be "altered as circumstances require," G. L. c. 244, § 14, we do not interpret this flexibility to suggest that the present holder of the mortgage need not identify itself in the notice.

[Note 18] The plaintiffs were not authorized to foreclose by virtue of any of the other provisions of G. L. c. 244, § 14: they were not the guardian or conservator, or acting in the name of, a person so authorized; nor were they the attorney duly authorized by a writing under seal.

[Note 19] Ibanez challenges the validity of this assignment to Option One. Because of the failure of U.S. Bank to document any preforeclosure sale assignment or chain of assignments by which it obtained the Ibanez mortgage from Option One, it is unnecessary to address the validity of the assignment from Rose Mortgage to Option One.

[Note 20] The plaintiffs have not pressed the procedural question whether the judge exceeded his authority in rendering judgment against them on their motions for default judgment, and we do not address it here.

[Note 21] Title Standard No. 58 (3) issued by the Real Estate Bar Association for Massachusetts continues: "However, if the Assignment is not dated prior, or stated to be effective prior, to the commencement of a foreclosure, then a foreclosure sale after April 19, 2007 may be subject to challenge in the Bankruptcy Court," citing In re Schwartz, 366 B.R. 265 (Bankr. D. Mass. 2007).

Home/Search Table of Cases by Citation Table of Cases by Name

Commonwealth of Massachusetts. Trial Court Law Libraries. Questions about legal information? Contact Reference Librarians.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS:

HOUSING COURT DEPARTMENT
METRO-SOUTH DIVISION
SUMMARY PROCESS
DOCKET NO.: 19H82SP01496

****

Deutsche Bank National Trust Company, as Trustee for Morgan Stanley Ixis Real Estate Capital Trust 2006-1 Mortgage Pass-Through Certificates, Series 2006-1
PLAINTIFF

v.

David P. Scanlan and Caryn Scanlan,
DEFENDANTS

****

ORDER

Defendants David P. Scanlan and Caryn L. Scanlan ("Defendants") are the former owners and mortgagors of the premises located at 26 Norlen Park, Bridgewater, Massachusetts ("premises"). On July 16, 2019, Plaintiff Deutsche Bank National Trust Company, as Trustee for Morgan Stanley Ixis Real Estate Capital Trust 2006-1, Mortgage Pass Through Certificates, Series 2006-1 ("Plaintiff") filed the present summary process action seeking to recover possession of the premises after purchasing it at foreclosure on November 19, 2018. Defendants filed an Answer and counterclaims challenging the validity of the foreclosure claiming that Plaintiff Failed to Properly Exercise the Power of Sale under the Mortgage Contract, G.L. c. 244, § 14, and All Related Statutory and Regulatory Requirements (Count I); violated G.L. c. 244, § 35C and 209 CMR 18.21A(2)(c) (Count II); and claiming that, that the Defendants' Mortgage was Obsolete under G.L. c. 260, § 33(Count III). Plaintiff filed a Motion for Summary Judgment which Defendants opposed and which is presently before the Court.

In support of its Motion, Plaintiff asserts the following undisputed facts: On January 4, 2006, Defendants executed and delivered to New Century Mortgage Corporation ("New Century"), a promissory note ("Note") and mortgage ("Mortgage") secured by the premises. In an assignment dated May 29, 2008, New Century assigned the mortgage to Deutsche Bank Trust Company Americas, formerly known as Banker's Trust Company, as Trustee and Custodian for MSIX 2006-1 ("Deutsche") and recorded same on March 31, 2009 at the Plymouth Country Registry of Deeds at Book 37006, Page 350. In a second assignment, Deutsche assigned the mortgage to Plaintiff. The second assignment provides that it was "entered into as of this 20th day of April 2010", was executed on June 9, 2011, and was recorded on March 1, 2013 in the Plymouth Country Registry of Deeds at Book 42747, Page 52. Defendants defaulted on the Mortgage and a foreclosure sale took place on November 19, 2018, at which time Plaintiff purchased the premises. The foreclosure deed, affidavit of sale and the "Affidavit Regarding Note Secured by Mortgage to be Foreclosed" ("35C Affidavit") are on record at the Plymouth County Registry of Deeds at Book 50649, Page 243 and Page 247. The 35C Affidavit provides that at the time of the foreclosure sale, Plaintiff was both the record mortgagee and note holder. On July 1, 2019, Plaintiff served Defendants with Notices to Quit, via constable, which ultimately led to Plaintiff's filing the underlying summary process action.

Based on the foregoing, Plaintiff argues in its motion that it has established its *prima facie* case for possession by filing a certified copy of the foreclosure deed and affidavit of sale which were recorded at the Registry of Deeds. Plaintiff further asserts that such recorded documents demonstrate compliance with the applicable statutory foreclosure requirements and in turn, standing to file the present action and superior right to possession.

In their Opposition, Defendants challenge the validity of the foreclosure and the underlying loan, as well as Plaintiff's right to possession. Defendants argue that Plaintiff failed to provide any evidence that it was the note holder at the time it sent to Defendants the right to cure notice; that Plaintiff's 35C Affidavit is insufficient under Mass. R. Civ. P. 56(e) as it contains hearsay statements only; that New Century, the original holder of the Note and Mortgage, went bankrupt and divested all of its mortgage assets before the purported first assignment to Plaintiff occurred; that Plaintiff failed to meet its burden to show that it complied with G.L. c. 183, § 21; and that the mortgage is void under the Obsolete Mortgage Statute, G.L. c. 260, § 33.

Standard of Review

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56(c). The moving party must demonstrate with admissible documents, based upon the pleadings, depositions, answers to interrogatories, admissions, material facts, and that the moving party is entitled to a judgment as a matter of law. *Community Nat'l Bank v. Dawes*, 369 Mass. 550, 553-56 (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).

In weighing the merits of a motion for summary judgment, the court must determine whether the factual disputes are genuine, and whether a fact genuinely in dispute is material. *Town of Norwood v. Adams-Russell Co., Inc.*, 401 Mass. 677, 683 (1988) citing *Anderson v.*

Liberty Lobby Inc., 477 U.S. 242, 247-248 (1986). The substantive law will identify which facts are material, and only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248; *Carey v. New England Organ Bank*, 446 Mass. 270, 278 (2006); *Molly A. v. Commissioner of the Dep't of Mental Retardation*, 69 Mass. App. Ct. 267, 268 n.5 (2007). In order to determine if a dispute about a material fact is genuine, the court must decide whether "the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

To defeat summary judgment the non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answer to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial." *Korouvacilis v. General Motors Corp.*, 410 Mass. 706, 714 (1991). The party opposing summary judgment "cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment." *LaLonde v. Eissner*, 405 Mass. 207, 209 (1976).

When the court considers the materials accompanying a motion for summary judgment, the inferences to be drawn from the underlying facts in such material must be viewed in the light most favorable to the party opposing the motion. *Attorney Gen. v. Bailey*, 386 Mass. 367, 371 (1982); see *Simplex Techs, Inc., v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). The court does not "pass upon the credibility of witnesses or the weight of the evidence or make its own decision of facts." *Id.* at 370. However, the court may only consider evidence which meets the requirements of Mass. R. Civ. P. 56(e). That evidence must come from "pleadings, depositions, answers to interrogatories, and responses to requests for admission under Rule 36, together with... affidavits, if any." Mass. R. Civ. P. 56(c).

To prevail in a summary process action involving foreclosed property where the validity of the foreclosure is challenged, the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. To prove this element of its claim for possession, the post-foreclosure plaintiff must show "that the title was acquired strictly according to the power of sale provided in the mortgage." *Wayne Inv. Corp. v. Abbot*, 350 Mass. 775,775 (1966); see *Pinti v. Emigrant Mtg. Co., Inc.,* 472 Mass. 226 (2012); *Bank of New York v. Bailey,* 460 Mass. 327 (2011). A foreclosure deed and affidavit that meets the requirements of G.L. c. 244, §15 is evidence that the power of sale was duly executed and constitutes prima facie evidence of the plaintiff's case in chief. See *Federal Nat'l Mortg. Ass'n v. Hendricks*, 463 Mass. 635, 641-42 (2012).

Once a plaintiff makes a prima facie case, the burden shifts to the defendant to demonstrate, through the use of evidence that would be admissible at trial, specific facts showing that there exists a genuine issue for trial. If a defendant fails to show the existence of a genuine issue of material fact in response to a motion for summary judgment by contesting factually a prima facie case of compliance with G.L. c. 244, §14, such failure generally should result in judgment for the plaintiff. *Id.* at 642.

Discussion

I. Whether Plaintiff Held the Note at the Time of the Notice of Foreclosure Sale

In arguing that Plaintiff has failed to set forth competent evidence establishing that it held the note in January 2017 (*i.e.*, at the time the right to cure notice was sent to Defendants), Defendants challenge under Mass. R. Civ. P. 56(e) the sufficiency of the 35C Affidavit submitted by Plaintiff. Defendants argue that Plaintiff failed to present a prima facie case for

possession as the 35C Affidavit recorded by Plaintiff fails to demonstrate that Plaintiff was the holder of the note at the time of the foreclosure. Defendants further argue that Plaintiff provided a purported copy of the note that was undated and indorsed "in blank" therefore, in order for Plaintiff to enforce the bearer status of the Note, Plaintiff must have been in physical possession of the Note at the time of the first publication of auction sale under G. L. c. 244, § 14.

Defendants argue that the 35C Affidavit is being offered as proof that Plaintiff was the holder of the note despite the fact that the Affidavit provides no indication that the affiant viewed the physical note; there is no verification that the affiant had personal knowledge that Plaintiff had physical possession of the note; and there are no business records attached to the Affidavit which support the contention that Plaintiff was in physical possession of the note.

Plaintiff argues that Defendants fail to show any defect within the 35C Affidavit which would overcome its presumptive validity under G.L. c. 183, § 54B pursuant to *Federal National Mortgage Association v. Hendricks,* 463 Mass. 635, 642 (2012). Plaintiff argues that the 35C Affidavit was executed by Ocwen as the loan servicer and attorney in fact to Plaintiff and is presumptively valid, would be admissible at trial, and establishes, as a matter of law, that it was the holder of the Note at the time of the foreclosure sale. Plaintiff further argues that there is no requirement under G. L. c. 244 that the 35C Affidavit include business records as attachments.

The 35C Affidavit states as follows:

> *"The undersigned, Anel Hernandez, having personal knowledge of the facts herein stated, under oath deposes and says as follows: 1. I am: An officer or employee of a duly authorized agents of Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real Estate Trust 2006-1, Mortgage Pass Through Certificates, Series 2006-1. 2. In my capacity as Contract Management Coordinator, I am familiar with the business records of OCWEN LOAN SERVICING, LLC, as they relate to servicing of the Mortgage Loan which is the subject of this affidavit. [OCWEN] records are reliable because they are kept in the ordinary course of business by persons who have a business duty to make such records. I have personal knowledge of the facts set forth in this affidavit based upon my review of [OCWEN] business records maintained in connection with the Mortgage and the related Mortgage loan account whose repayment the Mortgage secures. Based upon my review of the business records of [OCWEN] I certify that Deutsche Bank National Trust Company, as Trustee for Morgan Stanley IXIS Real Estate Trust 2006-1, Mortgage Pass Through Certificates, Series 2006-1 is the holder of the promissory note secured by the above mortgage."*

The Court has held that in order to effectuate a foreclosure pursuant to a power of sale, the mortgagee must hold the mortgage and the note or must be acting on behalf of the note holder at the time of the foreclosure sale. See *Eaton v. Fannie Mae,* 462 Mass. 569 (2012) ("*Eaton I*"). A foreclosing mortgage holder may establish that it either held the note or acted on behalf of the note holder at the time of the foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G.L. c. 183, § 54B. *Id.* at 589 n.28; see also *Strawbridge v. Bank of N.Y. Mellon,* 91 Mass. App. Ct 827, 830 (2017).

In *Eaton II,* where the validity of two affidavits submitted by the mortgagee were challenged, the Appeals Court determined that the affidavits were competent to show physical possession of the note and demonstrated personal knowledge of the affiants as they were submitted by individuals employed by the relevant parties; attest to the transfer of the note from the mortgagee's custodian to its new servicer; and were based on a review of the business records of each entity. *Eaton II,* 93 Mass. App. Ct. at 220. Further, the *Eaton II* affidavits specifically attest to the chain of custody of the note; namely, that the servicer, Bank of N.Y. Mellon, had received the note from Fannie Mae and retained physical custody of the note prior to the last transfer to the final servicing entity. *Id.* Both affidavits recited that they were based upon personal knowledge of the affiants and review of the business records kept in the usual course of business by each affiant's respective employer. *Id.*

Here, Plaintiff relies entirely upon the 35C Affidavit as proof that it held the Note at the time of publication. Unlike the affidavits in *Eaton II,* the 35C affiant in the present matter fails to attest to the chain of custody of the physical note and fails to establish personal knowledge of the location of the physical note at the time the notice of default was mailed. Further, Plaintiff failed to make the business records upon which the affiant relied available to the Defendants to review.

Plaintiff's argument that G.L. c. 244, § 14 does not require business records to be attached to a 35C Affidavit is misplaced as Plaintiff here is utilizing the 35C Affidavit to support its position that Plaintiff should be awarded summary judgment, not simply to demonstrate compliance with G.L. c. 244, § 14. Plaintiff fails to overcome Defendants' challenge to its prima facia case by pointing to the 35C Affidavit alone. Plaintiff failed to produce to Defendants in discovery or in its Reply to Defendants' Opposition, the business records or the wet ink note, either of which could have been used to refute Defendants' challenge.

In light of the standard of review at this juncture, where the court can neither weigh the evidence nor make credibility findings, there is no basis in the 35C Affidavit for the Court to conclude that the affiant had personal knowledge of the facts specifically at the time that the right to cure notice was sent to Defendants. Nor is there any basis in the 35C Affidavit for the court to conclude summarily that the affiant had personal knowledge as to whether Plaintiff was the holder of the note at the time the right to cure notice was sent. As such, the Court finds that there remain genuine issues of material fact as to whether Plaintiff held the note at the time the right to cure notice was sent, and therefore DENIES Plaintiff's Motion for Summary Judgment as to Count I.

II. 209 CMR 18.21(2)(c) and G.L. c. 244, § 35C (Count II)

Defendants argue that as Plaintiff has failed to provide competent evidence demonstrating that Plaintiff was the holder of the mortgage at the time the right to cure notice was sent, the Plaintiffs have violated G.L. c. 244, §35C, as well as 209 CMR 18.21(A)(2)(c) which requires third party servicers to "certify in writing the basis for asserting that the foreclosing party has the right to foreclose, including but not limited to, certification of the chain of title and ownership of the note and mortgage from the date of the recording of the mortgage

being foreclosed upon. The third party loan servicer shall provide such certification to the borrower with the notice of foreclosure, provided pursuant to M.G.L. c. 244, s 14 and shall also include a copy of the note with all required endorsements."

The Court finds based on the reasons set forth in Section I above that there exist genuine issues of material fact as to whether the Plaintiff held the note at the time of the service of the notice of the right to cure and therefore as to whether Plaintiff complied with G.L. c. 244, §35C, or 209 CMR 18.21(A)(2)(c). As a result, the Court DENIES Plaintiff's Motion for Summary Judgment on Count II.

III. Validity of the First Assignment and Defendants' Standing

Defendants argue that New Century, the lender and former mortgagee of the Note and mortgage, was divested of all of its mortgage assets prior to its assignment of the mortgage to Deutsche. The bankruptcy of New Century was completed on June 29, 2007 and sold all "mortgage assets" on May 18, 2007 to Ellington Capital Group, LLC on behalf of its client funds.[1] Defendants argue that as of the date of the purported first assignment, May 29, 2008, New Century no longer owned any mortgage loans, nor did it service any mortgages. Defendants argue that the purported First Assignment is an attempted confirmatory assignment and cite to *Ibanez, Juarez,* and *Kondaur,* which stand for the contention that a confirmatory assignment cannot confirm an assignment that was not validly made earlier or backdate an assignment being made for the first time.

Plaintiff argues in its Reply that Defendants' position that dissolution of an assignor affects an otherwise valid assignment has been rejected, citing to *Giannasca v. Deutsche Bank*

[1] While Plaintiff has filed a motion to have a large portion of the Defendants' "Russell Affidavit" and documents attached thereto stricken for failure to comply with Rule 56 regarding the affiant's personal knowledge, Plaintiff did acknowledge New Century's bankruptcy.

Nat'l Trust Co., 95 Mass. App. Ct. 775, 777 (2019). Plaintiff further argues that the New Century bankruptcy document entitled "Disclosure Statement" that Defendants rely upon to demonstrate New Century's divestiture of the mortgage does not specifically refer to the mortgage at issue, nor does it state that New Century sold "all" mortgage loans. Plaintiff contends that Defendants' reliance on *Ibanez* and *Juarez* is misplaced because those courts ruled that foreclosures are invalid when the assignment was not executed until after the foreclosure sale, which is not the case in the instant matter. See *U.S. Bank Nat'l Ass'n v. Ibanez,* 458 Mass. 637, 653-54 (2011) and *Juarez v. Select Portfolio Servicing,* 708 F.3d 269, 276-79 (1st Cir. 2013)

A foreclosing mortgagee must demonstrate that there is an unbroken chain of assignments in order to foreclose on a mortgage, and that it held the note or acts as an authorized agent of the note holder at the time it commences foreclosure. *Giannasca v. Duetsche Bank Nat'l Trust Co.*, 95 Mass. App. Ct. 775, 777 (2019). Whether a mortgage assignment in Massachusetts is valid or void is determined by statute, G.L. c. 183, §54B. *Id.* (citing *Wain*). The mortgagor's standing is limited to claims that a defect in the assignment renders it void, not merely voidable. *Carroll,* 91 Mass. App. Ct. 1116 at *15 (citing *Ibanez*). "For a mortgagor to have standing to challenge an assignment purporting to give the foreclosing mortgagee legal title and the authority to conduct a foreclosure sale, mortgagor must claim the assignment was void and not merely voidable." *Id.*

In *Giannasca*, as in this case, the original lending institution failed as an entity prior to the assignment of the mortgage to the foreclosing bank. Unlike in the instant case, however, the named mortgagee in *Giannasca* was MERS solely as nominee for the lender. After the lending institution failed, MERS, in its capacity as nominee for the lender, assigned the mortgage to the foreclosing bank. The mortgagor claimed that the assignment was invalid because the former

lender on behalf of whom MERS was purporting to act did not have an interest in the mortgage at the time of the assignment. The court disagreed and found that the assignment was valid as a result of the continued role of MERS as nominee.

Here, there does not exist an intermediary or nominee acting on behalf of New Century which distinguishes this case from the line of cases cited to by the Plaintiff. Instead, the assignment was signed by an authorized signatory for New Century, on May 29, 2008, with a notation that the document is effective as of January 2006. The Assignment was recorded with the Plymouth County Registry of Deeds on March 31, 2009. When viewing the evidence in the light most favorable to the non-moving party [here, the Defendants] the Court finds that there are disputed material facts as to whether the assignment was valid and therefore whether the Plaintiff had authority to foreclose. Accordingly, the Court DENIES Plaintiff's Motion for Summary Judgment as a result of the issue of the validity of the First Assignment.

IV. Obsolete Mortgage Statute G.L. c. 266, §33

Defendants argue that the mortgage is void under the Obsolete Mortgage Statute, G.L. c. 260 § 33, which states in relevant part: "A power of sale in any mortgage of real estate shall not be exercised and an entry shall not be made nor possession taken nor proceeding begun for foreclosure of any such mortgage after the expiration of in which no term of the mortgage is states, 35 years from the recording of the mortgage or, in the case of a mortgage in which the term or maturity date of the mortgage is stated, 5 years from the expiration of the term or from the maturity date, unless an extension of the mortgage, or an acknowledgement or affidavit that the mortgage is not satisfied, is recorded before the expiration of such period."

Defendants argue that Plaintiff's Notice of Acceleration of the Mortgage Loan dated

February 7, 2007, accelerated the "maturity date" of the mortgage, therefore bringing it within the five year statute of repose and making the mortgage obsolete.

In its recent decision in *Nimes v. Bank of N.Y. Mellon,* 97 Mass. App. Ct. 123, 124 (2019) the Massachusetts Appeals Court concluded that the acceleration of a mortgage does not alter the maturity date. The Court in *Nims* stated that the language of G.L. c. 260, § 33 does not support such a contention and that the argument is at odds with the purpose and design of the statute. The Court held that G.L. c. 260, §33 "acts as a self-executing mechanism by which to quiet title with respect to old mortgages without shortening the period of enforceability of mortgages before their term of maturity has been reached" and is designed to create a definite point in time at which an old mortgage will be deemed discharged by operation of law. *Nims* at 126. The Court therefore finds Defendants' arguments regarding the Obsolete Mortgage Statute without merit, and finds in favor of Plaintiff as to Count III of Defendants' Counterclaim.

ORDER

Based upon the forgoing, the Court rules as follows: Plaintiff's request for Summary Judgment for possession and against Count I and Count II of Defendants' Counterclaim is **DENIED** as there exist genuine issues of material fact relevant to those counts. Plaintiff's request for Summary Judgment as to Count III of Defendants' Counterclaim is **ALLOWED.**

The Clerk's Office is directed to schedule the matter for a Rule 16 Pretrial Conference and two-day Jury Trial and shall send notice to both parties.

/s/ Maria Theophilis
MARIA THEOPHILIS
ASSOCIATE JUSTICE

Dated: October 19, 2020

cc: **Glenn F. Russell, Jr., Esq.** (via USPS)
Hale Yazicioglu Lake, Esq. (via USPS)
Nella M. Lussier, Esq., Clerk Magistrate

CC:

Lake, Esq., Hale Y 679480 Hinshaw & Culbertson LLP 53 State St 27th Floor Boston MA 02109

Russell, Jr., Esq., Glenn F 656914 Law Office of Glenn F. Russell, Jr. 38 Rock St Suite 12 Fall River MA 02720

File Copy

CERTIFICATE OF SERVICE

I, Glenn F. Russell, Jr., hereby certify under the penalties of perjury that on June 14, 2021, I caused the foregoing to be filed via the Court's electronic filing service and I caused a true and accurate copy of the foregoing to be filed in the office of the clerk of the Appeals Court, and servedthe following counsel by electronic mail:

Marissa I. DeLinks
Maura McKelvey
Hale Yazicioglu-Lake
Jordan O'Donnell

Hinshaw & Culbertson, LLP
53 State Street, 27th Floor
Boston, MA 02109

Glenn F. Russell, Jr.

MASSACHUSETTS RULE OF APPELLATE PROCEDURE 16(K) CERTIFICATION

I hereby certify that, to the best of my knowledge, this brief complies with the Massachusetts Rules of Appellate Procedure that pertain to the filing of briefs.

/s/ Glenn F. Russell, Jr.
Glenn F. Russell, Jr.

(BBO No. 656918)
38 Rock Street
Fall River, MA 02720
(888) 400-9318
russ45esq@gmail.com