COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT

No. FAR-

Appeals Court No. 24-P-1440

MARY EARLE, and another,
Defendants Applicants-

v.

WELLS FARGO BANK N.A. AS TRUSTEE,
Plaintiff- Respondent.

ON APPEAL OF A JUDGMENT OF THE HOUSING COURT

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

Defendants/Applicants
by counsel,

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May 18, 2026

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INTRODUCTION AND REQUEST FOR LEAVE TO OBTAIN FURTHER APPELLATE REVIEW

Pursuant to Mass. R. App. P. 27.1, Defendant-Applicants Mary Earle and Joseph O'Hare ("Earle") respectfully apply for further appellate review of the Appeals Court's April 28, 2026 memorandum and order pursuant to Rule 23.0 in Wells Fargo Bank v. Earle, Appeals Court No. 24-P-1440. The Appeals Court affirmed summary judgment for Wells Fargo Bank, N.A., as Trustee in a post-foreclosure summary process action concerning registered land located at 6 Hoxie Lane, Sandwich, Massachusetts. Further appellate review is warranted because this case presents recurring and important questions concerning the intersection of Massachusetts foreclosure law, registered land, Housing Court subject matter jurisdiction, and the evidentiary requirements governing summary judgment. The decision below relies principally on Bank of New York v. Bailey, 460 Mass. 327 (2011), a case that addressed post-foreclosure summary process in the context of recorded land, without squarely resolving how Bailey applies where the property is registered land and where the defendant's theory of a title based defense necessarily implicates the Land Court's exclusive original jurisdiction over complaints affecting title to registered land under G.L. c. 185, § 1(a 1/2).

The Rule 23.0 decision also raises an important question concerning whether a G.L. c. 244, § 35C affidavit, offered in support of summary judgment to establish note-holder status or authority to act on behalf of the note holder at the time of the notice of sale, may satisfy the plaintiff's burden where the affidavit relies on business records that were not attached or otherwise served as required by Mass. R.

Civ. P. 56(e).

The issue is significant because Eaton v. Federal National Mortgage Ass’n, 462 Mass. 569 (2012) requires the foreclosing mortgagee, for post-Eaton foreclosures, to hold the mortgage and either hold the note or act on behalf of the note holder at the time of the notice of sale when exercising the statutory power of sale under G.L. c. 244, §14. Where the foreclosure is challenged by a borrower in summary process on summary judgment, the evidentiary sufficiency of the affidavit used to establish that authority has been case dispositive.

The Appeals Court’s decision, though unpublished, may influence Housing Court practice in a substantial category of post-foreclosure eviction cases involving registered land. The decision creates uncertainty regarding whether defendants with title-based defenses to registered land must litigate those defenses in Housing Court, in Land Court, or in both forums; whether a certificate of title issued after foreclosure forecloses or alters the defense; and what evidentiary showing a foreclosing party must make when relying on affidavits that incorporate unattached business records.

For these reasons, Mary Earle respectfully requests that the Supreme Judicial Court grant further appellate review, vacate the judgment affirming summary judgment, and remand for further proceedings, or for such other relief as the Court deems just and proper.

STATEMENT OF PRIOR PROCEEDINGS AND FACTUAL BACKGROUND

This case arises from a post-foreclosure summary process action brought by Wells Fargo Bank, N.A., as Trustee, seeking possession of the property located at 6 Hoxie Lane, Sandwich, Massachusetts. Defendant-Appellant

Mary Earle and Joseph O'Hare ("Earle" or "defendants") are former homeowners and defendants in the underlying summary process action in this matter. The property is registered land within the Barnstable County registry district of the Land Court. In April 2005, the defendants executed a mortgage to Option Onen Mortgage Corporation, secured by the Sandwich property. The mortgage was registered in the Barnstable County registry district of the Land Court and also recorded in the Barnstable County registry of deeds. In June 2007, Option One assigned the mortgage to Wells Fargo Bank, N.A., in trust for the benefit of Certificateholders of Asset Backed Securities Corporation Home Equity Loan Trust, Series OOMC 2005-HE6. The assignment was likewise registered in the Land Court and recorded in the registry of deeds.

After the defendants allegedly defaulted, an officer of PHH Mortgage Corporation, as loan servicer for Wells Fargo, executed affidavits concerning compliance with G.L. c. 244, §§ 35B and 35C. The § 35C affidavit was offered to establish that Wells Fargo was authorized to act with respect to the note, including at the time of the foreclosure process and notice of sale. The challenged affidavit, however, referred to business records that were not attached to the affidavit or otherwise included as sworn or certified copies in the summary judgment record.

In 2022, Wells Fargo again published notice of foreclosure sale and purportedly purchased the property at public auction. A foreclosure deed was registered and noted in the Land Court, and a new certificate of title was issued.

On September 11, 2023, Wells Fargo served a notice to quit, and later in September 2023 served a summary process summons and complaint for possession. On January 26, 2024, Wells Fargo moved for summary judgment in the Housing Court. Earle, acting pro se opposed the motion and raised defenses, including that Wells Fargo had not established strict compliance with the statutory power of sale, that the § 35C affidavit did not satisfy the evidentiary requirements of Mass. R. Civ. P. 56(e), and that the Housing Court lacked subject matter jurisdiction to determine a title-based defense involving registered land, where the Land Court has exclusive original jurisdiction over complaints affecting title to registered land. On May 9, 2024, the Housing Court judge granted Wells Fargo’s motion for summary judgment. Following judgment, Mary Earle then sought appellate relief. Prior to the Bond hearing Earle hired counsel to defend. In the Opposition for the imposition of Bond counsel argued Wells Fargo had not established strict compliance with the statutory power of sale, that the § 35C affidavit did not satisfy the evidentiary requirements of Mass. R. Civ. P. 56(e), and that the Housing Court lacked subject matter jurisdiction to determine a title-based defense involving registered land, where the Land Court has exclusive original jurisdiction over complaints affecting title to registered land.

In an order dated June 21, 2024, the Housing Court judge denied and/or addressed the request for an appeal bond and stated that the defendants had presented a non-frivolous defense to summary process. The bond was ultimately waived based on indigency and under the non-frivolous nature of the appeal, it was allowed to proceed.

The Appeals Court affirmed in a Rule 23.0 memorandum and order dated April 28, 2026. See Wells Fargo Bank v. Earle, Appeals Court No. 24-P-1440 (Mass. App. Ct. Apr. 28, 2026). The panel concluded that Wells Fargo made a prima facie showing of its right to possession by providing an attested copy of the recorded and registered foreclosure deed and statutory affidavit of sale, and that the burden shifted to Earle to show a genuine issue of material fact.

The panel further held that the Housing Court had subject matter jurisdiction under Bailey to consider the title-based defense in the summary process action, notwithstanding that the property was registered land. The panel rejected the constitutional arguments as unnecessary to reach or unpersuasive under the facts presented.

STATEMENT OF POINTS WITH RESPECT TO FURTHER APPELLATE REVIEW

1. Whether the G.L. c. 244, § 35C Affidavit Established Wells Fargo’s Possession of the Earle Note at the Time of the Notice of Sale Under Rule 56(e).

2. Whether the Housing Court Had Subject Matter Jurisdiction to Determine a Title-Based Defense Involving Registered Land.

3. Whether Bailey Provides Proper Guidance in Registered Land Summary Process Cases.

4. Whether the Housing Court Applied the Correct Summary Judgment Standard to the Nonmoving Party.

5. Whether the Case Presents Constitutional Concerns Regarding Due Process and Equal Protection

STATEMENT WHY FURTHER APPELLATE REVIEW IS APPROPRIATE

1. Whether the G.L. c. 244, § 35C Affidavit Established Wells Fargo's Possession of the Earle Note at the Time of the Notice of Sale Under Rule 56(e)

The first question presented may be an issue of first impression before this Court: whether, in a borrower-contested post-foreclosure summary process action, a G.L. c. 244, § 35C(b) affidavit filed without notice to a borrower may be used as conclusive proof [without providing the borrower any opportunity to challenge the contents] that the foreclosing mortgagee possessed the borrower's note, or had authority from the note holder, at the time of the Notice of Sale to comply with G.L. c. 244, § 14. Here, for purposes of summary judgment, Wells Fargo relied upon the § 35C affidavit to establish that it possessed the Earle Note, or otherwise had authority to act on behalf of the note holder, at the time of the

Notice of Sale, even though the affidavit referenced business records that were not attached, sworn, certified, or served as required by Mass. R. Civ. P. 56(e).

The statutory text of G.L. c. 244, § 35C(b) does not support treating a § 35C(b) affidavit as conclusive proof of note possession in a contested foreclosure defense by a borrower, *compare* Eaton v. Fed. Nat'l Mortgage Ass'n, 462 Mass. 569, n. 28. Section 35C(b) states that the affidavit is filed to certify compliance with "this section" [G.L. c. 244, § 35C]. The statutory text of G.L. c. 244, § 35C(b) does not state that the affidavit is filed to conclusively establish, and for all purposes, compliance with G.L. c. 244, § 14 in a borrower-contested foreclosure matter. Nor does the statute state that a § 35C affidavit eliminates the borrower's right to challenge such affidavit as to whether the foreclosing mortgagee actually held the note or acted with authority from the note holder at the time of the Notice of Sale.

The function of the legislatively enacted language in G.L. c. 244, § 35C(b) is directed to statutory compliance for protection of an arm's-length third-party purchaser for value, not to preclude a homeowner's evidentiary challenge in summary judgment litigation challenging the sale.

The use of the G.L. c. 244, § 35C(b)Affidavit becomes more acute under summary judgment. Rule 56(e) requires affidavits supporting summary judgment to be made on personal knowledge, to set forth facts admissible in evidence, to show affirmatively that the affiant is competent to testify, and to attach or serve sworn or certified copies of papers referred to in the affidavit.

The defect here is not merely technical. Where the §35C affiant depends on loan-servicing or business records for personal knowledge to establish possession of the note or authority to foreclose at the time of the notice of sale, the failure to attach those records deprives the court and the homeowner of the ability to gauge whether the affiant's statements are based on admissible facts rather than conclusory assertions. Such Affiant would clearly not be competent to testify based upon a record that only includes unsupported statements in this Affidavit regarding title to real property.[1]

[1] In Massachusetts summary judgment requires the moving party to demonstrate the absence of a genuine issue of material fact with competent materials, and the nonmoving party is entitled to rely on defects in the movant's own proof. See Madsen v. Erwin, 395 Mass. 715, 719 (1985); Godbout v. Cousens, 396 Mass. 254,

In order for Wells Fargo to remove all material disputed facts, it had to show competent evidence of its note-holder status or authority at the relevant foreclosure stage, including at the time of the Notice of Sale. A recorded § 35C affidavit may have evidentiary significance, but when it is used to obtain summary judgment it must also satisfy the evidentiary requirements of Rule 56(e), see Deutsche Bank National Trust Co. v. Scanlan, No. 19H82SP01496, at pp. 5-8 (Metro-Sth Housing Ct. October 19, 2020). The panel also may have failed to consider that the trial court judge had the ability to dismiss the Wells Fargo Bank complaint sua sponte' under Mass. R. Civ. P., R. 12(h)(3), where issues of standing became apparent. The Appeals Court's own cited authority confirms why stricter evidentiary showing was required once Earle placed possession of the note in issue.[2]

In Khalsa v. Sovereign Bank, N.A., 88 Mass. App. Ct.

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261 (1985). The §35C Affidavit fails in this summary judgment context, particularly under 56(e).

[2] This would leave Wells Fargo neither an "owner or lessor" of the property, to utilize G.L. c. 239, see Rental Property Mgmnt v. Hatcher, 479 Mass. 542, 547 (2018). The preceding would also subject Wells Fargo to sua sponte' dismissal of its complaint under Mass. R. Civ. P., R. 12(h)(3).

824, 830-831, n. 7 (2016), the Appeals Court recognized that this Court has yet to opine on the issue whether the burden shifts to the foreclosing mortgagee where the borrower places the foreclosing party’s note-holder status or authority in dispute, because the relevant documents concerning the relationship between the mortgagee, servicer, and note holder are within the bank’s possession, the bank must make a competent showing of its authority, see Id. at n. 7.

Further appellate review is warranted because the Appeals Court’s treatment of the § 35C affidavit is difficult to reconcile with parallel persuasive authority addressing materially similar proof problems.

In U.S. Bank Trust, N.A. v. Perry, 99 Mass. App. Ct. 1111 (2016) [R. 23.0], the Appeals Court addressed the need for competent evidence to support a foreclosure plaintiff’s claimed authority where the plaintiff relies on a § 35C affidavit to evidence compliance with G.L. c. 244, §14.

2. Whether the Housing Court Had Subject Matter Jurisdiction to Determine a Title-Based Defense Involving Registered Land

The second question presented is whether the Housing Court has subject matter jurisdiction to adjudicate a defense that necessarily turns on title to registered land, where G.L. c. 185, § 1(a 1/2) grants the Land Court exclusive original jurisdiction over complaints affecting title to registered land, and where the defendant's raised a title based defense that challenges whether the foreclosure and resulting certificate of title are valid.

The Appeals Court relied on Bank of New York v. Bailey, 460 Mass. 327, 951 N.E.2d 331 (Mass. 2011) which held that the Housing Court may consider a former homeowner's challenge to title as a defense to post-foreclosure summary process. But Bailey did not analyze registered land, the certificate of title system, G.L. c. 185, § 1(a 1/2), or the effect of Land Court registration procedures on summary process defenses. In fact, Bailey specifically relied upon concurrent jurisdiction granted to the Housing Court under G.L. c. 185C, § 3, see Bailey at 460 Mass. 327, 331-333. Earle identified that the Land Court is not mentioned or included in G.L. c. 185C, § 3. This Court revisited the title-based defense by a borrower again in Bank of Am., N.A. v. Rosa, 466 Mass. 613, 999 N.E.2d 1080 (Mass. 2013). Like Bailey, Rosa also involved recorded land, and thus there was no direction provided as to the application, or effect, of the apparent housing court examination of title issues involving registered land under a borrower “title based” defense to eviction.

Applying Bailey and Rosa mechanically to registered land risks collapsing the distinction between ordinary recorded land disputes and registered title disputes.

3. Whether Bailey Provides Proper Guidance in Registered Land Summary Process Cases

The third question presented is whether Bailey should be clarified or limited in cases involving registered land.

In Sullivan v. Kondaur Capital Corp., 85 Mass. App. Ct. 202 (2014), the Appeals Court recognized that claims affecting title to registered land in foreclosure matter were transferred from the Superior Court to the Land Court because of that court’s exclusive jurisdiction and also recognized that registered title may be challenged in appropriate circumstances where a foreclosing mortgagee’s title is allegedly defective. Sullivan also stated that the effect of G.L. c. 185, § 70 is negated whereas here, the foreclosing entity purchases at sale, see Sullivan 85 Mass.App.Ct. 202, at n. 11.

Sullivan illustrates that registered land raises concerns not present in Bailey. The point is reinforced by Bevilacqua v. Rodriguez, 460 Mass. 762, 778-780 (2011), which underscores that a purchaser claiming through a void foreclosure deed does not acquire the legal title necessary to maintain a try-title claim, and by U.S. Bank, N.A. v. Ibanez, 458 Mass. 637 (2011) which holds that a foreclosure conducted without legal authority is void. Title must be examined, which in registered land cases involving contested matters is beyond the jurisdiction of the Housing Court.

The panel's decision infers that Earle suggested that the Land Court should hear the summary process action. That mischaracterizes the defense. Earle's position is not that the Land Court has jurisdiction over summary process matters. Rather, the issue presented by Earle is where a borrower with registered land raises a title-based defense, this necessarily implicates the Land Court's expertise and authority under G.L. c. 185, § 1(a 1/2)to examine documents recorded on title [such as the §35C Affidavit, affidavit of sale, foreclosure deed, and other registry documents that Wells Fargo relied upon].

Bailey may currently be providing improper guidance to post foreclosure borrowers that have registered-title defenses in summary process matters that may fall within the exclusive jurisdiction of the Land Court.

4. Whether the Housing Court Applied the Correct Summary Judgment Standard to the Nonmoving Party

The fourth question presented is whether the Housing Court and Appeals Court applied the correct standard under Mass. R. Civ. P. 56(c) and 56(e), including the last sentence of Rule 56(c), where Earle contested the legal sufficiency of Wells Fargo’s evidentiary showing and was not required to produce her own evidence if the plaintiff’s materials failed to establish entitlement to judgment as a matter of law. While the panel recognized that the nonmoving party may have a ruling entered in its favor, it stated that the non-movant must still produce “facts” that rebut the movant’s case. This finding is contra to the wording of the last sentence of Mass. R. Civ. P. 56(c), and the associated Reporters Notes at (1973). The non-movant can oppose summary judgment on legal grounds and may argue that the moving party’s own record is insufficient.

If the plaintiff’s affidavits fail to comply with Rule 56(e), the burden should not shift to the defendant to disprove matters the plaintiff has not competently established, because the Plaintiff failed to remove all material disputed facts as movant.

5. Whether the Case Presents Constitutional Concerns Regarding Due Process and Equal Protection

The fifth question presented is whether, under the circumstances of this case, Massachusetts post-foreclosure summary process procedures, including the interaction of appeal bond requirements, registered land title adjudication, and reliance on nonjudicial foreclosure affidavits, raise due process or equal protection concerns as applied to borrowers defending possession after foreclosure.

Although the Appeals Court declined to reach or rejected the constitutional arguments, the issues may recur where a homeowner is required to litigate registered-title defenses in an expedited summary process action while facing the risk of loss of possession and appeal bond requirements.

CONCLUSION

Further appellate review is appropriate because the decision below presents recurring questions of statewide importance at the intersection of registered land, post-foreclosure summary process, and summary judgment proof.

The case concerns open questions whether a Housing Court may enter judgment for possession where the defense necessarily challenges the validity of foreclosure title to registered land, and whether a foreclosure plaintiff may rely on a G.L. c. 244, § 35C affidavit that references business records not attached or served under Mass. R. Civ. P. 56(e).

First, this Court should clarify the scope of Bailey in registered land cases. Second, the Appeals Court's reasoning conflicts with the registered land principles recognized in Sullivan v. Kondaur Capital Corp. Sullivan recognized that claims affecting title to registered land belong in the Land Court, while also recognizing that registered title may be challenged where the foreclosing mortgagee's title allegedly depends on a void foreclosure.

The void-foreclosure principle is central to Massachusetts foreclosure law, see Ibanez, 458 Mass. at 646-648; Bevilacqua v. Rodriguez, 460 Mass. 762, 778-780 (2011). Earle does not argue that the Land Court should try the summary process action; she argues that the Housing Court could not enter summary judgment where doing so required it to resolve a registered- title defense within the Land Court's exclusive statutory framework, or at least required coordination with that framework.

Third, further review is needed to clarify to an apparent issue of first impression before this Court under the facts presented: the evidentiary showing required under Mass. R. Civ. P. 56(e) when a foreclosure plaintiff relies on a § 35C affidavit to prove note-holder status or authority in a borrower-contested foreclosure defense.

Fourth, Hendricks does not resolve this case. Hendricks held that a foreclosure deed and statutory affidavit of sale may create a prima facie case of possession, compare Federal Home Loan Mortgage Corp. v. Bartleman, 94 Mass. App. Ct. 800, 806-808 (2018). Summary judgment remains governed by ordinary Rule 56 principles, including the requirement that the moving party establish entitlement to judgment with competent record evidence see Mass. R.Civ. P. R. 56(e); See Madsen, 395 Mass. at 719; Godbout, 396 Mass. at 261; Gabriel, 81 Mass. App. Ct. at 569-570.

Finally, the case raises serious due process, and equal protection concerns inherent in requiring homeowners to litigate complex registered-title and foreclosure-authority defenses in an expedited eviction proceeding while allowing an untested § 35C affidavit to conclusively establish note possession, without any ability to challenge its sufficiency. As Federal Home

Loan Mortgage Corp. v. Bartleman, 94 Mass. App. Ct. 800, 806-808 (2018) confirms, a borrower must have a meaningful opportunity to challenge the contents of the affidavit of sale before property interests are lost. A rule that prevents any meaningful challenge to the contents of the § 35C affidavit would deny that opportunity.

For the foregoing reasons, Defendant-Appellant Mary Earle and Joseph O’Hare respectfully request that the Supreme Judicial Court grant this Application for Further Appellate Review, review the Appeals Court’s April 28, 2026 Rule 23.0 memorandum and order, vacate the judgment affirming summary judgment, and remand the case for further proceedings consistent with the Court’s ruling.

Respectfully submitted,

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May 18, 2026
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ADDENDUM

ADDENDUM

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 24-P-1440

WELLS FARGO BANK, N.A., trustee,

vs.

MARY EARLE & another.

Pending in the Southeast Division of the Housing Court

Ordered, that the following entry be made on the docket:

Judgment affirmed.

By the Court,

Paul Tuttle, Clerk

Date April 28, 2026.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

24-P-1440

WELLS FARGO BANK, N.A., trustee,[1]

vs.

MARY EARLE & another.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendants, Mary Earle and Joseph M. O'Hare, appeal from a Housing Court judge's grant of summary judgment for the plaintiff, Wells Fargo Bank, N.A., in this summary process action. On appeal, the defendants assert, inter alia, that because the Housing Court lacked subject matter jurisdiction over actions affecting title to registered land, the judge had no authority to decide this matter. We affirm.

[1] For the benefit of Certificateholders of Asset Backed Securities Corporation Home Equity Loan Trust, Series OOMC 2005-HE6.

[2] Joseph M. O'Hare.

Background. We summarize the facts in the summary judgment record in the light most favorable to the defendants, the nonmoving parties. In April of 2005, the defendants executed and delivered a mortgage to Option One Mortgage Corporation (Option One), secured by property located in Sandwich (property). The mortgage was registered in the Barnstable County registry district of the Land Court and recorded in the Barnstable County registry of deeds.

In June of 2007, Option One assigned the mortgage to the plaintiff in trust for the benefit of Certificateholders of Asset Backed Securities Corporation Home Equity Loan Trust, Series OOMC 2005-HE6, and the assignment was also registered in the Land Court and recorded in the registry of deeds.

Thereafter, the defendants defaulted on the mortgage. In February of 2021, an officer of the PHH Mortgage Corporation (PHH), as loan servicer for the plaintiff, executed affidavits of compliance with G. L. c. 244, § 35B, concerning good faith efforts to avoid foreclosure; and with G. L. c. 244, § 35C, concerning authorization to act on behalf of the note holder.[3]

[3] As an authorized agent of the loan servicer PHH, the officer was a proper party to submit the affidavits of compliance with §§ 35B and 35C, both of which include mortgage servicer, its agents, and its employees in the definition of creditor. See G. L. c. 24, § 35B (a), fifth par.; § 35C (a), third par.

On three dates in 2022, the plaintiff published a notice of a foreclosure sale, and at the public auction the property was sold to the plaintiff. The foreclosure deed was then registered and noted in the Land Court, and a new certificate of title was issued and then recorded in the registry of deeds.

On September 11, 2023, the plaintiff served the defendants with a notice to quit. Also in September of 2023, the plaintiff served the defendants with a summary process summons and complaint for possession of the premises, and on January 26, 2024, the plaintiff moved for summary judgment. Earle, who had submitted a written answer to the plaintiff's complaint, appeared at the motion hearing and also submitted exhibits in opposition to the motion. O'Hare did not appear at the hearing on the plaintiff's motion for summary judgment and was defaulted.

On May 9, 2024, a Housing Court judge granted summary judgment in favor of the plaintiff. The defendants appeal.[4]

Discussion. 1. Summary judgment standard. On appeal, Earle contends that the judge, in allowing the plaintiff's

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[4] O'Hare filed a motion to remove the default judgment, which was denied. Because O'Hare may not appeal from the summary process judgment, see Rule 12 of the Uniform Summary Process Rules (2004); Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 856 (2019), and makes no argument that his motion to remove the default was erroneously denied, we affirm the judgment as to him.

motion for summary judgment, applied "an incorrect standard" to her as the nonmoving party under Mass. R. Civ. P. 56, 365 Mass. 824 (1974). We review the judge's grant of summary judgment de novo. See Galenski v. Erving, 471 Mass. 305, 307-308 (2015). While we view the evidence in the light most favorable to the opposing party, "the opposing party 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 (1989), citing Community Nat'l Bank v. Dawes, 369 Mass. 550, 554 (1976).

In a postforeclosure summary process case, a plaintiff "may make a prima facie showing of its right to possession by producing an attested copy of the recorded foreclosure deed and affidavit of sale under G. L. c. 244, § 15." Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 637 (2012) (Hendricks). Moreover, where, as here, the mortgage contained a power of sale, "[l]egal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; and that alone is subject to challenge." Bank of N.Y. v. Bailey, 460 Mass. 327, 333 (2011) (Bailey), quoting Wayne Inv. Corp. v. Abbott, 350 Mass. 775, 775 (1966).

Earle correctly states that, as the nonmoving party, she was not "required" to introduce any materials in opposition to the plaintiff's motion. See Reporter's Notes to Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002) ("[a nonmovant] may decline to introduce his [or her] own materials and may instead fight the motion on entirely legal [as opposed to factual] grounds"). However, where, as here, the plaintiff made a prima facie case of its right to possession, the burden shifted to Earle to factually contest the plaintiff's compliance with G. L. c. 244, § 14. "If a plaintiff makes a prima facie case, it is then incumbent on a defendant to counter with his [or her] own affidavit or acceptable alternative demonstrating at least the existence of a genuine issue of material fact to avoid summary judgment. . . ." Hendricks, 463 Mass. at 642. "If a defendant fails to show the existence of a genuine issue of material fact . . . 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." Hendricks, supra.

Here, the plaintiff properly presented a prima facie case of its right to possession by providing an attested copy of its recorded and registered foreclosure deed and the statutory affidavit of sale. See Hendricks, 463 Mass. at 637. Additionally, the plaintiff submitted a detailed affidavit of continuing note holder status and strict compliance with the mortgage terms. See Pinti v. Emigrant Mtge. Co., 472 Mass. 226, 240 (2015) (foreclosing party must strictly comply with mortgage's power of sale provisions). Thus, the burden shifted to Earle to show a genuine issue of material fact regarding the plaintiff's right to possession. See Hendricks, supra at 642. Although Earle submitted an answer with exhibits in response to the plaintiff's prima facie case, the judge stated, and we agree, that the "allegations in her affirmative defenses [were] conclusory and unsupported by any admissible evidence." The judge then properly concluded that "there [were] no genuine issues of material fact in dispute on the issue of possession of the premises," and thus, "the plaintiff [was] entitled to the entry of summary judgment in its favor as a matter of law." Based on our independent review of the summary judgment record, we agree that the plaintiff was entitled to summary judgment.

2. Subject matter jurisdiction. Earle contends that the Housing Court lacked subject matter jurisdiction to "opine on issues of 'title' in defense to a summary process complaint regarding [r]egistered [l]and," and that the judge should have dismissed the plaintiff's complaint sua sponte on that basis. Earle primarily relies on G. L. c. 185, § 1 (a 1/2), which grants the Land Court "exclusive original jurisdiction" over "[c]omplaints affecting title to registered land" (emphasis added), and Bailey, and argues that because the judge "necessarily had to make [a] finding that [the p]laintiff

possessed superior title" in granting the motion for summary judgment, the Housing Court lacked jurisdiction.

However, the Supreme Judicial Court stated in Bailey, 460 Mass. at 333, "There is nothing in th[e] jurisdictional scheme that supports a conclusion that the Legislature intended to give the Housing Court concurrent jurisdiction over summary process actions, yet preclude its consideration of the long-recognized validity of title defense to summary process." While Earle recognizes that Bailey "definitively held . . . that a defendant in a summary process matter may raise issue(s) of superior title in defense of an eviction action," she nonetheless argues that the court "was remiss in its failure to discuss the obvious remaining issue of how this finding would affect future cases involving title to Registered Land." However, nothing in Bailey suggests that the Housing Court would not have subject matter jurisdiction over a summary process action involving registered land even if a defendant challenges the plaintiff's standing by claiming a defective foreclosure. Instead, Bailey suggests that a defendant would be entitled to raise the question of the plaintiff's standing by challenging the propriety of the sale or the plaintiff's legal title to the foreclosed property. See Bailey, supra. We note that the Land Court does not have jurisdiction over summary process actions. See Commentary to Rule 1 of the Uniform Summary Process Rules (1980) ("Four

Departments of the Massachusetts Trial Court have jurisdiction over summary process actions [Superior Court, District Court, Boston Municipal Court, and Housing Court]"). Earle has not provided contrary authority.

3. Good faith and reasonable diligence. Next, Earle asserts that, in foreclosing on the property, the plaintiff failed to protect her interests. See U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 647 n.16 (2011), citing Williams v. Resolution GGF OY, 417 Mass. 377, 382-383 (1994) (recognizing mortgage holder's responsibility to "act in good faith and . . . use reasonable diligence to protect the interests of the mortgagor" is "more exacting" where holder becomes buyer at foreclosure sale). Earle alleges on appeal that upon the defendants' default in 2007, they were "wrongfully[,] forcibly removed" from the property, and then, upon learning of the eviction's invalidity in 2012, the defendants returned to the property to find it abandoned and neglected. Despite these allegations, Earle produced no evidence in the record to establish these events; we are thus unable to assess this aspect of Earle's appeal. See Mass. R. A. P. 18 (a) (1) (A), as appearing in 481 Mass. 1637 (2019). To the extent that Earle contends that a prior invalid attempt to foreclose on the property precluded the plaintiff from foreclosing at a later date, she has failed to provide any legal support for her

position. Thus, we conclude that Earle failed to raise a genuine issue of material fact related to the plaintiff's good faith or reasonable diligence.

4. Constitutional challenges. Lastly, Earle raises arguments aimed at challenging the constitutionality of the statutory scheme underlying this summary process action. First, she argues that G. L. c. 239 and G. L. c. 185C, § 3, as applied, create an unconstitutional disparity between "the same class of property owners" based on whether the owner challenges the validity of the foreclosing party's title in the Housing Court -- where an appeal is conditioned on posting an appeal bond[5] -- or in the Superior Court, where a party is entitled to an appeal as of right. We discern no such disparity; General Laws c. 239, §§ 5 and 6, condition an appeal from a judgment of either the Superior Court or the Housing Court for possession of land after foreclosure on the appellant's posting of a bond.

Even if that were not the case, however, we would not reach the question. This is because as a general matter, "[w]e do not decide constitutional questions unless they must necessarily be reached" (citation omitted), Dinkins v. Massachusetts Parole Bd., 486 Mass. 605, 616 (2021), and "constitutional question[s] should be addressed as applied to the facts in the instant case,

[5] See Rule 12 of the Uniform Summary Process Rules.

and not as an abstract question of law." Frechette v. D'Andrea, 494 Mass. 167, 178 (2024).[6] Here, the judge waived the appeal bond, finding that Earle was indigent and had raised a nonfrivolous defense on appeal. Earle was, therefore, on equal footing with the "class of property owners" in the Superior Court, and we need not address her constitutional claim.

Second, Earle asserts that the plaintiff's reliance on a G. L. c. 244, § 35C, affidavit to satisfy its burden to show that it "physically possessed the borrower's note" at the time of notice of sale, in compliance with G. L. c. 244, § 14, was unconstitutional, as it violated her procedural due process rights. We are not persuaded. Earle had the opportunity to place facts in dispute concerning the note at the time of the foreclosure, see Khalsa v. Sovereign Bank, N.A., 88 Mass. App. Ct. 824, 830-831 (2016), but did not. Thus, where the plaintiff submitted a recorded and registered affidavit, executed by an authorized agent, that states that the plaintiff was "the holder of the promissory note secured by the above mortgage," its showing was sufficient. See Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 584-586 (2012) (foreclosing mortgagee not

[6] To the extent Earle also argues that these statutes are facially unconstitutional, that argument is similarly without merit.

required to "have physical possession of the mortgage note in order to effect a valid foreclosure").

Judgment affirmed.

By the Court (Massing, Hand & Allen, JJ.[7]),

Paul Tuttle

Clerk

Entered: April 28, 2026.

[7] The panelists are listed in order of seniority.

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.

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CERTIFICATE OF SERVICE

I, Glenn F. Russell, Jr., hereby certify under the penalties of perjury that on May 18, 2026, 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 served upon the following counsel by electronic mail:

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