

# United States Court of Appeals For the First Circuit

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No. 19-1069

JOHN HIGGINS, JR.,

Plaintiff - Appellant,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Defendant - Appellee.

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## JUDGMENT

Entered: April 3, 2019  
Pursuant to 1st Cir. R. 27.0(d)

By notice issued March 11, 2019 appellant was notified that he was in default for failure to file an opening brief. Appellant was warned that unless he filed a brief by March 25, 2019 his appeal would be dismissed for lack of diligent prosecution.

Appellant having failed to file a brief, it is hereby ordered that the above-captioned appeal be dismissed in accordance with 1st Cir. R. 45.0(a) and 3.0(b).

By the Court:

Maria R. Hamilton, Clerk

cc:

John T. Higgins  
Effie Gikas Tchobanian

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JOHN HIGGINS, JR.,

\*

Plaintiff,

\*

\*

v.

Civil Action No. 18-cv-11392-IT

\*

FEDERAL NATIONAL  
MORTGAGE ASSOCIATION,

\*

\*

\*

Defendant.

\*

ORDER OF DISMISSAL

December 13, 2018

TALWANI, D.J.

Pursuant to the court's ORDER [#23] issued on December 13, 2018 ALLOWING  
Defendant's Motion to Dismiss for Failure to State a Claim [#8], the complaint is hereby  
dismissed. This case is CLOSED.

IT IS SO ORDERED.

/s/ Indira Talwani  
United States District Judge

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

JOHN HIGGINS, JR., )  
Plaintiff, )  
 )  
v. ) C.A. No. 18-11392-IT  
 )  
FEDERAL NATIONAL MORTGAGE )  
ASSOCIATION, )  
Defendant. )

ORDER

**TALWANI, D.J.**

1. Plaintiff's motion for leave to proceed *in forma pauperis* is granted.
2. The Clerk shall issue a summons. Because the Plaintiff is proceeding *in forma pauperis*, he may elect to have the United States Marshals Service ("USMS") complete service with all costs of service to be advanced by the United States. If so asked by the Plaintiff, the USMS shall serve copies of the summons, complaint, and this Order upon the Defendant as directed by Plaintiff. The Plaintiff shall have 90 days from the date of this Order to complete service.

**So ordered.**

/s/ Indira Talwani  
Indira Talwani  
United States District Judge

Dated: August 21, 2018

4. Do you have **any** cash or checking or savings accounts? G Yes

G No

If "Yes," state the total amount. \_\_\_\_\_

5. Do you own any real estate, stocks, bonds, securities, other financial instruments, automobiles or any other thing of value? G Yes

G No

If "Yes," describe the property and state its value.

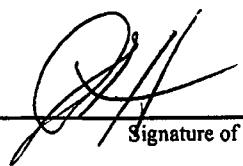
6. List the persons who are dependent on you for support, state your relationship to each person and indicate how much you contribute to their support.

*NONE*

I declare under penalty of perjury that the above information is true and correct.

*7-2-18*

Date



Signature of Applicant

**NOTICE TO PRISONER:** A Prisoner seeking to proceed without prepayment of fees shall submit an affidavit stating all assets. In addition, a prisoner must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

ML  
COPY

UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT  
HIGGINS JR V FEDERAL NATIONAL MORTGAGE  
ASSOCIATION

NO. 19-1069

2-5-19

"MOTION FOR A NEW TRIAL"

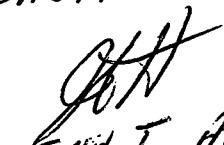
I PLAINTIFF, HIGGINS JR DO  
HEREBY REQUEST NEW HEARING  
BASED UPON PRIOR COURT  
DECISION AND CONSTITUTIONAL  
LAW.

ATTACHED ARE DECISION,  
CLAIM OF CONSTITUTIONAL  
VIOLATION.

2019 FEB -6 PM 12: 22

RECEIVED  
U.S. COURT OF APPEALS  
FIRST CIRCUIT  
CLERK'S OFFICE

RESPECTFULLY  
SUBMITTED

  
JOHN T. HIGGINS

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS (BOSTON)  
HIGGINS, JR V FEDERAL NATIONAL MORTGAGE ASSOCIATION

CSE # 18-11392

NOTICE OF APPEAL

1/9/19

I, PLAINTIFF, JOHN T HIGGINS  
DO HEREBY APPEAL RULING  
FROM CASE # 18-11392 IT.

ISSUE'S NOT ADDRESSED:

VIOLATION OF FOURTH AMEND-  
MENT RIGHTS (NO WARRANT  
EXECUTED WHEN EVICTION  
OCCURRED).

ALSO SEE ATTACHED  
DOCUMENT, RULING  
BY LOWER COURT.

ADDITION TO COMPLAINT  
RETURN + REMODELING  
OF MY HOME AT  
316 E. BORDER RD. MEDFORD.  
REQUEST COMPENSATION  
OF \$1,448.000

RESPECTFULLY  
SUBMITTED:

  
JOHN T HIGGINS

FILED  
IN CLERKS OFFICE

2019 JAN 10 PM 2:28

U.S. DISTRICT COURT  
DISTRICT OF MASS.

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

CASE # 18-11392-IT

10/30/18

HIGGINS JR V FEDERAL NATIONAL MORTGAGE  
ASSOCIATION

TO JUDGE INDIRA TALWANI

I HAD PHONE CALL, WEEK OF  
10/22/18 FROM DEFENDANTS ATTORNEY  
(FNMA) DEMANDING A IMMEDIATE  
SETTLEMENT ON THIS CASE.

SAID THIS MATTER NEEDS TO  
BE CLOSED TODAY.

REFERRED PARTY TO CONTACT  
COURT.

RESPECTFULLY  
SUBMITTED

  
JOHN T HIGGINS  
PLAINTIFF

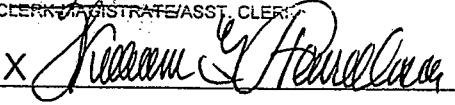
<b>NOTICE TO THE PARTIES</b>		DOCKET NUMBER <b>1510SU000242</b>	<b>Trial Court of Massachusetts District Court Department</b>
CASE NAME      Fannie Mae A/K/A Federal National Mortgage Association v. John Higgins, Jr.			
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF NOTICE IS ISSUED  File Copy		COURT NAME & ADDRESS  Somerville District Court 175 Fellsway Somerville, MA 02145	

**TO THE PARTIES TO THIS CASE:**

The enclosed indicates the Court's action in this matter.

Defendant's Motion to Stay Execution ALLOWED, upon payment of \$2500.00 in costs for levy, otherwise DENIED, YEE, J

DATE ISSUED  September 11, 2015	CLERK-MAGISTRATE/ASST. CLERK  Robert A Tomasone
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<b>EXECUTION FOR POSSESSION OF LEASED OR RENTED DWELLING</b>		DOCKET NUMBER <b>1510SU000242</b>	Trial Court of Massachusetts District Court Department Summary Process Session 
CASE NAME <b>Fannie Mae A/K/A Federal National Mortgage Association v. John Higgins, Jr.</b>			
DEFENDANT AGAINST WHOM EXECUTION IS ISSUED  John Higgins, Jr. 316 East Border Road Medford, MA 02155		COURT NAME & ADDRESS  Somerville District Court 175 Fellsway Somerville, MA 02145	
		PLAINTIFF(S) IN WHOSE FAVOR EXECUTION IS ISSUED  <b>Fannie Mae A/K/A Federal National Mortgage Association</b>	
PLAINTIFF (OR PLAINTIFF(S) ATTORNEY) WHO MUST ARRANGE SERVICE OF EXECUTION  Sarah Crocker, Esq. Orlans Moran PLLC 465 Waverley Oaks Road Suite 401 Waltham, MA 02452		FURTHER ORDERS OF THE COURT	
SUBJECT DWELLING PREMISES  316 East Border Road, Medford, MA 02155			
<b>TO THE SHERIFFS OF THE SEVERAL COUNTIES OR THEIR DEPUTIES, OR ANY CONSTABLE OF ANY CITY OR TOWN WITHIN THE COMMONWEALTH:</b>			
The plaintiff(s) named above has recovered judgment against the defendant named above for possession of the subject premises shown above, which were leased or rented for dwelling purposes.			
WE COMMAND YOU, therefore, subject to the requirements of G.L. c. 235 § 23 and G.L. c. 239, § 3, to cause the plaintiff(s) to have possession of the premises shown above without delay.			
This Writ of Execution is <b>VALID FOR THREE CALENDAR MONTHS ONLY</b> . It may not be levied upon if any underlying money judgment for non-payment of rent, along with any use and occupancy accruing since the date of judgment, has been fully satisfied. It must be returned to the clerk-magistrate's office of this court, along with your return of service, within ten days after this judgment for possession has been satisfied or discharged, or after three calendar months if this judgment remains unsatisfied or undischarged.			
TESTE OF FIRST JUSTICE  <b>WITNESS: Hon. Maurice R Flynn, III</b>	DATE EXECUTION ISSUED  <b>08/18/2015</b>	CLERK/MAGISTRATE/ASST. CLERK  	
<b>RETURN OF SERVICE</b>			
<input type="checkbox"/> Pursuant to this writ, I have caused the plaintiff(s) to have possession of the subject premises. <input type="checkbox"/> After notice the defendant(s) vacated the subject premises voluntarily. <input type="checkbox"/> I have physically removed the defendant(s) and his/her/their personal possessions from the subject premises. <input type="checkbox"/> I have not caused the plaintiff(s) to recover possession of these premises pursuant to this writ because:			
DATE & TIME WRIT SERVED  025	DATE OF RETURN	CONSTABLE/DEPUTY SHERIFF  <b>A TRUE COPY ATTEST</b>  	
www.mass.gov/courts		Date/Time Printed: 08-18-2015 14:35:21	

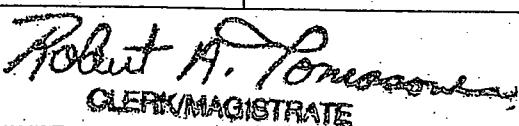
<b>NOTICE TO THE PARTIES</b>		DOCKET NUMBER <b>1510SU000242</b>	<b>Trial Court of Massachusetts District Court Department</b>
CASE NAME <b>Fannie Mae A/K/A Federal National Mortgage Association v. John Higgins, Jr.</b>			
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF NOTICE IS ISSUED  <b>John Higgins, Jr. 316 East Border Road Medford, MA 02155</b>		COURT NAME & ADDRESS  <b>Somerville District Court 175 Fellsway Somerville, MA 02145</b>	

**TO THE PARTIES TO THIS CASE:**

The enclosed indicates the Court's action in this matter.

Defendant's Motion for Relief from Judgment **DENIED**, YEE, J

DATE ISSUED  <b>August 18, 2015</b>	CLERK-MAGISTRATE/ASST. CLERK  <b>Robert A Tomasone</b>
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JUDGMENT FOR PLAINTIFF(S) FOR POSSESSION AND RENT		DOCKET NUMBER 1510SU000242	Trial Court of Massachusetts District Court Department Summary Process Session
Fannie Mae A/K/A Federal National Mortgage Association v. John Higgins, Jr.			
SUBJECT PREMISES 316 East Border Road, Medford, MA 02155			
PLAINTIFF(S) WHO ARE PARTIES TO THIS JUDGMENT Fannie Mae A/K/A Federal National Mortgage Association		COURT NAME & ADDRESS Somerville District Court 175 Fellsway Somerville, MA 02145	
DEFENDANT(S) WHO ARE PARTIES TO THIS JUDGMENT John Higgins, Jr.		NEXT COURT EVENT (IF ANY) No Future Event Scheduled	
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF JUDGMENT IS ISSUED John Higgins, Jr. 316 East Border Road Medford, MA 02155		FURTHER ORDERS OF THE COURT SEE FINDING SHEET ATTACHED	
<b>JUDGMENT FOR PLAINTIFF(S) FOR POSSESSION AND RENT</b>			
<p>On the above action, after defendant(s) failed to appear, the issues having been duly tried or heard, and a finding or verdict having been duly rendered, IT IS ORDERED AND ADJUDGED by the Court (Hon. Paul M Yee) that the plaintiff(s) named above recover of the Defendant(s) named above possession of the subject premises shown above and, for unpaid rent, use and occupation, the "Judgment Total" shown below plus other costs as may be taxed pursuant to law, with postjudgment interest thereon pursuant to G.L. c. 235, § 8 at the "Annual Interest Rate" shown below from the "Date Judgment Entered" shown below until the date of payment.</p>			
<b>NOTICE OF ENTRY OF JUDGMENT</b>			
<p>Pursuant to Mass. R. Civ. P. 54, 58, 77(d) and 79(a) and Uniform Summary Process Rule 10(d), this Judgment has been entered on the docket on the "Date Judgment Entered" shown below, and this notice is being sent to all parties.</p>			
1. Date of Breach, Demand or Complaint		06/30/2015	
2. Date Judgment Entered		07/29/2015	
3. Number of Days of Prejudgment Interest (line 2 - Line 1)		29	
4. Annual Interest Rate of 0.12/365.25 = Daily Interest rate		.000329	
5. Single Damages		\$0.00	
6. Prejudgment Interest (lines 3x4x5)		\$0.00	
7. Double or Treble Damages Awarded by Court (where authorized by law)		\$	
8. Costs Awarded by Court		\$0.00	
9. Attorney Fees Awarded by Court (where authorized by law)		\$	
10. JUDGMENT TOTAL PAYABLE TO PLAINTIFF(S) (Lines 5+6+7+8+9)		\$0.00	
DATE JUDGMENT ENTERED 07/29/2015	CLERK-MAGISTRATE/ASST. CLERK X	 <b>Robert A. Longo</b> <b>CLERK/MAGISTRATE</b>	

<b>ORDER</b>		DOCKET NUMBER <b>1410SU000386</b>	<b>Trial Court of Massachusetts District Court Department</b>
CASE NAME <b>Fannie Mae A/K/A Federal National Mortgage Association v. Catherine Higgins</b>			
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF NOTICE IS ISSUED  <b>John Higgins, Jr. 316 East Border Road Medford, MA 02155</b>		COURT NAME & ADDRESS  <b>Somerville District Court 175 Fellsway Somerville, MA 02145</b>	

**ORDER**

FNMA's Motion to Alter or Amend pursuant to Rule 59(e) and Motion for New Trial are, hereby, DENIED.

**NOTICE OF ENTRY OF ORDER**

This Order has been entered on the docket on the "Date Order Entered" shown below and this notice is being sent to all parties.

DATE ISSUED  <b>May 28, 2015</b>	JUDGE ISSUING ORDER  <b>Honorable Paul M. Yee</b>	CLERK-MAGISTRATE/ASST. CLERK  <b>Robert A Tomasone</b>
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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

DISTRICT COURT DEPARTMENT  
SOMERVILLE DIVISION  
NO. 1410SU0386

FEDERAL NATIONAL MORTGAGE ASSOCIATION

v.

JOHN HIGGINS, JR.

MEMORANDUM OF DECISION AND ORDER ON  
PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, OR IN THE  
ALTERNATIVE, MOTION FOR NEW TRIAL

Plaintiff Federal National Mortgage Association ("FNMA") sought to evict the defendant, John Higgins, Jr., from his home located at 316 East Border Road in Medford, Massachusetts ("the premises"). After a jury waived trial, I found for the defendant on the ground that the Affidavit of Sale referenced an assignment of the bid by the mortgagee, One West Bank N.A., made at a foreclosure auction of premises, to FNMA, but the assignment of bid referenced as Exhibit B was not attached to the Affidavit of Sale; and the foreclosure deed to FNMA was, therefore, defective. The judgment for the defendant entered on March 5, 2015.

FNMA moved timely on March 13, 2015 under Mass. R. Civ. P Rule 59(e) that the judgment for the defendant was entered in error. Rule 59(e) of Mass. R. Civ. provides: "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment." "[R]ule 59(e) is designed to correct judgments which are erroneous because they lack legal or factual justification. Pentucket Manor Chronic Hospital, Inc. v. Rate Setting Commission, 394 Mass. 233, 237 (1985).

First, FNMA argued that the court raised an affirmative defense of lack of legal title which was not raised by the defendant. FNMA is simply wrong and ignored the pleadings i.e. Summary Process Answer with Counterclaims filed by the defendant on November 3, 2014.

In ¶67, the defendant asserted an affirmative defense: "The plaintiff's case should be dismissed because it does not have proper title to the property and therefore does not have standing to bring this action and/cannot prove a superior right to possession of the premises."

Since I had to consider the defenses and counterclaims asserted by the defendant, I was required to decide these issues and did not raise any issue, sua sponte.

In addition, FNMA argued that FNMA was not obligated to introduce the assignment of bid, since the document was "not an integral part of either the Foreclosure Deed or the statutory form Affidavit of Sale." As a result, FNMA established a prima facie case for possession from the Foreclosure Deed and the statutory form Affidavit of Sale introduced into evidence.

"In a summary process action for possession after foreclosure by sale, the plaintiff is required to make a prima facie showing that it obtained a deed to the property at issue and that the deed and affidavit of sale, showing compliance with statutory foreclosure requirements, were recorded. See Lewis v. Jackson, 165 Mass. 481, 486-487 (1896); G. L. c. 244, § 15." Bank of New York v. Bailey, 460 Mass. 327, 334 (2011). The mortgagor's equitable title or an equity of redemption in the mortgaged property can be exercised to redeem the mortgaged property, until the right of redemption is foreclosed by the mortgagee. Bevilacqua v. Rodriguez, 460 Mass. 762, 774-75 (2011). After foreclosure, the mortgagee owns both the legal and equitable title, and the mortgage no longer exists. Id. at 775.

The pertinent part of M.G.L. c. 244, § 15 provides: "If the affidavit shows the requirements of the power of sale and of the statute have in all respects been complied with, the affidavit or a certified copy of the records thereof, shall be admitted as evidence that the power of sale was duly executed." "Where that challenge is focused on an affidavit of sale that is defective on its face, a defendant needs no other evidence to proceed with his challenge. . . . However, where the affidavit of sale is in the statutory form or meets the particular requirement of § 15, a plaintiff has made a prima facie case. (Citations omitted)." Federal National Mortgage Association v. Hendricks, 463 Mass. 635, 642 (2012). However, "[o]nce the plaintiff has made out a prima facie case at trial, the trial judge can accept that evidence as fact or not. She can believe the affidavit, or not." Federal National Mortgage Association v. Read, 2014 Mass. App. Div. Lexis, 10, 12. An affidavit of sale is not conclusive proof of compliance with c. 244, § 14. Id.

In Massachusetts, the assignment of the bid like an assignment of a mortgage is a land conveyance and must be in writing and signed. "An estate or interest in land created without an instrument in writing signed by the grantor or by his attorney shall have the force and effect of an estate at will only, and no estate or interest in land shall be assigned, granted or surrendered unless by such writing or by operation of law." M.G.L. c. 183, § 3. "Like a sale of land, the assignment of a mortgage is a conveyance of an interest in land that requires a writing signed by the grantor." U.S. National Association v. Ibanez, 458 Mass. at 649, citing M.G.L. c. 183 §3; Saint Patrick's Religious, Educ. & Charitable Ass'n v. Hale, 227 Mass. 175, 177 (1917). See also Novastar Mortgage, Inc. v. Saffran, 79 Mass. App. Ct. 1124 (2011)(the burden of proof is on the plaintiff in a summary process action to produce valid assignments to the mortgage holder for authority to foreclose).

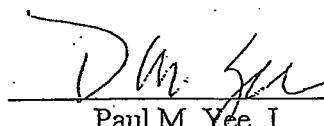
Here, the highest bidder according to the Affidavit of Sale was the mortgagee, OneWest Bank N.A. Since OneWest Bank N.A. did not sign a written assignment of the bid to FNMA, the mortgagee had to deliver the foreclosure deed to OneWest Bank N.A. instead of FNMA. The assignment of bid was necessary to show FNMA's good and clear legal title for the foreclosure deed. Without the assignment of bid, FNMA did not have legal title or a greater right to possession than the defendant. There was no error of law under these circumstances.

Finally, the omission of the assignment of bid in the affidavit under c. 244, § 15 does not affect the validity of the foreclosure but is essential for good and clear title only. O'Meara v. Gleason, 246 Mass. 136, 139 (1923); Fielding v. Gooding, 106 Mass. 310, 312-13 (1871). With the omission in the affidavit, the buyer, FNMA, would have to rely on extrinsic evidence that the power of sale was properly exercised, and the foreclosure was valid. O'Meara v. Gleason, 246 Mass. at 139. FNMA still has not produced any extrinsic evidence i.e. the Assignment of Bid in support of its motion for new trial. Allowance of the motion for new trial would not produce a different result.

#### ORDER

Accordingly, FNMA's Motion to Alter or Amend pursuant to Rule 59(e) and Motion for New Trial are, hereby, DENIED.

Dated: May 22, 2015

  
Paul M. Yee, Jr.

my Copy Subm<sup>n</sup> 4/27/16  
to Paperfile CT.

<b>NOTICE TO THE PARTIES</b>		DOCKET NUMBER <b>1510SU000242</b>	<b>Trial Court of Massachusetts District Court Department</b>
CASE NAME <b>Fannie Mae A/K/A Federal National Mortgage Association v. Higgins, Jr., John</b>			
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF NOTICE IS ISSUED <b>John Higgins, Jr. 25 Landerrs Road Stoneham, MA 02180</b>	COURT NAME & ADDRESS <b>Somerville District Court 175 Fellsway Somerville, MA 02145</b>		

**TO THE PARTIES TO THIS CASE:**

The enclosed indicates the Court's action in this matter.

Defendant's motion DENIED, YEE, J on the grounds defendant is not in possession and has no ability to repay the reverse mortgage and has not stated a valid defense to summary process action.

DATE ISSUED <b>April 7, 2016</b>	CLERK-MAGISTRATE/ASST. CLERK <b>Robert A Tomasone</b>
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COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Somerville District Court  
Civil Action No: 1410SU386

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Federal National Mortgage Association,

Plaintiff,

v.

John Higgins Jr.,

Defendant(s).

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**PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT, OR, IN  
THE ALTERNATIVE, MOTION FOR A NEW TRIAL**

Now comes the Plaintiff, Federal National Mortgage Association (hereinafter "Fannie Mae"), and respectfully moves the Court pursuant to Mass. R. Civ. P. 59(e) to alter or amend the Court's judgment in this matter dated March 5, 2015 granting possession of the subject premises to the Defendant, John Higgins, Jr. (hereinafter "Higgins"). In the alternative, the Plaintiff requests a new trial pursuant to Mass. R. Civ. P. 59, which permits the Court to "open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment." Mass. R. Civ. P. 59(a).

As grounds for its motion, Fannie Mae states as follows:

## FACTUAL AND PROCEDURAL BACKGROUND

1. Fannie Mae is the owner of the property located at 316 East Border Road, Medford, Massachusetts ("the Property") following a foreclosure auction conducted at the Property on May 17, 2014.
2. Attached hereto as Exhibit "A" is a true and accurate copy of a Massachusetts Foreclosure Deed and Affidavit of Sale conveying the Property to Fannie Mae, which was recorded in the Middlesex (South District) Registry of Deeds at Book 64069, Page 65.
3. Higgins is the son of the former owner and former mortgagor of the Property, Catherine M. Higgins, who is deceased. A Suggestion of Death for Catherine M. Higgins was previously filed with the Court.
4. Higgins continues to reside at the property.
5. Fannie Mae brought the present summary process action to recover possession of the Property.

6. Following a bench trial on January 22, 2015, the Court entered Judgment for Possession in favor of Higgins on March 5, 2015.

7. In its Summary Process Findings, the Court found that the "Affidavit of Sale of Adam F. Faria references a bid assignment to FNMA as Exh. "B" but none was attached. The foreclosure deed of OneWest is defective." See, Summary Process Finding attached hereto as Exhibit "B."

## ARGUMENT

### **I. Standard for Relief Under Rule 59(e)**

A motion brought under Mass R. Civ. P. 59(e) (which is analogous to Fed. R. Civ. P. 59(e)) should be granted to correct a clear error, whether of law or of fact, and to prevent a manifest injustice. Firestone v. Firestone, 76 F.3d 1205, 1208 (D.C. Cir. 1996) (the four grounds for reconsideration are: to prevent manifest injustice, to accommodate for an intervening change in controlling law, to account for newly discovered evidence, or to correct clear error of fact or law); EEOC v. Lockheed Martin Corp., 116 F.3d 110, 112 (4th Cir. 1997). So long as the Rule 59(e) motion is timely filed, the courts have considerable discretion. Lockheed Martin Corp., 116 F.3d at 112. Although the courts are not required to consider new legal arguments, or mere restatements of old facts or arguments, the court can and should correct clear errors in order to “preserve the integrity of the final judgment.” Turkmani v. Republic of Bolivia, 273 F. Supp. 2d 45, 50 (D.D.C. 2002).

### **II. As Fannie Mae Proved Its Prima Facie Case for Possession, It Was Clear Error for the Court to Enter a Judgment for Possession in Favor of the Defendant.**

Fannie Mae contends that the Court committed clear error in awarding judgment for possession to Higgins, based on the fact that the Assignment of Bid referenced in the Affidavit of Sale attached to the Foreclosure Deed was not actually attached to the Foreclosure Deed.

The Assignment of Bid is not an integral part of either the Foreclosure Deed or statutory form Affidavit of Sale. It is an ancillary document which merely demonstrates the transfer of the bid submitted by the successful bidder at the foreclosure auction. It

does not serve to either transfer title, as a foreclosure deed does, or establish compliance with the statutory power of sale, G.L. c. 244, § 14, as the statutory form affidavit does.

Whether or not the Assignment of Bid was attached to the Foreclosure Deed in this case is immaterial.

“[I]n a summary process action a foreclosure deed and statutory form [affidavit of sale] constitute *prima facie* evidence of the right of possession. Federal Nat'l Mortgage Ass'n v. Hendricks, 463 Mass. 635, 642 (2012), citing Lewis v. Jackson, 165 Mass. 481, 486-487 (1896). In Hendricks the Supreme Judicial Court further held that “where the affidavit of sale is in the statutory form or meets the particular requirements of § 15, a plaintiff has made a *prima facie* case.” Id., citing Bank of New York v. Bailey, 460 Mass. 327, 334 (2011); Deutsche Bank Nat'l Trust Co. v. Gabriel, 81 Mass. App. Ct. 564, 568-570 (2012). The Affidavit of Sale in this case, which was attached to and submitted into evidence with the Foreclosure Deed, is clearly in the statutory form, and tracks the language of the statutory form affidavit of sale, proscribed by G.L. c. 183, § 8, Appendix 12. Thus, Fannie Mae has established its *prima facie* case for possession.

There is no requirement under Hendricks that an assignment of the high bidder’s bid must be accompanied by a written assignment of that bid, or that the assignment of bid be attached to the foreclosure deed and affidavit. On the contrary, Hendricks clearly establishes that the *only* documents required to establish a plaintiff’s *prima facie* case are the foreclosure deed and affidavit in the statutory form. Hendricks, at 642. Fannie Mae complied with this requirement, notwithstanding the fact that the Assignment of Bid was not attached.

Where Fannie Mae has complied with the requirements of Hendricks and has established its prima facie case for possession of the Property, and where Higgins has failed to offer any evidence to rebut Fannie Mae's prima facie case, Fannie Mae submits that the Court should alter or amend the judgment to reflect this fact, and award it possession of the Property, in order to correct a clear error of fact or law.

**III. The Court Committed Error in Raising what Amounts to an Affirmative Defense on Behalf of the Defendant, where no such Affirmative Defense was ever Raised by the Defendant Himself.**

At trial, Fannie Mae submitted into evidence its Foreclosure Deed, with the attached Affidavit of Sale in the statutory form. There was no objection to either the Foreclosure Deed or Affidavit of Sale, and the documents were received as full exhibits. Having met its burden, with no contravening evidence offered by Higgins, Fannie Mae was entitled to a judgment for possession in its favor.

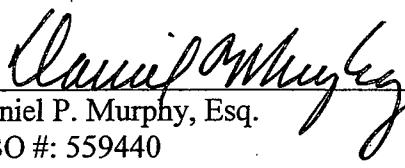
Fannie Mae argues that the Court committed further error, however, in going beyond the four corners of the documentary evidence it submitted in the form of the Foreclosure Deed and Affidavit of Sale, and, in essence, raising *sua sponte* what amounts to an affirmative defense that was never raised by Higgins. Higgins did not raise this issue, and Fannie Mae argues that it is beyond the discretion of the trial court to take such action on Higgins' behalf. As such this would constitute further grounds to grant Fannie Mae the relief requested in the form of altering or amending the judgment to award it possession of the property, or, in the alternative, granting it a new trial.

## CONCLUSION

For the reasons stated above, Fannie Mae submits that the Court committed an error of law, and in its discretion should alter or amend the judgment in this matter to award possession of the Property to Fannie Mae. In the alternative, Fannie Mae requests that the Court grant it a new trial.

Respectfully submitted,

FEDERAL NATIONAL MORTGAGE  
ASSOCIATION,  
By its attorney,

  
Daniel P. Murphy, Esq.  
BBO #: 559440  
Orlans Moran PLLC  
P.O. Box 540540  
Waltham, MA 02454  
781-790-7800

Dated: March 12, 2015

## **CERTIFICATE OF SERVICE**

I, Daniel P. Murphy, Esq., hereby certify that on March 12, 2015, I served a copy of the foregoing document by overnight mail, postage prepaid, to all parties appearing pro se:

John T. Higgins  
316 East Border Road  
Medford MA 02155

  
Daniel P. Murphy



The Commonwealth of Massachusetts

MASSACHUSETTS TRIAL COURT  
DISTRICT COURT DEPARTMENT  
SOMERVILLE DIVISION

175 FELLSWAY  
SOMERVILLE, MASSACHUSETTS 02145

ROBERT A. "TED" TOMASONE  
Clerk Magistrate

TEL. (617) 666-8000  
FAX (617) 776-2111

FANNIE MAE A/K/A FEDERAL NATIONAL  
MORTGAGE ASSOCIATION

WILLIAM G. FARRELL, ESQ.

First Assistant Clerk

JOSEPH F. RILEY

Assistant Clerk

MARGARET WEEKS

Assistant Clerk

ROBERT C. TRINGALE

Assistant Clerk

MARY P. KANACH

Assistant Clerk

STEPHEN F. BORELLI, ESQ.  
Assistant Clerk

VS.

Civil Action Docket Number: 1410SU386

CATHERINE M. HIGGINS  
JOHN HIGGINS JR.

SUMMARY PROCESS FINDING

After full hearing, the Court finds for:

*Defendant John Higgins, Jr. for Plaintiff's Possession & Complaint dismissed as to both defendants.*

() Plaintiff's Possession

() Account annexed in the amount of: \$ \_\_\_\_\_

() EXECUTION TO ISSUE ON: \_\_\_\_\_

() Conditions of continued occupancy until execution: timely payments of use and occupation to be paid. Accrued; and quiet use of premises.

() Additional conditions:

() Defendant defaulted.

*Defendant's Condemnation*

() DEFENDANT - CASE DISMISSED.

() Finding Attached Affidavit of Sale of Adam F. Farni references a bid assignment to FNMA no Exch. "B" but none was attached. The foreclosure deed of the West is before

Date of Finding March 4, 2015

*DLG*  
Justice

DATE PARTIES NOTIFIED OF FINDING

*3-5-15*

<b>JUDGMENT FOR DEFENDANT(S) FOR POSSESSION AND RENT</b>		DOCKET NUMBER <b>1410SU000386</b>	<b>Trial Court of Massachusetts District Court Department Summary Process Session</b>
CASE NAME <b>Fannie Mae A/K/A Federal National Mortgage Association v. Catherine Higgins</b>			
SUBJECT PREMISES <b>316 East Border Road, Medford, MA 02155</b>			
PLAINTIFF(S) WHO ARE PARTIES TO THIS JUDGMENT <b>Fannie Mae A/K/A Federal National Mortgage Association</b>		COURT NAME & ADDRESS <b>Somerville District Court 175 Fellsway Somerville, MA 02145</b>	
DEFENDANT(S) WHO ARE PARTIES TO THIS JUDGMENT <b>John Higgins, Jr.</b>		NEXT COURT EVENT (IF ANY) <b>No Future Event Scheduled</b>	
ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF JUDGMENT IS ISSUED <b>Catherine Higgins 316 East Border Road Medford, MA 02155</b>		FURTHER ORDERS OF THE COURT	

#### **JUDGMENT FOR DEFENDANT(S) FOR POSSESSION AND RENT**

On the above action, after trial by a judge, the issues having been duly tried or heard, and a finding or verdict having been duly rendered, IT IS ORDERED AND ADJUDGED by the Court (Hon. Paul M Yee) that judgment enter in favor of the Defendant(s) named above for possession of the subject premises shown above, that the Plaintiff(s) named above take nothing for rent, use and occupation, and that the Defendant(s) recover of the Plaintiff(s) his(her)(their) costs pursuant to law.

#### **NOTICE OF ENTRY OF JUDGMENT**

Pursuant to Mass. R. Civ. P. 54, 58, 77(d) and 79(a) and Uniform Summary Process Rule 10(d), this Judgment has been entered on the docket on the "Date Judgment Entered" shown below, and this notice is being sent to all parties.

DATE JUDGMENT ENTERED <b>03/05/2015</b>	CLERK-MAGISTRATE/ASST. CLERK <b>X</b>	<i>Robert A. Tomassini</i> <b>CLERK/MAGISTRATE</b>
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