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**United States Court of Appeals**
**For the First Circuit**

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Nos. 21-1817
22-1346 LAIRD J. HEAL,

Plaintiff-Appellant,

MARK PAOLUCCIO,

Plaintiff,

v.

WELLS FARGO, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust; JPMORGAN CHASE BANK, N.A.; MORTGAGE CONTRACTING SERVICES, LLC, d/b/a Mortgage Contracting Services,

Defendants-Appellees,

JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4,

Defendants.

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Before

Kayatta, Howard and Gelpí,
Circuit Judges.

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**JUDGMENT**

Entered: January 17, 2023

In appeal 21-1817, pro se plaintiff-appellant Laird Heal appeals from the district court's

summary-judgment and other rulings disposing of his claims against defendant-appellees. Heal also challenges a number of discovery and evidentiary rulings preceding the summary judgment rulings, as well as the denial of his motions for sanctions, to amend the operative complaint, and to amend the judgment. In appeal 22-1346, Heal challenges the district court's denial of a post-judgment motion to amend the complaint.

We have considered each of the arguments developed in the opening brief, and the discussion of specific points herein should not be read to suggest that the court did not consider any specific argument or point not expressly mentioned. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (insufficiently developed claims waived). After a careful review of the record, the submissions of the parties, and the reasoning provided by the district court, we affirm the challenged rulings, substantially for the reasons set forth in the district court's various Memoranda and Orders. See Local Rule 27.0(c); see also Estate of Bennett v. Wainwright, 548 F.3d 155, 165 (1st Cir. 2008) (summary judgment standard of review and general principles); see also Pina v. Children's Place, 740 F.3d 785, 790–91 (1st Cir. 2014) (abuse of discretion review generally applies to district court's discovery rulings); Alternative Sys. Concepts, Inc. v. Synopsys, Inc., 374 F.3d 23, 31 (1st Cir. 2004) (court generally reviews evidentiary rulings, including those undergirding summary judgment rulings, for abuse of discretion).

In particular, we agree with the district court that there was no triable question with respect to whether entries for purposes of inspecting and securing the relevant real property were authorized and properly noticed under the terms of the operative mortgage agreement, given the uncontroverted evidence regarding the status and condition of the property at relevant times. We also agree that there was no genuine issue of material fact as to whether the alleged conversion or removal of Heal's personal property by employees or agents of the defendant-appellees would have fallen within the scope of their employment, as required for defendant-appellees to be held vicariously liable for any conversion or trespass to chattels.

Moreover, we conclude that the district court properly disposed of Heal's claims for breach of contract and breach of fiduciary duty on the grounds that Heal, a rental tenant, was neither a party to nor an intended beneficiary of the operative mortgage agreement. See Anderson v. Fox Hill Vill. Homeowners Corp., 676 N.E.2d 821, 822 (Mass. 1997) (in order for a third party to enforce a contract, the intention for the contract to benefit the third party must be "clear and definite").

We further discern no abuse of discretion in the challenged rulings preceding the summary judgment rulings, including the district court's decisions resolving the numerous motions to strike or to exclude certain statements and evidence and the district court's denials of Heal's motions to amend the complaint and judgment. See, e.g., Lennon v. Rubin, 166 F.3d 6, 8 (1st

Cir. 1999) ("We review the district court's decision as to the evidentiary materials it will consider in deciding a motion for summary judgment only for a clear abuse of discretion.") (internal citation omitted); United States v. Shay, 57 F.3d 126, 134 (1st Cir. 1995) erroneous evidentiary ruling requires reversal if "the exclusion results in actual prejudice because it had a substantial and injurious effect or influence"); see also Windross v. Barton Protective Servs., Inc., 586 F.3d 98, 104 (1st Cir. 2009) (denial of motion to amend complaint reviewed for abuse of discretion).

Turning to appeal 22-1346, through which Heal challenges the district court's denial of a post-judgment motion to amend the operative complaint, we discern no error or abuse of discretion as to the district court's ruling. See Feliciano-Hernández v. Pereira-Castillo, 663 F.3d 527, 538 (1st Cir. 2011) ("The law in this circuit is clear that a district court may not accept an amended complaint after judgment has entered unless the judgment is set aside or vacated under Rules 59 or 60."); Windross, 586 F.3d at 104 (standard of review).

Heal's remaining claims of error are unconvincing. The rulings and judgment of the district court are **affirmed** in all respects. See Loc. R. 27.0(c). Any remaining pending motions, to the extent not mooted by the foregoing, are **denied**.

By the Court:

Maria R. Hamilton, Clerk

cc:
Laird James Heal
Anne Dunne
Tonya M. Esposito
Maura Katherine McKelvey
Marissa I. Delinks
Hale Yazicioglu Lake
Samuel Craig Bodurtha
Kevin William Manganaro
Mark Paoluccio

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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|---|---|
| LAIRD J. HEAL,<br>Plaintiff,<br>v.<br>WELLS FARGO, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERVICES 2006-PR2 TRUST, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, MORTGAGE CONTRACTING SERVICE LLC, D/B/A MORTGAGE CONTRACTING SERVICE, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3 and JOHN DOE 4,<br>Defendants. | CIVIL ACTION<br>NO. 17-11918-TSH |

**MEMORANDUM AND ORDER ON CROSS MOTIONS TO STRIKE AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGEMENT (Docket Nos. 143, 148, 162, 163, 164, 166, 170)**

September 1, 2021

**HILLMAN, D.J.**

Mark Paoluccio and Laird J. Heal, Paoluccio's tenant (collectively, "Plaintiffs"), brought this action asserting Forcible Entry (Count I), Breach of Contract (Count II), Trespass to Chattel (Count III), Conversion

(Count IV), and Breach of Fiduciary Duty (Count V) claims in connection with Defendants' pre-foreclosure activity on Paoluccio's mortgaged property in Winchendon, Massachusetts. Plaintiffs allege that from 2012 to 2018 Defendants repeatedly entered the property illegally and removed or stole Heal's possessions, including an antique gold coin, changed the locks, shut off utilities, and nailed the windows shut. The mortgagor, Paoluccio, voluntarily dismissed his claims after the Winchendon property was foreclosed in 2018, leaving Heal the sole Plaintiff. I granted summary judgment on Counts II and V, and have capped Heal's damages for the gold coin at $500, adjusted for inflation. (Docket No. 46).

Before the Court are Wells Fargo Bank and JP Morgan Chase's ("Bank Defendants") and Mortgage Contracting Services' ("MCS") motions for summary judgment on Counts I (Forcible Entry), III (Trespass to Chattels), and IV (Conversion). (Docket Nos. 143, 148). Also pending are five motions to strike portions of both parties' summary judgment pleadings. (Docket Nos. 162, 163, 164, 166, 170).

For the reasons stated below, Plaintiff's Motion to Strike Bank Defendants' Statement of Material Facts (Docket No. 162) is ***granted in part and denied in part***; Plaintiff's Motion to Strike MCS' Statement of Material Facts (Docket No. 163) is ***granted in part and denied in part***; Plaintiff's Motion to Strike the Benavidez Affidavit (Docket No. 164) is ***denied***; Bank Defendants' Motion to Strike Plaintiff's Affidavit (Docket No. 166) is ***granted***; and MCS' Motion to

Strike Plaintiff's Affidavit (Docket No. 170) is ***granted in part and denied in part***. Bank Defendants and MCS' motions for summary judgment (Docket Nos. 143, 148) are ***granted*** on all counts in accordance with this memorandum of decision.

## I. Background

*The Mortgage*

On January 12, 2006, Mark Paoluccio granted a mortgage on his duplex apartment at 8 Linden Street in Winchendon (the "Property") to Washington Mutual Bank. (Mortgage, Docket No. 151-1 at 2). JP Morgan Chase, Washington Mutual's successor in interest, assigned the mortgage to Wells Fargo Bank in March 2012 and remained the mortgage servicer. (Assignment, Docket No. 151-2).

The mortgage's Uniform Covenants required the borrower (Paoluccio) to keep the Property in good condition and repair to prevent any decrease in value. (Mortgage ¶ 7, Docket No. 151 at 8-9). It also authorized the lender or its agent to "make reasonable entries upon and inspections of the Property." (*Id.*). With reasonable cause, the lender could inspect the interior of the Property, so long as the lender gave the borrower "notice at the time of or prior to such an interior inspection specifying the reasonable cause." (*Id.*).

If the borrower violated the mortgage terms, a legal proceeding significantly affected the lender's interest in the Property, or the borrower abandoned the

Property, the lender could take reasonable or appropriate steps to protect its interest in the Property, including:

> "protecting and/or assessing the value of the Property, and securing and/or repairing the Property . . . [s]ecuring the Property includes, but is not limited to, entering the Property to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on and off." (¶ 9).

The mortgage agreement did not provide a legal definition for abandonment.

*The Lease*

Paoluccio and Heal entered into a lease agreement in October 2010, under which Heal ("Plaintiff") agreed to pay $500 per month in rent and maintain the Property. (Lease Agmt. ¶ 11, Docket No. 151-8 at 4-5). Plaintiff's maintenance duties included keeping windows, doors, lacks and hardware in good, clean order and repair; not obstructing windows or doors, or leaving them open in inclement weather; and keeping plumbing in good order and repair. (*Id.*). Plaintiff claims that aside from a brief period of hospitalization from February—March 2014 he lived continuously at the Property until the foreclosure sale in February 2018, so that it was never vacant, abandoned, or fell into a state of disrepair. (Docket No. 161, ¶ 44; Foreclosure Deed at 4, Docket No. 151-3).

*The Dispute*

In 2008, Mortgage Contracting Services ("MCS") entered into a contract with JP Morgan Chase to provide property preservation services. (Docket No. 146-1).

When Chase reports that a mortgage loan is delinquent, inspections at the underlying property are automatically triggered. (Nguyen Dep. 42:16-19, Docket No. 151-4). MCS hires vendors to conduct necessary inspections and maintenance work whom it calls field agents. It transmits work orders to its field agents via the Vendor360 online portal. (Benavidez Aff. ¶ 14). MCS' standard practice is to have its field agents conduct inspections at mortgaged properties and leave a vacancy notice at any property which appears to be vacant and abandoned. (Benavidez Aff., ¶ 26). The notices advise residents that MCS will secure the property on behalf of the mortgage lender unless a resident informs MCS that the property is not vacant by calling the posted telephone number. (*Id.*).

Bank Defendants and MCS allege that the Property appeared vacant and unmaintained, which authorized MCS' field agents to conduct the property preservation activities set out in the mortgage for abandoned or unmaintained property, including securing the Property by changing the locks on the doors, boarding up windows, and shutting off utilities. Plaintiff alleges—without providing dates for any of the incidents, or a list of the stolen property—that the Bank Defendants (acting through MCS or MCS' field

agents) forced their way inside the Property on multiple occasions, changed the locks three times; "rifled through" his personal property and "took what they felt like;" "turned the electric circuit breaker in the cellar" two times; nailed various doors and windows shut; and told the neighbors to call the police if anyone tried to enter. (Compl. ¶¶ 24-35, Docket No. 1). As a result, Plaintiff claims he was locked out of the upper level of the Property for about a year, but provides no dates.

MCS' reports for each inspection, many of which contain photographs, show that its field agents visited the Property as many as 98 times between July 7, 2012 and January 11, 2018. (*See* Ex. 5, Docket No. 146-5). Most of the visits were to cut grass or perform a visual inspection for signs of occupancy from the exterior,[1] but some, labelled "winterization," "secure," "initial secure," or "re-secure," directed field agents to enter the Property and change the locks or install a lock box, nail windows closed, or take other actions to fortify the house for winter, such as shutting off utilities, unless the Property was occupied. (*Id.*). MCS field agents executed secure or winterization orders, which involved nailing doors or windows shut, or adding a lockbox, 14 times: August 2, 2012; October 2, 2013; April 20, 2014; June 26, 2014; July 2, 2014; October 11, 2016; April 10, 2017; May 6, 2017; June 1, 2017; and August 29, 2018.

[1] For example, the reports note a car in a driveway, a satellite dish, or personal possessions visible from outside the home through its windows are signs the property may be occupied or partially vacant, while photographs of overgrown grass or vegetation or a driveway buried deep in snow indicate that the Property is vacant.

(*Id.*). MCS' reports indicate that field agents conducted inspections and posted vacancy notices on: July 11, 2012 (approximately 3 weeks before Property was secured on August 2, 2012; photos of posted vacancy notice in report); October 7, 2013 (5 days *after* Property was secured on October 2, 2013); October 17, 2013 (six days after the prior secure order; photos of posted vacancy notice included in report); November 10, 2013 (approximately a month after Property was secured on photos of vacancy notice included in report); and November 28, 2016 (photos of vacancy notice included in report; agent reported the Property was partially vacant because the yard was maintained and people were inside). (Docket Nos. 146-6; 146-9; 146-10; 146-1; 146-15).

Only one MCS Work Order appears to have authorized MCS field agents to remove any private property from inside the house. On October 21, 2013, MCS put out a work order for the removal of two cubic yards of raw garbage, including food and trash. (Docket No. 157-8 at 2). That order was completed on October 24, 2013. (*Id*). Photographs in the subsequent report show three or four black garbage bags being filled with non-perishable canned food items, pizza boxes, and other debris. (*Id*). The photographs of the interior of the house show kitchen counters strewn with garbage, several cardboard boxes, used bedding, a bare mattress, and a pile of unfolded men's clothing. (*Id.* at 3-10).

*Police Records*

On June 27, 2014, Plaintiff returned to the Property to discover that the locks had been changed, and an MCS notice had been posted on the door. He reported a suspected larceny of an antique gold coin from a locked strongbox inside the Property to the Winchendon Police. (Police Rep. I, Docket No. 151-9). The responding officer, Sgt. Anair, visited the Property with Plaintiff. (*Id.* at 4.). They entered through a door whose lock had not been changed, and examined the strongbox, which "did not appear to [Sgt. Anair] to have been pried or forced." (*Id.*). Sgt. Anair reported that the Property exterior appeared "unkempt" and the interior "did not appear to have been lived in." (*Id.*). He closed the case because Plaintiff did not follow up and MCS never responded to Sgt. Anair's calls about whether Plaintiff had a right to be inside the Property. (*Id*).

On Friday, July 14, 2014, Winchendon Police responded to a call about the Property. (Police Rep. II, Docket No. 151-11). Officer Ross spoke with Plaintiff at the Property; Plaintiff could not produce a lease and Officer Ross observed that "there was junk and trash everywhere" and no "furniture that would be in a livable apartment" other than a bare mattress on the floor—in other words, "a squatters lair." (*Id.* at 4). Plaintiff visited the police station three days later and furnished the lease agreement, an affidavit signed by Paoluccio, and a March-April electric bill for more than $5,000 with a notice to terminate service as proof he was Paoluccio's tenant. (*Id.* at 5).

On September 16, 2015, Plaintiff reported another break in at the Property, but told officers he had already reversed the changed door locks before they arrived." (Police Rep. III, Docket No. 151-12 at 4). The police closed the case. *Id.*

On September 5, 2017, the police responded when Stacey Wilson, a CMS vendor, attempted to conduct an interior inspection at the Property when Plaintiff was at the Property. (Police Rep. IV, Docket No. 151-13). Police advised her that she would need an eviction order to conduct the walkthrough. (*Id.*).

## II. Procedural History

On June 29, 2017, Paoluccio and Heal, acting *pro se*,[2] filed a lawsuit in Worcester Superior Court against JP Morgan Chase, Wells Fargo Bank, MCS, and John Does for Forcible Entry (Count 1), Breach of Contract (Count 2), Tort to Chattels (Count 3), Conversion (Count 4), and Breach of Fiduciary Relationship (Wells Fargo only) (Count 5). (Docket No. 1). On Count 1, Plaintiffs sought "an order requiring then [sic] quit up the property and [sic] forever." On the remaining counts, Plaintiffs sought damages based on the damage to the property, the values of the items removed from the property, their pain and suffering, as well as

[2] Plaintiff resigned from the practice of law and the Supreme Judicial Court entered an order of disbarment in 2017. *In re: Laird Hames Heal*, Judgment of Disbarment (Mass. Sup. Jud. Ct. Dec. 22, 2016).

punitive damages. The case was removed to federal court.

Following the foreclosure, Paoluccio dismissed his claims with prejudice on March 5, 2018, leaving Heal as the sole plaintiff. (Docket No. 18). I granted summary judgment on Heal's breach of contract and breach of fiduciary relationship claims because Heal, as a tenant, had no privity in contract or fiduciary relationship with Defendants. (Docket No. 46). My order also capped Heal's damages for loss of an antique gold coin at the $500 valuation he attributed to the coin during his 2001 bankruptcy proceedings, adjusted for inflation. (Docket Nos. 46, 48, 49, 73, 89).

The remaining claims against MCS and the Bank Defendants are forcible entry (Count I), tort to chattels (Count III),[3] and conversion (Count IV).

## III. Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that the court shall grant summary judgment if the moving party shows, based on the materials in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute precludes summary judgment if it is both "genuine" and "material." *See Anderson v. Liberty Lobby, Inc.*, 477

[3] There is no tort to chattels cause of action under Massachusetts law, but I have construed the cause of action as trespass to chattels.

U.S. 242, 247-48, 106 S.Ct. 2505 (1986). An issue is "genuine" when the evidence is such that a reasonable factfinder could resolve the point in favor of the non-moving party. *Morris v. Gov't Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir. 1994). A fact is "material" when it might affect the outcome of the suit under the applicable law. *Id.*

The moving party is responsible for "identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). It can meet its burden either by "offering evidence to disprove an element of the plaintiff's case or by demonstrating an 'absence of evidence to support the nonmoving party's case.'" *Rakes v. United States*, 352 F. Supp. 2D 47, 52 (D. Mass. 2005), aff'd, 442 F.3d 7 (1st Cir. 2006) (quoting *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548). Once the moving party shows the absence of any disputed material fact, the burden shifts to the non-moving party to place at least one material fact into dispute. *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 15 (1st Cir. 1994) (citing *Celotex*, 477 U.S. at 325). When ruling on a motion for summary judgment, "the court must view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Scanlon v. Dep't of Army*, 277 F.3d 598, 600 (1st Cir. 2002) (citation omitted).

## IV. Discussion

Before the Court reach MCS and the Bank Defendants' motions for summary judgment, it must consider the five pending motions to strike portions of the summary judgment record.

### A. Motions to Strike

Under Fed. R. Civ. P. 56(c)(4), "[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." When considering a motion for summary judgment, "a court may take into account any material that would be admissible or usable at trial . . . [but] inadmissible evidence may not be considered." *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 2013). "A motion to strike is the appropriate means of objection to the use of affidavit evidence on a motion for summary judgment." *Facey v. Dickhaut*, 91 F.Supp.3d 12, 19 (D. Mass. 2014). "The moving party must specify the objectionable portions of the affidavit and the specific grounds for objection. Furthermore, a court will disregard only those portions of an affidavit that are inadmissible and consider the rest of it." *Casas Office Machines, Inc. v. Mita Copystar America, Inc.*, 42 F.3d 668, 682 (1st Cir. 2014).

### 1. Plaintiff's First Motion to Strike (Docket No. 162)

Plaintiff seeks to strike dozens of paragraphs in Bank Defendants' Statement of Material Facts (Docket No. 150) on five grounds: (1) neither Wells Fargo nor Chase's initial Rule 26(a)(1) disclosures identified any potential trial witnesses; (2) neither Wells Fargo nor Chase provided the names of the field agents who conducted inspections at the Property in response to Plaintiff's Interrogatories; (3) failure to comply with L.R. 56.1; (4) certain facts are immaterial, lack support or a foundation, or are misleading; and (5) certain facts contain inadmissible hearsay.

First, Plaintiff has not provided any legal precedent that a defendant's failure to disclose potential trial witnesses with its initial disclosures warrants striking its entire statement of material facts.

Second, assuming Bank Defendants had access to and deliberately withheld the names of MCS's field agents in their responses to interrogatories, Plaintiff has not shown why striking their entire statement of material facts is a proportionate remedy at law, when Defendant could have instead sought a motion to compel or other, more targeted relief from the Court.

Third, none of the facts cited by Plaintiff fall afoul of L.R. 56.1, which requires a statement of facts accompanying a summary judgment motion to contain page references to affidavits, depositions, and other documentation. (*See* ¶¶ 3-6, 8-17, 19-21, 29-48, 66-70, Docket No. 150). L.R. 56.1 "was adopted to expedite the

process of determining which facts are genuinely in dispute, so that the court may turn quickly to the usually more difficult task of determining whether the disputed issues are material." *Brown v. Armstrong*, 957 F.Supp. 1293, 1297 (D. Mass. 1997). Bank Defendants have complied with the spirit of the rule by providing pincites to paragraphs or short exhibits where page numbers would be less useful for the Court's purposes.

Fourth, none of the paragraphs cited by Plaintiff contain immaterial, irrelevant, or misleading information which is subject to a motion to strike. The paragraphs include information about the status of the mortgage and Property ownership (¶ 3); MCS' contract with Chase (¶ 10); information about Plaintiff's lease and the condition of the Property (¶¶ 25, 29), and the actions of MCS' field agents at the Property (¶¶ 37, 46); excerpts from police reports related to the Property and the dispute (¶¶ 55-60); and Plaintiff's bankruptcy filings concerning the value of the personal property which he now alleges Defendants or their agents damaged or stole. (¶¶ 74-82). Furthermore, ¶¶ 5, 6, 7, 9, 10, 12, 13, 14, 15, 18, 23, 28, 30, 33, 34, 35, 41, 43, 44, 45, 56, 72, 73, 84, and 86 are supported by affidavit evidence authenticated by personal knowledge, and thus do not lack foundation or support.

Fifth, while hearsay cannot be considered at summary judgment, ¶¶ 15, 16, 19, and 46 do not contain hearsay. *See Davila v. Corporacion de Puerto Rico Para La Difusion Publica*, 2007 WL 2253531 (1st Cir. Aug. 7, 2007). ¶¶ 15, 16, and 19 cite provisions of the contract between Chase and CMS, which is provided in full in

the record and is authenticated by the Benavidez Affidavit. (*See* Docket No. 146). ¶ 46 cites an MCS Property Inspection Report which is a business record authenticated by the Benavidez Affidavit, and is not an out-of-court statement. The Benavidez Affidavit satisfies Fed. R. Civ. P.'s 56(c)(4)'s requirement that affidavits or declarations supporting a summary judgment motion "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated."

¶ 62 cites to a statement in a police report the author attributed to an MCS field agent who reported to the Property while Plaintiff was there, causing Plaintiff to call the police. While police reports may be admissible in civil cases under Fed. R. of Evid. 803(8)'s public records exception, "hearsay statements by third persons . . . are not admissible under the [public records] exception merely because they appear within public records." *U.S. v. Mackey*, 117 F.3d 24, 28 (1st Cir. 2017).

Therefore, Heal's motion to strike ¶ 62 is ***granted*** as it contains double hearsay. The rest of the motion is ***denied***.

### 2. Plaintiff's Second Motion to Strike (Docket No. 163)

Plaintiff also seeks to strike MCS' Statement of Material Facts (Docket No. 145) on similar grounds. Plaintiff objects that certain paragraphs should be

struck for: 1) failure to identify witnesses to be called at trial; 2) failure to comply with L.R. 56.1; 3) failure to sufficiently "identify" the Benavidez Affidavit or list Mr. Benavidez as a witness; 4) immateriality or lack of support or foundation; and 5) hearsay.

Again, Plaintiff has not provided any legal precedent that a defendant's failure to disclose potential trial witnesses with its initial disclosures warrants striking its entire statement of material facts.

Second, MCS has complied with L.R. 56.1 in that it has provided pincites in lieu of page numbers when citing to parts of the record where page numbers would not help the Court easily locate the source material.

Third, information provided by the Benavidez Affidavit can be considered at summary judgment even if Benavidez has not been identified as a trial witness. There is no requirement within the Federal Rules of Civil Procedure that an affiant providing affidavit testimony for summary judgment be listed as a trial witness, so long as the affiant provides testimony based on personal knowledge, sets out facts that would be admissible in evidence, and would be competent to testify at trial. *See* R. 56(c)(4).

Fourth, I find that ¶¶ 6, 19, and 40 do lack foundation, although the citations to the underlying record could have been more precise. ¶¶ 3, 10, 25, 29, 32, 48, 55-6, and 74-82 are not irrelevant or immaterial, as they cite to information about the Property mortgage (¶ 3); MCS' business (¶¶ 10, 55); the condition of the Property as observed by police officers on certain dates

relevant to the dispute (¶¶ 25, 29, 32); Plaintiff's own estimate of damages (¶ 48); Plaintiff's valuation of his personal property from his bankruptcy proceedings (¶ 56), and Plaintiff's deposition testimony (¶¶ 57, 58). Plaintiff also contends that ¶¶ 59, 60, and ¶¶ 74-82 are immaterial or irrelevant, but MCS' Statements of Facts ends with ¶ 58, so I am not sure where those objections are aimed. (Docket No. 145 at 8).

Fifth, Plaintiff is correct that ¶ 28, which contains a statement in a police report that a neighbor called the Police Department to report a person at the Property, constitutes double hearsay (hearsay within a public record). It will therefore be struck. Otherwise, the motion is ***denied***.

### 3. Plaintiff's Third Motion to Strike the Benavidez Affidavit (Docket No. 164)

Plaintiff also seeks to strike the Affidavit of Gary Benavidez, the Assistant Vice President of MCS, on the grounds that Benavidez was never identified as a trial witness for MCS or Bank Defendants, that he lacks personal knowledge about the information contained in his Affidavit, and that he reproduced certain MCS inspection reports of the Property in black and white, when MCS provided the same reports to Plaintiff in color.

First, as explained above, there is no requirement in Fed. R. Civ. P. 56 that a party must designate every summary judgment affiant as a trial witness which

would compel me to strike Mr. Benavidez' Affidavit. Moreover, R. 26(a)(3)(B) does not require parties to disclose trial witnesses until 30 days before trial, and we have not reached that point in time. Furthermore, the purpose of mandatory witness disclosure under the Federal Rules is "to avoid trial by ambush;" and there was no unfair surprise here because Benavidez was designated as MCS' R. 30(b)(6) witness, and Plaintiff was able to depose Benavidez on December 10, 2020. Macaulay v. Anas, 321 F.3d 45, 50 (1st Cir. 1992); *see* Benavidez Dep., Docket No. 157-15.

Second, the Benavidez Affidavit satisfies R. 56(c)(4)'s requirement that affidavits or declarations supporting a summary judgment motion "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." It is reasonable that a senior executive at a corporation would have personal knowledge of that company's operations and electronic recordkeeping, which are the types of documents submitted with the Benavidez Affidavit.

Third, I find that submitting the MCS property inspection reports in the Benavidez Affidavit in black and white rather than color was harmless. I have compared the color photographs included in Plaintiff's submission with the black and white photographs in MCS' submission and find that colored ink does not provide any relevant information that aids either party to meet their burden supporting or opposing summary judgment.

Plaintiff's third motion to strike is ***denied***.

**4. Bank Defendants' Motion to Strike Plaintiff's Affidavit (Docket No. 166)**

Bank Defendants seek to strike all or substantially all of Plaintiff's Affidavit (Docket No. 160) opposing their motion for summary judgment on the grounds that it impermissibly seeks to: 1) change Plaintiff's deposition testimony after the fact and after Defendants moved for summary judgment; 2) introduce evidence not based on Plaintiff's personal knowledge, or which constitutes legal conclusion or speculation; and 3) relitigate prior Court rulings on the scope of discovery.

First, the motion is granted as to the errata sheet which purports to change Plaintiff's deposition testimony. Under R. 30(e), a party may make form or substantive changes to their deposition testimony within 30 days of the receipt of the deposition transcript, so long as they provide a signed statement listing their changes and the reasons for them.

Plaintiff was deposed on January 29, 2021, and submitted his errata sheet on February 26, 2021, eleven days after the deadline for dispositive motions on February 15, 2021. (*Compare* Heal Aff. and Errata Sheet at Docket No. 157-7 at 4 *with* Docket Nos., 143, 148). Because the errata sheet was submitted after the Defendants' summary judgment motions, it will be analyzed under the framework of the sham affidavit rule, which prohibits parties who have given a clear answer

to an unambiguous question at deposition from creating a disputed issue of fact to avoid summary judgment by offering an affidavit with contradicts their earlier testimony without providing a satisfactory explanation of why the testimony has changed. *Torres v. El Dupont De Nemours & Co.*, 219 F.3d 13, 20 (1st Cir. 2000); *Maga v. Hennessy Industries, Inc.*, 2014 WL 10051399 at *8 (D. Mass. Dec. 1, 2014).

At deposition, Plaintiff gave contradictory testimony when asked about his entitlement to equitable relief on Count 1 (forcible entry), first stating "I don't believe that I would have a right for equitable, you know, relief. You know, I'm not sure" and later possibly implying the opposite: "I don't believe I would *not* have the right to ask for an injunction, or you know, possession. And certainly not, you know, quit forever. That's a little extreme." (Heal Dep. 165:14-16, 166:15-19, Docket No. 151-14) (*emphasis added*). Equitable relief is the only type of relief the Complaint demands on Count 1, so Plaintiff's waiver of that relief at deposition would be significant.

Now that Plaintiff has read Bank Defendants' summary judgment motion which relies on his deposition testimony to dispose of Count 1, he seeks to amend his testimony to make a forceful assertion about his right to equitable relief which directly contradicts his deposition answers: "After consideration, my rights to possession of the Property at 8 Linden St., Winchendon, Massachusetts is superior to Chase, which is a trespasser. I have the right to obtain an injunction against Chase. An injunction against Wells Fargo

would not change my right to possession as opposed to its [right to possession]." (Errata Sheet, Docket No. 157-7 at 4.). Not only would allowing such contradictory testimony thwart the sham affidavit rule, Plaintiff also did not comply with R. 30(e) by providing a reason for the amended statement on the errata sheet.

Second, I agree that Plaintiff's 19-page, single-spaced Affidavit contains dozens of paragraphs which provide legal conclusions or arguments rather than testimony based on personal knowledge, as is required for affidavits supporting summary judgment motions. Many of Plaintiff's "facts" are legal arguments about what provisions in the mortgage mean or what Massachusetts law guarantees—they belong in a legal brief, not a summary judgment affidavit. (*See, e.g.* ¶ 26: "The provisions of the I-4 Rider applying to lease and renting of the Property is subject to the implied covenant to quiet enjoyment of the Property during its possession;" ¶ 60: "Gary Benavidez has submitted an affidavit, speaking from his personal knowledge and not as the keeper of the records. This affidavit would not be admissible at trial and the Court should disregard it;" ¶ 95: "I am not restricted to seeking injunctive relief against the Defendants. M.G.L. C. 184 § 18 allows for money damages as well as equitable relief."). Many others are obviously not based on Plaintiff's personal knowledge or are speculative. (*See, e.g.* ¶ 21: "There is no evidence that Wells Fargo ever appeared in court in order to allow it to enforce the provisions of the mortgage."). Many of Plaintiff's assertions of fact about

Defendants do not contain citations to the record for support, and are unfounded.

Third, Plaintiff has improperly used the Affidavit to rehash discovery disputes that the Court has already considered at length, including his inability to locate and depose MCS' field agents within the extended and ample time provided for discovery. (*See* ¶¶ 67-74, 78-83).

Applying R. 56(c)(4)'s rule that affidavits are based on personal knowledge, set forth facts admissible in evidence, and must show the affiant is competent to testify on the matter in the affidavit "requires a scalpel, not a butcher knife." *Perez v. Volvo Car Corp.*, 247 F.3d 303, 315 (1st Cir. 2001). However, so much of Plaintiff's Affidavit violates the Federal Rules that it would be an inefficient use of the Court's time to parse through the Affidavit line by line to rescue those few paragraphs which comply with R. 56(c)(4). Bank Defendants' Motion to Strike the Heal Affidavit at Docket No. 160 is therefore ***granted***.

### 5. MCS' Motion to Strike Plaintiff's Declaration (Docket No. 170)

MCS seeks to strike significant portions of Plaintiff's Affidavit opposing its motion for summary judgment (Docket No. 156), as well as the Affidavits of Salustia Ortiz, Joseph La Casse, and Joseph Presti attached to Plaintiff's Declaration, a separate document opposing MCS's motion for summary judgment. (Docket Nos. 157, 157-16, 157-17, and 157-18).

Plaintiff's Affidavit contains improper legal arguments or statements of law rather than statements of fact based on his personal knowledge. ¶¶ 11, 14, 15, 22, 25, 33, 34, 35, 36, 44, 45, 46, 47, 50, 52, 63, 64, 65, 68, 76, 78, 79 are struck for failure to comply with R. 56 (c)(4).

MCS' motion to strike the Ortiz and Presti Affidavits are granted. I have already capped the measure of damages for Plaintiff's antique gold coin at the inflation-adjusted value he attributed to the coin in his prior bankruptcy proceedings, so the Presti Affidavit's appraisal of the coin's market value is immaterial and will be disregarded. (Order on Motion for Summary Judgment at 5-5, Docket No. 46; Order Denying Motion for Reconsideration, Docket No. 48).

The Ortiz Affidavit, prepared by Plaintiff's current employer, contains mostly irrelevant information about Plaintiff's health and real estate work; Ortiz does state that Plaintiff told her in 2013 that "he was suffering break-ins at his home" and "was very upset" but she claims no personal knowledge about whether Defendants were involved or who was responsible. (Docket No. 157-16 at ¶¶ 5, 11-12). Indeed, the key issue here is not *if* MCS field agents entered the Property (the record is replete with dated reports and pictures documenting the occasions when agents entered the Property, and what they did), but *whether they were legally authorized to do so*, and what, if anything, they removed from the Property—nothing in the Ortiz Affidavit helps resolve either issue.

Unlike the Ortiz and Presti Affidavits, the LaCasse Affidavit does contain information about the conditions at the Property based on the affiant's personal knowledge, gleaned during two visits there. However, the affiant does not provide a date certain for either visit, so the information cannot inform the Court's summary judgment analysis. (Docket No. 157-17 at ¶¶ 5-7). Of special concern, the Affidavit appears to be in draft form, with edits from Plaintiff second-guessing LaCasse's account of when he visited. (¶ 5). MCS' motion to strike is ***granted in part and denied in part***, in accordance with the reasoning above.

### B. Bank Defendants' Motion for Summary Judgment

1. Forcible Entry (Count I)

Count One alleges that Defendants' actions violated M.G.L. c. 184, § 18, which bars self-help evictions. § 18 provides that:

> "**§ 18. Entry into land; legal proceedings required to recover possession of land or tenements; jurisdiction.**
>
> No person shall make an entry into land or tenements except in cases where his entry is allowed by law, and in such cases he shall not enter by force, but in a peaceable manner.
>
> No person shall attempt to recover possession of land or tenements in any manner other than through an action brought pursuant to chapter two hundred and thirty-nine or such

> other proceedings authorized by law. The superior and district courts shall have jurisdiction in equity to enforce the provisions of this section."

As a threshold matter, Plaintiff's request for equitable relief on Count 1 is moot. Plaintiff "prays of the Defendant an order requiring then [sic] quit up the property and [sic] forever," which the Court interprets as a request for a permanent injunction banning MCS and Bank Defendants from the Property. (Compl. ¶ 38). However, the Property was foreclosed and sold to Wells Fargo Bank at public auction three years ago, and the validity of that foreclosure has not been challenged. (Docket No. 151-). The Court has no right to permanently exclude Wells Fargo from its own property, nor has Plaintiff, as the former owner's tenant, established his legal right to exclude others from the Property post-foreclosure. It is also unclear whether a federal Court could issue injunctive relief, as the Commonwealth's statute only conveys jurisdiction to enforce § 18 to Massachusetts superior and district courts.

Both Bank Defendants and MCS urge the Court to grant the motion because Plaintiff testified at deposition that he did not believe that he was entitled to injunctive relief, and that the permanent relief sought (barring Defendants from entering the Property forever) would be "a little extreme." (Heal Dep. 166:5-19, Docket No. 147-2). Had Plaintiff made this argument at the summary judgment hearing in his capacity as an advocate, the Court would certainly hold it against him. However, the question called for a legal

conclusion, and Plaintiff was testifying as a fact witness concerning his own *pro se* claims. For that reason, I decline to indulge the Bank Defendants by throwing out Count I on that basis.

The crux of Plaintiff's forcible entry argument is that Bank Defendants or their agents' actions[4] exceeded the scope of their authority under the mortgage to take reasonable or appropriate steps to protect the Bank Defendants' interest in the Property and in fact constituted a self-help eviction.

I find that Plaintiff has not created a genuine dispute of material fact that the property preservation actions "since late 2010" were unreasonable under the terms of the mortgage. (Heal Aff. ¶ 3, Docket No. 156). Paoluccio consented to interior inspections if he abandoned the Property or became delinquent on his loan payments. It is true that Bank Defendants have not provided sufficient evidence that the inspections did not begin until Paoluccio's mortgage loan became delinquent. The only evidence to that effect is MCS' testimony that property preservation activities are automatically triggered when a mortgage loan becomes delinquent, but that general policy does not speak to

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[4] Bank Defendants dedicate as much of their brief to their argument that they are not vicariously liable for MCS or its field agents' actions at the Property as they do to arguing that they are entitled to summary judgment even if the Court found them vicariously liable. Because I find that Bank Defendants are entitled to summary judgment based on the merits and Plaintiff's lack of evidence, I will not address whether, as Bank Defendants claim, they are not liable for MCS or its field agents' actions because MCS is their independent contractor.

the status of Paoluccio's mortgage during the period alleged in the complaint. (*See* Nguyen Dep. 27:11-15, Docket No. 160-8). However, MCS had the right to secure the building because it intermittently appeared to be abandoned or improperly maintained. As the log of the inspections at the Property shows, from July 2011 to January 2018 the Property vacillated between occupied and vacant and was poorly maintained.

Additionally, there was no lack of required notice. Contrary to Plaintiff's claim that the mortgage requires prior notice before any interior inspections, Bank Defendants are only required to give notice "at the time of or prior to" an inspection. (*Compare* Compl. ¶ 23 ("While the mortgage gives the lender to make reasonable inspections, if the mortgagee will seek to inspect the interior of the building, a notice is required beforehand") *with* Mortgage, ¶ 7 ("Lender shall give Borrower notice at the time of or prior to such an interior inspection specifying such reasonable cause.")). Photographs from MCS field agents' reports establish that vacancy notices were posted at the Property on numerous occasions alerting any occupants that "this property has been determined to be vacant and abandoned" and advising them to "call MCS immediately" if the property was not occupied or abandoned or "the property may have its locks replaced and/or plumbing systems winterized in the next few days" to prevent "waste and/or deterioration." (*See*, *e.g.* July 11, 2012 Rep., Docket No, 157-10 at 6; October 10, 2013 Rep, Docket No. 146-9 at 5; June 11, 2012 Rep., Docket No. 146-6 at 6; Nov. 10, 2013 Rep., Docket No. 146-11 at 6;

Feb. 7, 2014 Rep., Docket No. 157-4 at 5; Nov. 28, 2016 Rep., Docket No. 146-15 at 6). Bank Defendants also sent letters directly to Paoluccio. (*See* Docket No. 150, ¶ 45). Where MCS field agents found the Property was occupied they took no action. (*See* Jan. 9, 2014 Rep., Docket No. 157-2; Aug. 26, 2016 Rep., Docket No. 157-2 at 7; Sep. 15, 2017 Rep., Docket No. 157-2 at 13; Mar. 14, 2017). Plaintiff acknowledged that he saw the notices and, at some undefined date, left one voicemail message for MCS. Plaintiff produced no evidence confirming that call or any other evidence that Bank Defendants or MCS should have known the Property was not abandoned on the occasions when they entered the interior of the Property to change the locks, shut off utilities, or perform winterization.

Between July 2012 and January 2018, MCS changed the locks, added a coded lockbox to the front or side door, or entered the apartment to winterize the plumbing at least 14 times, but Paoluccio only contacted MCS once to ask that the lockbox be removed. Meanwhile, field agents continued to visit the house and report new damage, including a broken window and missing copper pipes. (Docket No. 157-6 at 6 (copper pipes), 18 (broken window)). The photographs taken from outside the porch looking into the kitchen window show that the interior of the house was routinely in disarray, and the yard was erratically maintained. In fact, the Property appeared to be vacant for months at a time. MCS' reports are corroborated by Office Ross and Sgt. Anair's personal observations of the Property. Given these dynamics, it was reasonable as a

matter of law for MCS to conduct regular inspections, carry out winterization orders once a year, and secure the Property as needed to prevent further damage.

This holding is consistent with established First Circuit precedent on trespass actions against property preservation companies operating under identical mortgage provisions as paragraph ¶ 7 and ¶ 9 in Paoluccio's mortgage. In *Galvin*, the First Circuit affirmed that exterior and interior inspections, winterization, and change locks are reasonable property preservation actions as a matter of law where the mortgaged property was a substantial asset, it was unoccupied for much of the year, the owners had been in default for between 2-5 years, and there was no evidence in the record that such a degree of diligence did not conform to industry norms or was unreasonable. *Galvin v. U.S. Bank, N.A.*, 852 F.3d 146, 162-65 (1st Cir. 2017). Like Plaintiff, the homeowners in *Galvin* sued their mortgage lender for trespass. Between December 2011 and November 2014, property preservation agents visited the Galvins' property 26 times, and entered the home twice to change the locks and perform winterization. *Id.* at 164. Paoluccio's Property was also a valuable asset: the promissory note tied to the mortgage was valued at $142,000 in 2006. (Docket No. 1-6 at 1). While the MCS field agents entered the interior of the Property 14 times to perform winterization or change the locks, compared to just twice in *Galvin*, there the property owners had warned the mortgagor against trespass and had given notice that they were properly maintaining the property. *Galvin v. U.S. Bank National*

*Ass'n I*, 2015 WL 5822627 (D. Mass. Oct. 1, 2015). Where the Bank Defendants here had no such assurances and MCS agents appeared to believe that Plaintiff was a squatter with no right to occupy the Property, it was reasonable for them to conduct more frequent inspections, winterize the building, and secure it.

Bank Defendants' motion for summary judgment as to Count I is ***granted***.

### 2. Trespass to Chattels (Count III)

Count III states a claim against MCS and Bank Defendants for transporting Plaintiff's personal possessions from the Property, including unenumerated items which were kept "in locked areas," and seeks replevin and punitive damages. (Compl. ¶ 51). As with Count I (forcible entry), Plaintiff did not provide the dates for the alleged trespass in the Complaint. Nor did he provide a list of the items taken. In discovery, Plaintiff disclosed that Bank Defendants and Defendants had dispossessed him of or damaged: an antique gold coin, wedding band, string trimmer, welding kit, fireproof box, cigarette lighter, nail puller, mattress, bedding, a Lisa computer, a telescope, office furniture, and two Imagewriter computers. (Pltfs' Second Amended Answers to Bank Defendants' Interrogatories ¶¶ 5-7, Docket No. 151-17; Pltf's Revised 21(a)(6) Disclosures at 8-9, Docket No. 151-16). Bank Defendants make no claim that removing any of those items would be reasonable under their power pursuant to the mortgage to

take reasonable steps to protects its interest in the abandoned Property.

Under Massachusetts law, "[o]ne who commits a trespass to chattels is subject to liability to the possessor of the chattel if, but only if, (a) he dispossesses the other of the chattel, or (b) the chattel is impaired as to its condition, quality, or value, or (c) the possessor is deprived of the use of the chattel for a substantial time, or (d) bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest." *Smith v. Wright*, 2013 Mass. App. Div. 24 (Dist. Ct. 2013) (citing RESTATEMENT 2D OF TORTS § 218).

After two years of discovery, Plaintiff has produced no evidence that Bank Defendants, MCS, or one of MCS' field agents dispossessed him of any of the personal property he claims was taken. An MCS Report produced in discovery indicates that on June 26, 2014, one day before Plaintiff filed a larceny complaint for loss of the gold coin with the Winchendon Police, a field agent completed a secure order at the Property. (Docket No. 157-6). The field agent posted a vacancy notice, changed the locks, and secured the front door with a lock box, but did not report removing any personal property the interior. (*Id.*). Plaintiff has no evidence to dispute this account no dates, no identity of a responsible party—that would allow a reasonable jury to find Bank Defendants liable.

Even if Plaintiff had discovered evidence to create a genuine dispute over whether the items in his

inventory were interfered with or taken away, he has not explained why Bank Defendants should be liable for the act of an MCS field agent. Trespass to chattels is an intentional tort. Assuming *arguendo* that Bank Defendants could be held liable under Plaintiff's vicarious liability theory for the field agents' actions, "[a]n employer may only be held vicariously liable for an intentional tort of an agent if the tortious act or acts were committed within the scope of employment." *Worcester Ins. Co. v. Fells Acres Day School, Inc.*, 408 Mass. 393, 404-05 (1st Cir. 1990). Removing Plaintiff's personal possessions from the Property would fall outside the scope of the agent's employment, as the MCS Work Order explicitly bars agents from removing personal property without submitting a bid and getting prior approval.[5] (Docket No. 157-6 at 5). The June 23, 2014 Work Order does not contain an approved bid to remove personal property, so if the agent did indeed remove or damage any of the items which Plaintiff disclosed, that would fall outside the scope of her employment and Bank Defendants would not be liable. Nor is there any evidence that Plaintiff's personal property was removed on any other date in the record.

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[5] Specifically, the June 23, 2014 MCS Work Order states: "Line Item: REMOVE PERSONAL PROPERTY PER CU YD INT. Instructions: *Bid all work EXCEPT lock change/grass cut/ winterization if personals present. Complete lock change/grass cut/winterization if ordered and if in season. Do not remove personal property or complete debris removal, hazard removal, etc. Submit bids for work needed.*" (Docket No. 157-5 at 29).

Bank Defendants' motion for summary judgment as to Count III is ***granted***.

### 3. Conversion (Count IV)

Plaintiff's conversion claim is identical to his trespass to chattels claim, though some of the items listed above which were damaged but not removed from the Property would not be subject to a conversion claim. (Compl. ¶¶ 55-59). Again Plaintiff provided no details of which items were stolen until discovery. (*Id.*).

Under Massachusetts law, to recover for conversion a plaintiff must prove that a defendant "intentionally or wrongfully exercise[d] acts ownership, control or dominion over personal property to which he ha[d] no right of possession at the time . . . " *Abington Nat'l. Bank v. Ashwood Homes, Inc.*, 19 Mass.App.Ct. 503, 507 (1985). Like trespass to chattels (Count III), conversion is an intentional tort. Not only has Plaintiff failed to produce any evidence that his personal property was stolen by an MCS field agent, even if it were, the MCS Work Order for the date of the alleged theft proves that such conduct would fall outside the scope of that agent's employment and thus Bank Defendants could not be held liable. *Worcester* at 404-05.

Bank Defendants' motion for summary judgment as to Count IV is ***granted***.

### C. MCS' Motion for Summary Judgment

Bank Defendants and MCS moved separately for summary judgment, but their arguments are symmetrical. Just as Bank Defendants argued that they could not be liable for any actions imputed to MCS because MCS is an independent contractor, so MCS argues it cannot be liable for the actions of its field agents because they are independent contractors. Specifically, MCS alleges that each of its field agents executes a standard MCS Field Services Agreement stipulating that they are independent contractors, who must, among other requirements, provide their own tools and equipment. (MCS Statement of Material Facts ¶ 17, Docket No. 145; Docket Nos. 146-2, 146-3, 146-4). Because MCS' motions for summary judgment can also be resolved on the substantive merits of forcible entry, trespass to chattels, and conversion causes of action alleged, dissecting the contractual relationships between MCS and its field agents would be superfluous.

#### 1. Forcible Entry (Count I)

Count I against MCS for forcible entry concerns the same conduct as Count I against Bank Defendants. As analyzed above, *see supra* Part IV.B.1, the field agents' entries into the Property's interior to winterize the plumbing, conduct inspections, change locks, shut off the utilities, and nail windows shut were reasonable and appropriate acts authorized by the mortgage to prevent a reduction in value, given that the Property appeared to be abandoned at the time and neither

Plaintiff nor Paoluccio substantively responded to the multiple posted vacancy notices.

The Court also finds MCS' argument that frequent inspections are reasonable and appropriate because an unkempt exterior can lead to municipal code violations to be persuasive.

2. Trespass to Chattels (Count III)

For the same reasons as previously stated with respect to Count III against the Bank Defendants, MCS's motion for summary judgment as to Count III is ***granted***. Plaintiff has no evidence of trespass to chattels to create a genuine dispute for trial, and even if he had, any such conduct by an MCS field agent would be outside the scope of their employment, meaning that MCS could not be held liable.

3. Conversion (Count IV)

For the same reasons as previously stated with respect to Count IV against the Bank Defendants, MCS's motion for summary judgment as to Count IV is ***granted***. Plaintiff has no evidence of the alleged conversion to create a genuine dispute for trial, and even if he had, any such conduct by an MCS field agent would be outside the scope of their employment, meaning that MCS could not be held liable.

## Conclusion

For the reasons stated above, Plaintiff's Motion to Strike Bank Defendants' Statement of Material Facts (Docket No. 162) is ***granted in part and denied in part***; Plaintiff's Motion to Strike MCS' Statement of Material Facts (Docket No. 163) is granted in part and denied in part; Plaintiff's Motion to Strike the Benavidez Affidavit (Docket No. 164) is ***denied***; Bank Defendants' Motion to Strike Plaintiff's Affidavit (Docket No. 166) is ***granted***; and MCS' Motion to Strike Plaintiff's Affidavit (Docket No. 170) is ***granted in part and denied in part*** (Docket No. 170). Bank Defendants and MCS' motions for summary judgment (Docket Nos. 143, 148) are ***granted*** on all counts in accordance with this memorandum of decision.

**SO ORDERED.**

***/s/ Timothy S. Hillman***
**TIMOTHY S. HILLMAN**
**DISTRICT JUDGE**

**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

| | |
|---|---|
| MARK PAOLUCCIO and LAIRD J. HEAL, Plaintiffs, v. WELLS FARGO, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERVICES 2006-PR2 TRUST, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, MORTGAGE CONTRACTING SERVICE LLC, D/B/A MORTGAGE CONTRACTING SERVICE, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3 and JOHN DOE 4, Defendants. | CIVIL ACTION NO. 17-11918-TSH |

**MEMORANDUM AND ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT (Docket No. 29)**

**January 11, 2019**

**HILLMAN, D.J.**

Mark Paoluccio ("Mr. Paoluccio") and Laird J. Heal ("Plaintiff") brought this action asserting claims of forceable entry (Count I), breach of contract (Count II),

trespass to chattel (Count III), conversion (Count IV), and breach of fiduciary duty (Count V). Defendants subsequently filed a motion for summary judgement. (Docket No. 29). For the reasons stated below, Defendants' motion is ***granted***.

## Background

On June 19, 2017, Mr. Paoluccio and Plaintiff filed a Complaint in Worcester Superior Court alleging Defendants breached the mortgage granted to Mr. Paoluccio ("the Mortgage") and that Defendants converted some of Plaintiff's personal possessions.

Plaintiff, who has been a tenant at the property since 2010, claims that before foreclosure, Defendants wrongfully entered the property and stole his possessions. Plaintiff claims that his possessions are worth $305,000. Most significantly, Plaintiff alleges Defendants took a rare gold coin worth $300,000.

On February 5, 2018, Wells Fargo foreclosed on the Mortgage and, on March 5, 2018, Mr. Paoluccio voluntarily dismissed his claims against Defendants.

## Legal Standard

Rule 56 of the Federal Rules of Civil Procedure provides that the court shall grant summary judgment if the moving party shows, based on the materials in the record, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A factual dispute

precludes summary judgment if it is both "genuine" and "material." See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505 (1986). An issue is "genuine" when the evidence is such that a reasonable factfinder could resolve the point in favor of the non-moving party. *Morris v. Gov't Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir. 1994). A fact is "material" when it might affect the outcome of the suit under the applicable law. *Id.*

The moving party is responsible for "identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548 (1986). It can meet its burden either by "offering evidence to disprove an element of the plaintiff's case or by demonstrating an 'absence of evidence to support the nonmoving party's case.'" *Rakes v. United States*, 352 F. Supp. 2D 47, 52 (D. Mass. 2005), aff'd, 442 F.3d 7 (1st Cir. 2006) (quoting *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548). Once the moving party shows the absence of any disputed material fact, the burden shifts to the non-moving party to place at least one material fact into dispute. *Mendes v. Medtronic, Inc.*, 18 F.3d 13, 15 (1st Cir. 1994) (citing *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548). When ruling on a motion for summary judgment, "the court must view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Scanlon v. Dep't of Army*, 277 F.3d 598, 600 (1st Cir. 2002) (citation omitted).

## Discussion

*1. Count II*

Plaintiff alleges that Defendants breached the Mortgage by failing to provide notice of their intent to inspect the Property. Defendants argue that the claim must be dismissed because Plaintiff was not a party to the Mortgage and consequently lacks privity to assert a breach of contract claim.

According to Massachusetts law, a breach of contract claim requires the plaintiff either be in privity of contract or establish that he was an intended third-party beneficiary. See *Monahan v. Town of Metheun*, 408 Mass. 381, 391, 558 N.E.2d 951 (1990) (holding that the "contract claims must fail" since "[t]here is no allegation of any privity of contract . . . And there is no indication or argument presented which would allow the [plaintiffs] to recover under a third party beneficiary theory."); *Orell v. UMass Memorial Medical Center, Inc.*, 203 F. Supp. 2d 52, 68 (D. Mass. 2002) ("Because plaintiff has failed to allege privity of contract between her and the defendants or that she was a third-party beneficiary to the contract . . . her breach of contract claims . . . will be dismissed.").

In order to be a third-party beneficiary to a contract, a party must demonstrate that the "'language and circumstances of the contract' show that the parties to the contract 'clearly and definitely' intended the beneficiary to benefit from the promised performance." *Doherty v. Admiral's Flagship Condominium Trust*, 80 Mass. App. Ct. 104, 111 (2011) (quotation marks and

citation omitted). In *Cumis Ins. Soc. Inc. v. BJ's Wholesale Club, Inc.*, the Supreme Judicial Court affirmed the dismissal of a third-party beneficiary claim where the plaintiffs' complaint "assert[ed] merely the conclusion that they were third-party beneficiaries to the defendants' agreement without setting forth any factual allegations concerning the defendants' intentions." 455 Mass. 458, 467, 918 N.E.2d 36 (2009); see also *Boston Executive Helicopters, LLC v. Maguire*, 196 F. Supp. 3d 134, 142 (D. Mass. 2016) ("[The plaintiff] has not alleged that any language in the prime lease, other than a boilerplate contemplation of the possibility of future sublease agreements, bestowed third-party beneficiary status on [the plaintiff] (or any other past of future sublessee).").

Here, Plaintiff is not in privity of contract and has also not demonstrated that he is an intended third-party beneficiary. Plaintiff contends that "[i]f one looks at the Mortgage, one will see that the property is envisioned as rented out." (Docket No. 33, at 3). Like in *Cumis*, however, Plaintiff has failed to present sufficient factual allegations to find that he was an intended third- party beneficiary to the Mortgage. While the Mortgage may anticipate the property being rented, just like "the boilerplate contemplation of future sublease agreements" in *Maguire*, it is not enough to conclude from this generic language that Plaintiff was contemplated as a third-party beneficiary. *Maguire*, 196 F. Supp. 3d at 142.

*2. Counts I, III, & IV*

In Counts I, III, and IV, Plaintiff alleges that Defendants wrongfully entered the Property and "transported" and "dispossessed" him of his personal property. Plaintiff claims the property is worth $305,000. Most relevant here, Plaintiff alleges that the gold coin is worth $300,000. Defendants argue that, if they are found liable, Plaintiff's recovery should be capped at $2,150 based on Plaintiff's prior appraisals of the coin in a 2001 bankruptcy proceeding. In that proceeding, Plaintiff admits that he assigned a value of $500 to his "Coin, Books, CD, Tapes." (Docket No. 34, ¶ 20). Plaintiff does not dispute that the coin in that proceeding is the same coin at issue in this case. He argues, however, that he was mistaken as to the value of the coin at the time of the previous appraisal. *Id.*

I find that Plaintiff is bound by the value he assigned to the coin in his bankruptcy proceedings. See *Guay v. Burack*, 677 F.3d 10, 19 (1st Cir. 2012) ("[T]he integrity of the bankruptcy process is sufficiently important that we should not hesitate to apply judicial estoppel even where it creates a windfall for an undeserving defendant."); *Schomaker v. United States*, 334 Fed.Appx. 336, 340 (1st Cir. 2009) (holding that the plaintiff was "estopped from seeking to recover for the loss of that property in this case because, to the extent that he now claims over $34,000 in damages resulting form that loss, his position seems to be intentionally inconsistent with his sworn statements in the bankruptcy proceeding that the property was worth less than $1,000"). Thus, Plaintiff's recovery for the coin

will be capped at the inflation-adjusted $500 valuation from his 2001 bankruptcy proceeding.

*3. Count V*

In Count V, Plaintiff claims that Defendants breached their fiduciary duty and states, "Plaintiff Mark Paoluccio demands the Court judgement for the damages, for punitive damages and a permanent injunction against further interference with his rights as the owner of the Property." (Docket No. 1 ¶¶ 61-66).

To assert a claim for breach of fiduciary duty, Plaintiff must demonstrate "1) existence of a fiduciary duty arising from a relationship between the parties, 2) breach of that duty, 3) damages and 4) a causal relationship between the breach and the damages." *Questec, Inc. v. Krummenacker*, 367 F. Supp. 2d 89, 97 (D. Mass. 2005) (citing *Hanover Ins. Co. v. Sutton*, 46 Mass. App. Ct. 153, 164 (1999)). "A fiduciary duty exists 'when one reposes faith, confidence, and trust in another's judgment and advice.'" *Doe v. Harbor Sch., Inc.*, 446 Mass. 245, 251, 843 N.E.2d 1058 (2006) (quoting *Van Brode Group, Inc. v. Bowditch & Dewey*, 36 Mass. App. Ct. 508, 516 (1994)).

The Complaint does not plead that a fiduciary relationship existed between Plaintiff and Defendants. If Plaintiff were in privity of contract or an intended third-party beneficiary to the Mortgage, Defendants may have owed him a fiduciary duty. See, e.g., *LeBlanc v. Logan Hilton Joint Venture*, 463 Mass. 316, 328, 974 N.E.2d 34 (2012) ("Where a contractual relationship

creates a duty of care to third parties, the duty rests in tort, not contract."). As discussed above, however, this is not such a case. Accordingly, Defendants owed Plaintiff no fiduciary duty and Count V must also be dismissed.

## Conclusion

For the reasons stated above, Defendants' motion (Docket No. 29) is granted. Accordingly, Counts II and V are dismissed. In addition, Plaintiff's recovery for the lost coin in Counts I, III, and IV will be capped at the inflation-adjusted valuation from his 2001 bankruptcy proceeding.

**SO ORDERED.**

**/s/ Timothy S. Hillman**
**TIMOTHY S. HILLMAN**
**DISTRICT JUDGE**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 4/5/2022 at 12:14 PM EDT and filed on 4/5/2022

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |

**WARNING: CASE CLOSED on 09/01/2021**

| | |
|---|---|
| **Document Number:** | 211(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [188] Motion for Extension of Time and denying [194] Motion to Amend Complait. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 10/7/2021 at 10:00 AM EDT and filed on 10/7/2021

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |

**WARNING: CASE CLOSED on 09/01/2021**

| | |
|---|---|
| **Document Number:** | 184(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [181] Motion to Alter Judgment. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 2/3/2021 at 10:19 AM EST and filed on 2/3/2021

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 142(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [141] Motion for Reconsideration. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 2/1/2021 at 4:05 PM EST and filed on 2/1/2021

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 140(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [137] Motion for Extension of Time to Complete Discovery. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 7/24/2020 at 12:36 PM EDT and filed on 7/24/2020

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 119(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman:**
**ELECTRONIC ORDER entered denying [112]**
**Motion for Sanctions and denying as moot [117]**
**Motion for Leave to File. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 8/13/2019 at 10:28 AM EDT and filed on 8/13/2019

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 89(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman: ELECTRONIC ORDER entered granting [75] Motion for Partial Summary Judgment and denying [82] Motion to Amend. For the same reasons as set forth in the Memorandum and Order on Defendants' Motion for Summary Judgement (Docket #46), I grant the Defendant's motion. Accordingly, Defendant is granted summary judgment on Count II (breach of contract) and Count V (breach of fiduciary duty). Further, as to Counts I, III, and IV, Plaintiff's recovery is limited for the lost coin at the inflation-adjusted valuation from the 2001 bankruptcy proceeding. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 6/26/2019 at 4:35 PM EDT and filed on 6/26/2019

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 73(No document attached) |

**Docket Text:**
**Docket Text: District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [48] Motion for Reconsideration. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 6/26/2019 at 12:15 PM EDT and filed on 6/26/2019

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 72(No document attached) |

**Docket Text:**
**District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [54] Motion to Amend; denying [58] Motion to Compel; and denying [60] Motion to Amend. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 2/28/2019 at 3:08 PM EST and filed on 2/28/2019

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 53(No document attached) |

**Docket Text:**
**Docket Text: District Judge Timothy S. Hillman: ELECTRONIC ORDER entered denying [48] Motion for Reconsideration. (Castles, Martin)**

**United States District Court**
**District of Massachusetts**

**Notice of Electronic Filing**

The following transaction was entered on 1/11/2019 at 10:18 AM EST and filed on 1/11/2019

| | |
|---|---|
| **Case Name:** | Paoluccio et al v. Wells Fargo, N.A., et al |
| **Case Number:** | 4:17-cv-11918-TSH |
| **Filer:** | |
| **Document Number:** | 46 |

**Docket Text:**
**District Judge Timothy S. Hillman: MEMORANDUM AND ORDER entered granting [27] Motion for Summary Judgment. Counts II and V are dismissed. In addition, Plaintiff's recovery for the lost coin in Counts I, III, and IV will be capped at the inflation-adjusted valuation from his 2001 bankruptcy proceeding. (Castles, Martin)**

**United States Court of Appeals**
**For the First Circuit**

---

No. 21-1817

LAIRD J. HEAL,

Plaintiff - Appellant,

MARK PAOLUCCIO,

Plaintiff,

v.

WELLS FARGO, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust; JPMORGAN CHASE BANK, N.A.; MORTGAGE CONTRACTING SERVICES, LLC, d/b/a Mortgage Contracting Services,

Defendants - Appellees,

JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4,

Defendants.

---

Before

Barron*, Chief Judge,
Howard, Kayatta,
Gelpí and Montecalvo, Circuit Judges.

---

* Chief Judge Barron is recused and did not participate in the determination of this matter.

## ORDER OF COURT

Entered: March 21, 2023

Judgment entered in this case on January 17, 2023. The mandate has not yet issued. Appellant has filed a timely petition for rehearing en banc. Pursuant to First Circuit Internal Operating Procedure X(C), the petition for rehearing en banc has also been treated as a petition for rehearing before the original panel.

We have considered all cognizable arguments set out in Appellant's petition. The petition for panel rehearing is denied. As it appears that there may be no quorum of circuit judges in regular active service who are not recused who may vote on appellant's request for rehearing en banc, the request for rehearing en banc is also denied. See 28 U.S.C. § 46(d); 1st Cir. Loc. R. 35.0(a)(1). In any event, a majority of judges in regular active service do not favor en banc review.

By the Court:

Maria R. Hamilton, Clerk

cc:
Laird James Heal
Anne Dunne
Tonya M. Esposito
Maura Katherine McKelvey
Marissa I. Delinks
Hale Yazicioglu Lake
Samuel Craig Bodurtha
Kevin William Manganaro

Relevant Constitutional Sections

Constitution of the United States

Article I

Section 8

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of

the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Constitution of the United States

Article IV

Section 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Mark Paoluccio and Laird J. Heal,
Plaintiffs,
vs.
Wells Fargo, N.A., as Trustee for WaMu Mortgage Pass-Through Certificates Services 2006-PR2 Trust, JPMorgan Chase Bank, National Association, Mortgage Contracting Services, LLC, d/b/a Mortgage Contracting Service, John Doe 1, John Doe 2, John Doe 3, and John Doe 4,
Defendants.

BEFORE: The Honorable Timothy S. Hillman

Motion Hearing

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
December 21, 2018

Marianne Kusa-Ryll, RDR, CRR Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399 justicehill@aol.com
Mechanical Steno – Transcript by Computer

APPEARANCES:

Laird J. Heal
8 Linden Street
Winchendon, Massachusetts 01475-1415
Pro se

Parker Ibrahim & Berg, LLP
Jeffrey D. Adams, Esquire
2 Oliver Street, 4th Floor
Boston, Massachusetts 02109
On behalf of the Defendant, JPMorgan Chase Bank, National Association

Hinshaw & Culbertson, LLP
Hale Yazicioglu Lake, Esquire
53 State Street, 27th Floor
Boston, Massachusetts 02109
On behalf of the Defendant, Mortgage Contracting Services, LLC, d/b/a Mortgage Contracting Services

[2] PROCEEDINGS

(The following proceedings were held in open court before the Honorable Timothy S. Hillman, United States District Judge, United States District Court, District of Massachusetts, at the Donohue Federal Building & United States Courthouse, 595 Main Street, Worcester, Massachusetts, on December 21, 2018.)

* * *

[10] THE COURT: Well, I – I will grant that this case has no relationship to reality. I'm not sure on which side though.

MR. HEAL: Right.

THE COURT: All right. Anything else?

MR. HEAL: As – as far as the, you know, while -while we're here, you know, I keep mentioning, oh, I want to file – amend this complaint and – and I recently – the way I look at things, I download a whole bunch of cases, about 600 or almost 700 cases. The first one said when you don't have a [11] tracking order, you're ruled – ruled by Rule 15, at which point I said why did I look at all those cases. And so that – so apparently there's a fairly – I wouldn't say lenient, but one of those words that, you know, that I should amend this complaint, and he criticized that I had not put into the complaint that there was emotional distress, and so I would like, you know, leave from the Court to . . .

THE COURT: You need to file a motion. It's way late.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 4: 17-CV-11918-TSH

MARK PAOLUCCIO
and LAIRD J. HEAL

Plaintiffs,

v.

WELLS FARGO, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERVICES 2006-PR2 TRUST, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, MORTGAGE CONTRACTING SERVICES LLC, D/BA MORTGAGE CONTRACTING SERVICES, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3 AND JOHN DOE 4,

Defendants.

DECLARATION OF LAIRD J. HEAL IN OPPOSITION TO THE MOTION [#148] FOR SUMMARY JUDGMENT

(Filed Mar. 12, 2021)

* * *

4. Attached to this Declaration as Exhibit 3 are true and faithful copies of reports produced by Chase and Wells Fargo reporting that the Property was

occupied on: January 1, 2019 ; May 9, 2014; June 9, 2014; and July 10, 2014.

1. Note that the report from "Heal 00088" to "Heal 00093" contains more photographs not included in the report from "Heal000380" to "Heal000385", which was produced in a supplementary production. It also shows a latch affixed to the front door of the second floor and the field agent breaking through the bulkhead into the basement.

5. Attached to this Declaration as Exhibit 4 are true and faithful copies of reports produced by Chase and Wells Fargo reporting that the Property was not occupied on: February 7, 2014; March 10, 2014; and April 9, 2014.

6. Attached to this Declaration as Exhibit 5 are true and faithful copies of reports produced by Chase and Wells Fargo showing inspections of the Property's interior on: September 16, 2015; November 11, 2015; November 24, 2015; June 1, 2017; and August 29, 2017.

7. Attached to this Declaration as Exhibit 6 are true and faithful copies of reports produced by Chase and Wells Fargo described as "Initial Secure" on: April 20, 2014; June 26, 2014; July 2, 2014; July 23, 2014; and July 25, 2014.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 4: 17-CV-11918-TSH

MARK PAOLUCCIO
and LAIRD J. HEAL

Plaintiffs,

v.

WELLS FARGO, N.A., AS TRUSTEE FOR WAMU MORTGAGE PASS-THROUGH CERTIFICATES SERVICES 2006-PR2 TRUST, JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, MORTGAGE CONTRACTING SERVICES LLC, D/BA MORTGAGE CONTRACTING SERVICES, JOHN DOE 1, JOHN DOE 2, JOHN DOE 3 AND JOHN DOE 4,

Defendants.

AFFIDAVIT OF LAIRD HEAL IN OPPOSITION TO MOTION [#143] FOR SUMMARY JUDGMENT FILED BY MORTGAGE CONTRACTING SERVICES, LLC

Affidavit of Laird J. Heal

(Filed Mar. 12, 2021)

* * *

83. Attached to this Declaration as Exhibit 3 are true and faithful copies of reports produced by Chase and Wells Fargo reporting that the Property was occupied on: January 1, 2019 ; May 9, 2014; June 9, 2014; and July 10, 2014.

84. Attached to this Declaration as Exhibit 4 are true and faithful copies of reports produced by Chase and Wells Fargo reporting that the Property was not occupied on: February 7, 2014; March 10, 2014; and April 9, 2014.

85. Attached to this Declaration as Exhibit 5 are true and faithful copies of reports produced by Chase and Wells Fargo showing inspections of the Property's interior on: September 16, 2015; November 11, 2015; November 24, 2015; June 1, 2017; and August 29, 2017.

86. Attached to this Declaration as Exhibit 6 are true and faithful copies of reports produced by Chase and Wells Fargo described as "Initial Secure" on: April 20, 2014; June 26, 2014; July 2, 2014; July 23, 2014; and July 25, 2014.

* * *

Winchendon Police Department
[SEAL] 80 Central Street [SEAL]
Winchendon MA 01475

**David P. Walsh**
*Chief of Police*

**Office: 1-978-297-1212**
**Fax: 1-978-297-4945**

March 27, 2018

Now comes Lt. Kevin Wolski and states as follows:

I am the above named person;

I am the Keeper of the Records attached hereto/enclosed herewith;

I am producing the attached records in response to a public records request;

Re: 14-473-OF, 14-499-OF, 15-666-OF, 17-1049-OF; Laird Heal

The attached records were made in good faith, in the regular course of business, it is the regular course of business of the Town of Winchendon Police Department to make and maintain such records, and these records were not created in anticipation of litigation;

This affidavit is subscribed to and signed under the provisions of Massachusetts G.L. chapter 233, section 78/ or 79 et seq.

SIGNED UNDER PAINS AND PENALTIES OF PERJURY THIS 27th day of March 2018

Kevin Wolksi
Keeper of the Records - Signature

Lt. Kevin Wolksi
Keeper of the Records -Printed

---

[SEAL] **Winchendon Police Department Page: 1**
**Incident Report 03/20/2018**

**Incident #: 14-473-OF**
**Call #: 14-7274**

| | |
|---|---|
| Date/Time Reported: | 06/27/2014 0254 |
| Report Date/Time: | 06/27/2014 0343 |
| Status: | Incident Investigation Suspend |
| Reason Suspended: | No more leads |
| Reporting Officer: | Sergeant RAYMOND ANAIR |
| Approving Officer: | Lieutenant DAVID WALSH |
| Signature: | _____ |
| Signature: | _____ |

| # | OFFENSE(S) | ATTEMPTED | TYPE |
|---|---|---|---|
| | LOCATION TYPE: Zone: East<br>8 LINDEN ST Residence/Home/Apt./Condo<br>WINCHENDON MA 01475 | | |
| 1 | LARCENY OVER $250<br>266/30/A | N<br>266 | Felony<br>30 – THEFT/BLD |
| | OCCURRED: 06/27/2014 | | |

| # | VICTIM(S) | SEX | RACE | AGE | SSN | PHONE |
|---|---|---|---|---|---|---|
| 1 | HEAL, LAIRD<br>**********<br>********** | M | * | 59 | ***** | ******** |

DOB: **********
EMPLOYER: ********** ********
ETHNICITY: **********
RESIDENT STATUS: Non Resident
VICTIM CONNECTED TO OFFENSE NUMBER(S): 1

| # | OTHER PROPERTIES | PROPERTY # | STATUS |
|---|---|---|---|
| 1 | 1800'S $20 GOLD COIN | | Stolen |

QUANTITY: 1 VALUE: $251.00
SERIAL #: NOT AVAIL
DATE: 06/27/2014
OWNER: HEAL, LAIRD

**Winchendon Police Department Page: 1**
NARRATIVE FOR
SERGEANT M ANAIR

Ref: **14-473-OF**

| | | | |
|---|---|---|---|
| Entered: | 06/27/2014 @ 0400 | Entry ID: | RMA |
| Modified: | 07/04/2014 @ 1103 | Modified ID: | RMA |
| Approved: | 06/27/2014 @ 0414 | Approval ID: | RMA |

On 6/27/14, at about 0300, Liard Heal came to the station to report a larceny. He reported that he returned home to 8 Linden St. to find that his locks had been changed, and a notice by Mortgage Contracting Services (813-387-1100) had been posted on the door. Laird entered through a door whose lock had not been changed to find things had been gone through. He reported that a strong box had been forced open, and a

$20 gold 1800's coin had been stolen. I responded with him to his residence.

Prior to doing so, I had him give me his ID. A MA license issued in May had a Sterling address. I asked if he was supposed to be in the 8 Linden St. Address. He said that he was, and the matter of the ownership of the house was in litigation. He provided me with a number of the "landlord" Palluccio (781-353-2567) but there was no answer.

At the house, he showed me the open strong box on the floor of the upstairs apartment. The box did not appear to me to have been pried or forced. The residence, upstairs, did not appear to have been lived in. I asked if I could see the downstairs, and Laird said no.

I later tried calling Mortgage Contacting Services. They did have an account at that address, but could tell me no more. They offered to call back during regular business hours with more information. I gave them this report number, and asked that they talk to whoever was on duty to see who may have worked on the house, and if Laird is supposed to be living there.

As of 7/4/14, I have not heard back from Mortgage Contracting Services or Heal. The case is closed unless more information develops.

Winchendon Police Department
[SEAL] 80 Central Street [SEAL]
Winchendon MA 01475

**David P. Walsh**
*Chief of Police*

**Office: 1-978-297-1212**
**Fax: 1-978-297-4945**

March 27, 2018

Now comes Lt. Kevin Wolski and states as follows:

I am the above named person;

I am the Keeper of the Records attached hereto/enclosed herewith;

I am producing the attached records in response to a public records request;

Re: 14-473-OF, 14-499-OF, 15-666-OF, 17-1049-OF; Laird Heal

The attached records were made in good faith, in the regular course of business, it is the regular course of business of the Town of Winchendon Police Department to make and maintain such records, and these records were not created in anticipation of litigation;

This affidavit is subscribed to and signed under the provisions of Massachusetts G.L. chapter 233, section 78/ or 79 et seq.

SIGNED UNDER PAINS AND PENALTIES OF PERJURY THIS 27th day of March 2018

Kevin Wolksi
Keeper of the Records - Signature

Lt. Kevin Wolksi
Keeper of the Records -Printed

---

[SEAL] **Winchendon Police Department Page: 1**
**Incident Report 03/20/2018**

**Incident #: 14-499-OF**
**Call #: 14-7604**

| | |
|---|---|
| Date/Time Reported: | 07/04/2014 1206 |
| Report Date/Time: | 07/04/2014 1324 |
| Status: | No Crime Involved |
| Reporting Officer: | Detective ALAN ROSS |
| Assisting Officer: | Sergeant RAYMOND ANAIR |
| Approving Officer: | Lieutenant DAVID WALSH |
| Signature: | _____ |
| Signature: | _____ |

| # | INVOLVED | SEX | RACE | AGE | SSN | PHONE |
|---|---|---|---|---|---|---|
| 1 | HEAL, LAIRD<br>78 WORCESTER RD<br>STERLING MA 01564 | M | W | 59 | ***** | ******** |

| | |
|---|---|
| Military Active Duty: | N |
| BODY: | NOT AVAIL. |
| DOB: | ******** |
| LICENSE NUMBER: | ********** |

| | |
|---|---|
| COMPLEXION: | NOT AVAIL. |
| PLACE OF BIRTH: | ********** |
| ETHNICITY: | NOT HISPANIC |

# EVENT(S)

| | |
|---|---|
| LOCATION TYPE: | Residence/Home/ |
| 10 LINDEN ST | Apt./Condo |
| WINCHENDON MA 01475 | Zone: East |

1 PROPERTY DISPUTE

# PERSON(S) PERSON TYPE SEX
RACE AGE SSN PHONE

**Winchendon Police Department Page: 1**
NARRATIVE FOR
PATROLMAN ALAN R ROSS

Ref: **14-499-OF**

| | | | |
|---|---|---|---|
| Entered: | 07/04/2014 @ 1326 | Entry ID: | ARR |
| Modified: | 07/04/2014 @ 1340 | Modified ID: | ARR |
| Approved: | 07/07/2014 @ 0645 | Approval ID: | RMA |

On Friday July 4, 2014 at about 1200 hours dispatch received a call from Mr. Dufault at 15 Linden Street. Mr. Dufault advised dispatch that the house across the street is supposedly vacant. He stated that Bank of America had a representative secure the residence the other day and they asked him to keep an eye on it and report to the police if anyone tries to gain access to it. Sgt. Anair had already attempted to look into this the other day but he was unable to speak with anyone in regards to the ownership of the building. Today Laird Heal had again come to this building and went inside.

We spoke with Mr. Heal and he insists that he has been living here for 4 years. However, the vehicle he operates comes back to his former address in Sterling. When Sterling Police were contacted they stated that they have had a few dealings with him but have not since 2008. Mr. Heal stated that he had been to the registry on a few occasions to change his address and they must of made a mistake or never got around to it. When asked to provide proof of residency here and he could come up with was that his property was here. When asked to provide us with some paperwork to prove his residency he could not. I could see inside the residence and saw that it was in shambles and it didn't appear that anyone would be living in there. In an attempt to ascertain Mr. Heal's residency I entered inside looking for any obvious proof that he resides here. I did happen to locate some medication of his inside the apartment on the first floor. There was junk and trash everywhere. There were mens clothes hanging where ever he was able to hang them. I didn't locate so much as any furniture that would be in a livable apartment like a usable kitchen table or a living room set along with a television. There was a bed in one room but it was just a throw down mattress on the floor. For all intense and purpose this apartment resembled a squatters lair. It would appear that Mr. Heal would have had plenty of time to furnish the apartment if he had been residing here for four years.

Mr. Heal was allowed to leave the residence without being arrested or charged but was told by Sgt. Anair that if he were to return he needs to have certain proof that he actually lives here. Since today is a holiday it would be near impossible to reach someone at the bank in order to find out if the building is in

foreclosure or if Mr. Heal is supposed to be here or not. Mr. Heal made several attempts to contact someone in order to confirm his residency but he was unable to reach anyone.

**Winchendon Police Department Page: 1**
NARRATIVE FOR
PATROLMAN ALAN R ROSS

Ref: **14-499-OF**

| | | | |
|---|---|---|---|
| Entered: | 07/04/2014 @ 0637 | Entry ID: | RMA |
| Modified: | 07/04/2014 @ 0644 | Modified ID: | RMA |
| Approved: | 07/07/2014 @ 0645 | Approval ID: | RMA |

On 7/4/14, at about 2215, Laird Heal came to the station, and provided Sgt. Gagne with documentation proving that he was renting the property at 8-10 Linden St. He provided a National Grid Bill dated March – April in his name with 8 Linden as the address shown. He provided a lease agreement dated 2010, and an affidavit signed by the property owner, Mark Paoluccio. It should be noted that there has been no contact in person or by phone by the alledged property owner, Mark Paoluccio, even though Liard supposedly called him and left messages with him in my presence. It also should be noted that there is no way of verifying the lease or the signed affidavit. And the National Grid bill was over $5000, and there was a notice to terminate service on the bill.

**Winchendon Police Department Page: 1**
NARRATIVE FOR
PATROLMAN ALAN R ROSS

Ref: **14-499-OF**

| | | | |
|---|---|---|---|
| Entered: | 07/04/2014 @ 1523 | Entry ID: | RMA |
| Modified: | 07/04/2014 @ 1526 | Modified ID: | RMA |
| Approved: | 07/07/2014 @ 1526 | Approval ID: | RMA |

On 7/9/14, I spoke with Mark Palluccio, who said that he was the property owner. He stated that Laird Heal was his tenant, and did have the right to be there. He claimed that the property was in dispute, and he had a case filed in Worcester against the mortgage company. Based on this information he case is closed.

## LIMITED POWER OF ATTORNEY

1. Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely in its capacity as Trustee (the "Trustee") of those certain trusts set forth on the attached **Exhibit A** (each, a "Trust," and collectively, the "Trusts") under the respective Pooling and Servicing Agreements and/or Indentures and any related governing transactional and servicing agreement(s) (collectively, the "Agreements") hereby constitutes and appoints:

**JPMORGAN CHASE BANK, NA.**

solely in its capacity as the Servicer under the Agreements, and a) as acquirer of certain assets and liabilities of Washington Mutual Bank from the Federal Deposit Insurance Corporation, as Receiver for Washington Mutual Bank, or b) and as successor by merger to Chase Home Finance LLC, as applicable, as its true and lawful attorney-in-fact, acting by and through its authorized officers, with full authority and power to execute and deliver on behalf of the Trustee any and all of the following instruments to the extent consistent with the terms and conditions of the Agreements:

**(i)** all documents with respect to residential mortgage loans serviced for the Trust(s) by the Servicer which are customarily and reasonably necessary and appropriate for the satisfaction, cancellation, or partial or full release of any mortgages, deeds of trust, or deeds to secure debt upon payment and discharge of all sums secured thereby;

**(ii)** all documents and instruments necessary to institute, prosecute, and conduct (a) any judicial or non-judicial foreclosure or termination, cancellation, or rescission of any such foreclosure, or (b) the taking of any deed in lieu of foreclosure, or (c) any similar procedure (collectively, as applicable, a "Foreclosure");

**(iii)** suits on promissory notes, indemnities, guaranties, or other residential mortgage loan documents serviced for the Trust(s), actions for equitable and/or extraordinary relief (including, without limitation, actions for temporary restraining orders, injunctions, and appointment of receivers), suits for waste, fraud, and any and all other tort, contractual, and/or other claims;

**(iv)** all documents and instruments necessary in the appearance and prosecution of (i) suits for possession and unlawful detainer, and (ii) eviction actions seeking, without limitation, possession of any real property acquired through Foreclosure and any and all related damages;

**(v)** all documents and instruments necessary in the appearance and prosecution of bankruptcy proceedings; instruments appointing one or more substitute trustees or special purpose entities ("SPEs") to act in place of the corresponding entity named in any deed of trust;

**(vi)** affidavits of debt, notice of default, declaration of default, notices of foreclosure, notices to vacate, property registration forms, hazard and title insurance claims, listing agreements, and all such notices,

contracts, agreements, deeds, and instruments as are appropriate to (a) secure, maintain and repair any real property acquired through Foreclosure, or (b) effect any sale, transfer, or disposition of real property acquired through Foreclosure;

**(vii)** all documents and instruments necessary to effect any assignment of mortgage or assignment of deed of trust; and

**(viii)** all other comparable instruments.

2. This Limited Power of Attorney shall apply only to the foregoing enumerated transactions and shall be limited to the above-mentioned exercise of power. This instrument is to be construed and interpreted only as a limited power of attorney. The enumeration of specific items, rights, acts, or powers herein is not intended to, nor does it give rise to, and it should not be construed as, a general power of attorney.

3. Third parties without actual notice may rely upon the power granted to said attorney-in-fact under this Limited Power of Attorney and may assume that, upon the exercise of such power, all conditions precedent to such exercise of power have been satisfied and this Limited Power of Attorney has not been revoked. This Limited Power of Attorney shall supersede and replace any other limited power of attorney executed by the Trustee in connection with the Agreements in favor of the Servicer and any such other limited power of attorney shall be deemed revoked by this writing.

4. This Limited Power of Attorney is effective as of the date below and shall remain in full force and effect until (a) revoked in writing by the Trustee, or (b) as to any specific Trust, the termination, resignation or removal of the Trustee as trustee of such Trust, or (c) as to any specific Trust, the termination, resignation or removal of the Servicer as a servicer of such Trust, or (d) as to any specific Trust, the termination of the Pooling and Servicing Agreement related to such Trust, whichever occurs earlier.

5. Nothing contained in this Limited Power of Attorney shall (i) limit in any manner any indemnification obligation provided by the Servicer to the Trustee or Trust under the Agreements or any document related thereto, or (ii) be construed to grant the Servicer the power to initiate or defend any suit, litigation, or proceeding in the name of the Trustee or Trust except as specifically provided for herein or under the Agreements.

| | |
|---|---|
| Dated:<br>January 21, 2015 | Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely as Trustee on behalf of the Trust(s) |
| Attest:<br>/s/ Cynthia C. Day<br>By: Cynthia C. Day<br>Its: Assistant Secretary | /s/ Julie Eichler<br>By: Julie Eichler<br>Its: Vice President |

Unofficial Witnesses:

/s/ David Fraser
David Fraser

/s/ Daniel Williamson
Daniel Williamson

STATE OF MARYLAND
COUNTY OF HOWARD ss:

On the 21st day of January 2015 before me, Kathleen A. Dean, a Notary in and for said State, personally appeared Julie Eichler, known to me to be Vice President of Wells Fargo Bank, National Association, and also known to me to be the person who executed this Limited Power of Attorney on behalf of Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely as Trustee, and acknowledged to me that Wells Fargo Bank, National Association, not in its individual or banking capacity, but solely as Trustee, executed this Limited Power of Attorney.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my office seal the day and year written above,

/s/ Kathleen A. Dean
Notary Public: Kathleen A. Dean
My commission expires 2-6-2017

[Notary Stamp]

**Exhibit A**

1. WaMu Mortgage Pass-Through Certificates Series 2004-PR1 Trust
2. WaMu Mortgage Pass-Through Certificates Series 2004-PR2 Trust
3. WaMu Mortgage Pass-Through Certificates Series 2005-PR1 Trust
4. WaMu Mortgage Pass-Through Certificates Series 2005-PR2 Trust
5. WaMu Mortgage Pass-Through Certificates Series 2005-PR4 Trust
6. WaMu Mortgage Pass-Through Certificates Series 2005-PR5 Trust
7. WaMu Mortgage Pass-Through Certificates Series 2006-PRI Trust
8. WaMu Mortgage Pass-Through Certificates Series 2006-PR2 Trust
9. WaMu Mortgage Pass-Through Certificates Series 2006-PR3 Trust
10. WaMu Mortgage Pass-Through Certificates Series 2006-PR4 Trust
11. WaMu Mortgage Pass-Through Certificates Series 2006-PR5 Trust
12. WaMu Mortgage Pass-Through Certificates Series 2006-PR6 Trust