App. No. 24A470

In the Supreme Court of the United States

MARGALY PHILIPPE, *et al.*, – *Pro Se* PETITIONER

v.

WELLS FARGO, N.A. AS TRUSTEE FOR OPTION ONE MORTGAGE LOAN, TRUST 2007-FXD1 – RESPONDENT

ON WRIT OF CERTIORARI FROM
MASSACHUSETTS SUPREME JUDICIAL COURT

PETITION FOR WRIT OF CERTIORARI

APPENDIX a

Margaly Philippe
55 YOLANDA DRIVE, BROCKTON, MA 02301, (508) 345-9186

January 2, 2025

Additional Parties under Rule 12.4

App. No. 24A467

ELIZABETH D'ANDREA – *Pro Se* PETITIONER

v.

JP MORGAN CHASE BANK, N.A. – RESPONDENT

Elizabeth D'Andrea
33 HIGHLAND STREET, WEBSTER, MA 01570, (978) 257-0809

App. No. 24A468

GRACE RUNGU – *Pro Se* PETITIONER

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE – RESPONDENT

Grace Rungu
44 KEENE STREET, MA 01852, (978) 804-3451

App. No.

THERESA CHERRY AND ROBERT DANSEREAU - *Pro Se* PETITIONERS

v.

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, ON BEHALF OF THE HOLDERS OF THE ASSET BACKED SECURITIES CORP HOME EQUITY LOAN TRUST, SERIES AMQ 2006-HE7 ASSET BACKED PASS-THROUGH CERTIFICATES, SERIES AMQ 2006-HE7

Theresa Cherry
21 BAXTER STREET WORCESTER, MA 01602, (508)757-3241

January 2, 2025

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-727

MARGALY PHILIPPE

vs.

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

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This appeal is the most recent chapter in an ongoing effort by the plaintiff, Margaly Philippe, to retain her former home after a Housing Court judgment entered awarding possession of the home to the defendant, a foreclosing bank. The Housing Court judgment was affirmed on appeal, see Wells Fargo Bank, N.A. v. Philippe, 98 Mass. App. Ct. 1117 (2020) (Philippe I). Further appellate review was denied. See Wells Fargo Bank, N.A. v. Philippe, 486 Mass. 1113 (2021). An execution on the judgment issued, and Philippe's requests for relief from that execution were denied in the Housing Court.

Philippe then filed a "petition" in the Superior Court seeking relief from the Housing Court judgment, in equity and

[1] For Option One Mortgage Loan Trust 2007-FXD1.

pursuant to Mass. R. Civ. P. 60 (b) (4), 365 Mass. 828 (1974). On October 25, 2021, a judge of the Superior Court denied Philippe's petition by entering an order on the docket, and on November 16, 2021, also by docket order, the judge allowed a motion by the bank to close the case. Later, in a written memorandum, the judge allowed the bank's motions to strike a return of service of the petition and permanently close the case. On April 21, 2022, a judgment of dismissal entered pursuant to Mass. R. Civ. P. 54, as amended, 382 Mass. 829 (1981), and Mass. R. Civ. P. 58, as amended, 371 Mass. 908 (1977). The judge cited two reasons: (1) failure of service of the petition, and (2) the Housing Court judgment could not be collaterally attacked in the Superior Court.

Within ten days, Philippe filed a motion for relief from the judgment citing Mass. R. Civ. P. 60 (b) (1) (rule 60 [b] motion), in which she argued that the judge made a mistake when he struck the return of service. The rule 60 (b) motion was denied on June 30, 2022, and Philippe appealed.[2]

[2] In addition to the April 21, 2022 judgment of dismissal and June 30, 2022 order denying the rule 60 (b) motion, Philippe's renewed and combined notice of appeal identified the orders dated October 25 and November 16, 2021, but those were not "judgments" within the meaning of our procedural rules and are not separately appealable. See Jones v. Boykan, 74 Mass. App. Ct. 213, 218 & n.9 (2009).

In the appeal, Philippe requested a stay of levy on the Housing Court execution pursuant to Mass. R. A. P. 6 (a), as appearing in 481 Mass. 1608 (2019). On September 22, 2022, Philippe's request was denied by a single justice of this court. Philippe again appealed, and her appeals were consolidated for our consideration.

We have carefully considered Philippe's submissions, the April 21, 2022 judgment of dismissal, the June 30, 2022 order denying the rule 60 (b) motion, and the September 22, 2022 single justice order denying the motion to stay. We affirm.

Discussion. Philippe filed her Superior Court petition on October 8, 2021. According to a return of service filed in February 2022, the bank's designated agent was served with a summons and copy of the petition on November 29, 2021. This was after the judge denied the petition (on October 25, 2021) and allowed the bank's motion to close the case (on November 16, 2021), but within the ninety-day window for serving a summons and complaint. See Mass. R. Civ. P. 4 (j), as appearing in 402 Mass. 1401 (1988). The bank maintained that the petition was not a "complaint" within the meaning of Mass. R. Civ. P. 4, as amended, 402 Mass. 1401 (1988) (rule 4), therefore, the return of service was a nullity and should be struck. The judge agreed that "this Court never accepted the Petition," and he struck the

return both for that reason and because the "summons is not accompanied by any complaint as required by [rule] 4."

The challenge for Philippe here, as the Superior Court judge explained, is that she "cannot prevail in her quest to collaterally attack the final judgment of the Housing Court." Because the Housing Court judgment cannot be undone by the Superior Court or by us for reasons we will explain, we need not decide whether the judge mistakenly focused on the title of Philippe's pleading rather than its substance as she contends. Nor must we determine whether her service sufficed under rule 4 even though a return was not filed until February 2022. See Mass. R. Civ. P. 4 (f), 365 Mass. 733 (1974) ("Failure to make proof of service does not affect the validity of the service").

"It is well established as a general matter that denial of a motion under rule 60 (b) will be set aside only on a clear showing of an abuse of discretion." Wang v. Niakaros, 67 Mass. App. Ct. 166, 169 (2006). Applying that standard, we conclude that the judge properly rejected Philippe's contentions that title challenges are outside the jurisdiction of the Housing Court in a summary process proceeding and that only the Superior Court has jurisdiction over equal protection claims under G. L. c. 93, §§ 102 (b), 103 (b).

Both title challenges in a summary process action -- including those based on predatory lending and discrimination --

and "housing problems" that give rise to an equal rights violation fall squarely within the jurisdiction of the Housing Court. G. L. c. 185C, § 3. See G. L. c. 151B, § 9; G. L. c. 183C, § 18 (a)-(b). See also Bank of Am., N.A. v. Rosa, 466 Mass. 613, 625-626 (2013) (Housing Court has jurisdiction in summary process proceeding to consider all equitable challenges to title, including those that previously had to be raised by independent Superior Court action). Philippe raised claims for both predatory lending and discrimination before the Housing Court judge. The Housing Court judge rejected the claims because Philippe "was unable to articulate how her mortgage loan fell within any of the four indices of predation" and she admitted she could not afford her modified loan. After reviewing the evidence and arguments afresh, a panel of this court concluded that the Housing Court judge was correct. Philippe I. Philippe then sought further review of those decisions and it was denied.

Philippe's new action in the Superior Court (the one currently before us) was between the same parties, arose out of the same foreclosure, and asserted the same claims as those raised in the Housing Court (along with new claims that could or should have been raised before). The Superior Court judge correctly decided that Philippe's new action was barred by claim preclusion. That doctrine "makes a valid, final judgment

conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action," "based on the idea that the party to be precluded has had the incentive and opportunity to litigate the matter fully in the first lawsuit" (citations omitted). Laramie v. Philip Morris USA Inc., 488 Mass. 399, 405 (2021).

In Philippe I, Philippe had every opportunity and incentive to pursue all claims that would have called into question the bank's title and therefore its right to possession, including claims for equal rights violations and those based on the ruling in Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830 (2019). She did not pursue those claims. Considerations of fairness and the requirements of efficient judicial administration dictate that she not be given a second bite at the apple. Laramie, 488 Mass. at 405.

For all these reasons, the single justice correctly discerned that Philippe "failed to demonstrate any likelihood of success on the merits that would result in the reversal of the Housing Court's judgment for possession." Denial of the requested stay was not an abuse of discretion. Cartledge v. Evans, 67 Mass. App. Ct. 577, 578 (2006). This is especially true where the appeal was from a judgment of the Superior Court, while the execution Philippe asked the single justice to stay was issued by the Housing Court. Litigants cannot avoid the

binding effect of a valid and final judgment rendered by a court of competent jurisdiction "by seeking an alternative remedy or by raising the claim from a different posture or in a different procedural form." Wright Mach. Corp. v. Seaman-Andwall Corp., 364 Mass. 683, 688 (1974).[3]

April 21, 2022 judgment of dismissal affirmed.

June 30, 2022 order denying rule 60 (b) motion affirmed.

September 22, 2022 single justice order affirmed.

By the Court (Meade, Hershfang & D'Angelo, JJ.[4]),

Paul Sutton

Assistant Clerk

Entered: January 3, 2024.

[3] Other contentions by Philippe have not been overlooked; we find nothing in them that requires discussion. Department of Revenue v. Ryan R., 62 Mass. App. Ct. 380, 389 (2004). Philippe's motion to schedule oral argument is denied.

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

Commonwealth of Massachusetts

Appeals Court for the Commonwealth

At Boston

In the case no. 22-P-481

JPMORGAN CHASE BANK, N.A.

vs.

SHANE D'ANDREA & others.

Pending in the Central Division of the Housing Court

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

Orders entered January 26, 2022, dismissing plaintiff's amended complaint with prejudice, and dismissing defendants' counterclaims without prejudice, affirmed.

Order denying defendant Elizabeth D'Andrea's motion for reconsideration affirmed.

By the Court,

Joseph F. Stanton, Clerk

Date November 28, 2023.

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

22-P-481

JPMORGAN CHASE BANK, N.A.

vs.

SHANE D'ANDREA & others.[1]

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

Defendant Elizabeth D'Andrea appeals from orders of a Housing Court judge dismissing both the summary process amended complaint of the plaintiff, JP Morgan Chase Bank, N.A. (the bank), and the defendants' counterclaims without prejudice. On appeal, Elizabeth claims, among other things, that the judge erred in dismissing the counterclaims.[2] Finding no error, we affirm.

In 2008, Dorothy Menzone, Elizabeth's mother, purchased a home at 33 Highland Street in Webster, Massachusetts (the property) by taking out a loan. In 2012, Menzone refinanced the loan, executing a note in favor of Intercontinental Capital

[1] Elizabeth D'Andrea, Jennifer Wilson, and Dennis Brown.

[2] Because defendants Shane D'Andrea and Elizabeth D'Andrea share the same last name, we will refer to them by their first names to avoid confusion.

Group, Inc. The loan was secured by a mortgage encumbering the property.[3] After her death on March 15, 2013, no further mortgage payments were made. On January 14, 2020, the bank purchased the property from itself at a foreclosure auction after purportedly sending the required foreclosure notices and publishing notice of the foreclosure sale.

The bank then commenced a summary process action on February 17, 2020, against Shane only, Menzone's great-grandson. On December 8, 2021, while the summary process action was pending, the bank sold the property to a third party. On December 10, 2021, two days after the sale of the property, the bank, with leave of court, served the other occupants of the property in this action with an amended summary process summons and complaint.[4] Elizabeth filed an answer to the amended complaint and counterclaims on December 31, 2021, and the other newly-added defendants filed their answer and counterclaims on January 3, 2022. On January 13, 2022, the bank moved to voluntarily dismiss the summary process action and to dismiss all counterclaims, as it no longer held title to the property. A judge held a hearing attended by Elizabeth and then dismissed the bank's claim for possession and all counterclaims without

[3] The mortgage was later acquired by the bank.
[4] The amended complaint added Elizabeth; Jennifer Wilson, Shane's mother; and Dennis Brown, another occupant of the property.

prejudice because it lacked subject matter jurisdiction. Elizabeth appeals from the orders.[5]

Discussion. "We review the allowance of a motion to dismiss de novo, accepting as true all factual allegations in the complaint and favorable inferences drawn therefrom." Lipsitt v. Plaud, 466 Mass. 240, 241 (2013), citing Curtis v. Herb Chambers I-95, Inc., 458 Mass. 674, 676 (2011).

In her appeal, Elizabeth offer several reasons why the Housing Court judge erred, each of which can only be addressed if the Housing Court had jurisdiction over the bank's claim and the defendants' counterclaims. See Commonwealth v. Doughty, 491 Mass. 788, 805 (2023) ("Subject matter jurisdiction concerns the power of the court to entertain a particular category of case"). Accordingly, we begin our analysis with the issue of whether the Housing Court judge erred in dismissing either the bank's claim for possession or the defendants' counterclaims.

1. Dismissal of summary process action. The Housing Court is a court of limited jurisdiction. LeBlanc v. Sherwin Williams Co., 406 Mass. 888, 896 (1990). General Laws c. 185C, § 3, gives the Housing Court jurisdiction over claims involving "the possession, condition, or use of any particular housing

[5] Elizabeth has waived her appeal of the order denying her motion for reconsideration. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019).

accommodations." Here, it is undisputed that at the time of the filing of the bank's motion to dismiss, the bank was not the owner of the property because it had transferred whatever interest it had in the property to a third party via a quitclaim deed. "Where, as here, the plaintiff is neither the owner nor the lessor of the property, the plaintiff has no standing to bring a summary process action." Rental Prop. Mgt. Servs. v. Hatcher, 479 Mass. 542, 546 (2018). "[L]egal standing is a jurisdictional matter; if parties do not have standing, a court has no jurisdiction to adjudicate their claims." Matter of Chapman, 482 Mass. 1012, 1015 (2019).

After the bank sold its entire interest in the property, its claim for possession became moot and the bank properly informed the court of its change in status by filing a motion for voluntary dismissal. The judge then acted correctly by scheduling the matter for a hearing and providing the defendants an opportunity to be heard. Because it is undisputed that the bank no longer even purported to own any interest in the property, it was not only proper, but also required for the Housing Court to dismiss the bank's summary process action.[6] There was no error.

[6] Elizabeth appears mistakenly to believe that the order of dismissal here include a judgment on the merits that the bank owned the property, a question on which we express no opinion. Moreover, the order dismissing the bank's claim for possession

2. Dismissal of counterclaims. We next address whether the court had jurisdiction over the counterclaims once the summary process action had been properly dismissed. In a summary process action following foreclosure, "[an] occupant facing eviction may assert that the power of sale was not strictly complied with and that the foreclosure is therefore void . . . [and] other affirmative defenses or counterclaims, such as those based on violations of G. L. c. 93A or G. L. c. 151B, and may seek possession, monetary damages, or other equitable relief." Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 339 (2016).

Elizabeth's answer and counterclaims challenged, among other things, the validity of the mortgage loan transaction and the foreclosure sale and alleged unfair business practices under G. L. c. 93A. There is no doubt that, in adjudicating a summary process action, the Housing Court has the authority to consider an affirmative defense or counterclaim challenging the validity of the foreclosure sale. Here, however, the Housing Court did not have jurisdiction over any of the defendants' counterclaims for the same reasons it did not have jurisdiction over the

was with prejudice. We also note that the judge had no duty at any time before issuing his order of dismissal to determine, sua sponte, whether the bank had standing to bring this action in the first place.

bank's summary process action. As noted above, the bank no longer claims to own any interest in the property and the bank's claim to superior right of possession was moot once its property interests were transferred. In fact, at the time Elizabeth filed her counterclaims, the transfer of the property was already complete. The Housing Court correctly noted that "untethered from a claim for possession, the Housing Court is without jurisdiction under G. L. c. 185C to adjudicate post-foreclosure title issues pertaining to the validity of a mortgage loan transaction or the validity of a foreclosure sale." Also as noted by the Housing Court judge, the defendants are not without a forum to challenge the validity of the foreclosure sale in a court of competent jurisdiction, and, should the purchaser of the bank's interest bring a summary process action, some of the bases of the counterclaims might perhaps be raised as defenses and counterclaims there, something about which, again, we express no opinion. We also express no opinion on the merits of the defendants' claims.

Conclusion. Because the Housing Court did not have jurisdiction to adjudicate either the summary process action or the defendants' counterclaims, we affirm the orders entered January 26, 2022, dismissing the plaintiff's amended complaint with prejudice and the defendants' counterclaims without

prejudice. The order denying defendant Elizabeth D'Andrea's motion for reconsideration is affirmed.

So ordered.

By the Court (Rubin, Neyman & Walsh, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: November 28, 2023.

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

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-931

DEUTSCHE BANK NATIONAL TRUST COMPANY, trustee,[1]

vs.

GRACE RUNGU.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This appeal relates to a postforeclosure eviction. The defendant, Grace Rungu (Rungu), is the former owner of a residential property of which the plaintiff, Deutsche Bank National Trust Company (Deutsche Bank), trustee, is now the record owner. After a series of cross motions for summary judgment, a judge of the Housing Court awarded possession and use and occupancy payments to Deutsche Bank. In Rungu's pro se appeal, she makes several claims including that the judge of the Housing Court erred in granting summary judgment in favor of Deutsche Bank. Finding no error, we affirm.

Background. In March of 2004, Rungu's husband, Norman Emond, as the surviving joint tenant, became the sole owner of a

[1] For Morgan Stanley Home Equity Loan Trust 2006-03, Mortgage Pass Through Certificates, Series 2006-3.

two-family home located at 44-46 Keene Street in the city of Lowell (the property). In June of 2004, Emond borrowed approximately $185,000 from Optima Mortgage Corporation that was secured by a mortgage granted to Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for Optima Mortgage Corp. Prior to his death in 2005, Norman Emond was in default on the mortgage loan. Rungu purchased the property at foreclosure, signing a mortgage in 2006 for approximately $210,800.[2] For about three years Rungu, for the most part, was able to pay the mortgage. Unfortunately, she then experienced financial difficulties and completely stopped paying the mortgage in 2009. That same year, Rungu's loan was assigned to Deutsche Bank. In 2017 Deutsche Bank sent notice to Rungu pursuant to G. L. c. 244, § 35A, to cure her default and information about her right to seek modification of the loan. Rungu did not cure the default and did not modify her monthly payments and in 2018 Deutsch Bank pursued foreclosure. At the foreclosure sale, Deutsch Bank was the highest bidder and purchased the property for approximately $300,000. Deutsche

[2] In her answers to interrogatories, Rungu denies that she bid on the property and claims that her attorney at the time committed fraud and signed her name. In the statement of facts contained in her brief, however, she states that she signed the mortgage and note.

Bank then commenced this action in the Housing Court for possession and use and occupancy payments.

Discussion. On appeal, Rungu presents eight arguments with several sub-arguments and then attempts to preserve another eighteen arguments for "future argument." We note at the outset that the defendant, while acting pro se, is still required to abide by the Massachusetts Rules of Appellate Procedure and is held to the same standard as litigants represented by counsel. See Maza v. Commonwealth, 423 Mass. 1006, 1006 (1996). While we have offered some leniency to Rungu in her filings, her brief does not come close to presenting an acceptable appellate argument -- it does not contain one citation to the record appendix, the record appendix is mostly unnumbered, and her brief does not comply with page limitations, to mention just a few. Her failure to substantially comply with the rules of appellate procedure leaves us in a position that we are unable to analyze most of her arguments. We are not required to consider appellate arguments that fall below a minimal quality of competent legal argument. See Zora v. State Ethics Comm'n, 415 Mass. 640, 642 n.3 (1993); Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019). As a result, we are lacking both a factual basis and legal argument with citations to the record and authorities to permit meaningful appellate review of most of the issues raised on appeal.

However, given her pro se status, we have reviewed the entire record and arguments in order to determine whether we can address any of the arguments raised on appeal. There are only two claims that Rungu has arguably presented sufficient legal authority and evidence to be addressed: first, whether the judge erred by failing to apply the correct standard for summary judgment and second, whether the judge erred in relying upon the affidavit of Melaney Atencio, the eviction manager at Deutsche Bank. We address each in turn.

1. Summary Judgement standard. We review a decision to grant summary judgment de novo. Ritter v. Massachusetts Cas. Ins. Co., 439 Mass. 214, 215 (2003). We look to see whether when "viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Augat, Inc. v. Liberty Mut. Ins. Co., 410 Mass. 117, 120 (1991).

Rungu claims that the judge erred by deciding disputed issues of material facts. This claim fails because at least in part, it relies upon an affidavit that was properly stricken from the record as it was filed with the court after the close of the hearing. Rungu makes no argument that striking the affidavit constituted an abuse of discretion. Therefore, the only "disputed" facts are Rungu's own self-contradictory statements and affidavits, which are insufficient to survive

summary judgment. The nonmoving party cannot defeat a motion for summary judgment by submitting self-contradicting affidavits because they are insufficient as a matter of law to create a genuine issue of material fact. See Locator Servs. Group Ltd. v. Treasurer & Receiver Gen., 443 Mass. 837, 864 (2005).

Finally, that some facts are in dispute will not defeat a motion for summary judgment. "The point is that the disputed facts must be material." Janzabar, Inc. v. David Crystal, Inc., 82 Mass. App. Ct. 648, 649 (2012), quoting Hudson v. Commissioner of Correction, 431 Mass. 1, 5 (2000). Rungu has not made that showing here.

2. Atencio affidavit. The defendant claims that summary judgment should not have entered in favor of the plaintiff because Melaney Atencio's affidavit (the eviction manager for the loan servicer for Deutsche Bank), failed to attest to personal knowledge of the facts contained in her affidavit and instead averred that certain facts were "upon information and belief." Rungu is correct that Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974), requires that an affidavit submitted in support of summary judgment must be based upon personal knowledge of facts that would be admissible in evidence. "A useful rough test for evaluating the evidentiary sufficiency of an affidavit is simply: If the affiant were in court, testifying word-for-word in accordance with the contents of the

affidavit, would the judge sustain an objection on any ground whatsoever? If the answer is 'Yes' or even 'Probably' the affidavit is at risk." J.W. Smith & H.B. Zobel, Rules Practice § 56.6, at 281 (Supp. 2022-2023).

First, we note that the proper procedure would have been for Rungu to have filed a motion to strike the affidavit. See Fowles v. Lingos, 30 Mass. App. Ct. 435, 439-440 (1991). Second, and the reason that Rungu's argument cannot succeed, is that when read in its entirety, the affidavit states that Atencio had personal knowledge of the information provided in the affidavit as she was the eviction manager for Deutsche Bank's servicer and was familiar with the documents that she attached to the affidavit. See First Nat'l Bank of Cape Cod v. North Adams Hoosac Sav. Bank, 7 Mass. App. Ct. 790, 793-794 (1979). There was no error by the judge as her affidavit was sufficient. For these reasons, we affirm the judgments.

Judgments affirmed.

By the Court (Milkey, Walsh & Smyth, JJ.[3]),

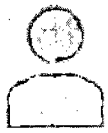
Joseph F. Stanton

Clerk

Entered: June 9, 2023.

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

FAR-29662 - Notice: FAR denied



SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us> Fri, Apr 19, 1:11 PM

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-29662

MARGALY PHILIPPE
vs.
WELLS FARGO BANK, N.A., trustee

Plymouth Superior (Brockton) No. 2022-J-0054; 2183CV00821
A.C. No. 2022-P-0727

NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on April 18, 2024, the application for further appellate review was denied.

Very truly yours,
The Clerk's Office

Dated: April 19, 2024

To: Margaly Philippe
Kevin Polansky, Esquire
Peter M. Ayers, Esquire

GRACE C ROSS
10 Oxford St. #2R
Worcester, MA 01609
774-239-3640

No. App. No. 24A470

AFFIDAVIT OF SERVICE

I, Grace C Ross, of lawful age, being duly sworn, upon my oath state that I did on the 2nd day of January, 2025, send out from Worcester, MA 01609 package(s) containing XXX copies of the PETITION FOR WRIT OF CERTIORARI in the above entitled case. All parties required to be served have been served by First Class Mail. Packages were plainly addressed to the following:

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Signed under pains and penalty of perjury,

Grace C Ross
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Worcester, MA 01609

Date: January 2, 2025

BANK NATIONAL ASSOCIATION v. THERESA CHERRY (2023)

Appeals Court of Massachusetts.

U.S. BANK NATIONAL ASSOCIATION, trustee,1 v. THERESA A. CHERRY.2

22-P-248

Decided: October 23, 2023

By the Court (Rubin, Neyman & Walsh, JJ.10)

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

This appeal stems from a judgment entered in favor of the plaintiff, U.S. Bank National Association, in a summary process action in the Housing Court. A single justice of this court denied defendant Theresa Cherry's subsequent motion to stay the eviction pending appeal. This appeal followed. We affirm.[3]

Background. As far as we can discern from the record,[4] the underlying summary process action commenced in December 2018. On May 3, 2019, a judge of the Housing Court entered a summary process judgment for possession in favor of the plaintiff. Cherry and one of her codefendants in the underlying action, Robert Dansereau, timely appealed and sought a waiver of the appeal bond. On May 31, 2019, a judge of the Housing Court issued an appeal bond order. A single justice of this court affirmed the order, and Cherry and Dansereau appealed. Cherry and Dansereau then failed to comply with the appeal bond order, and, on July 9, 2019, their appeal was dismissed. That same day, an execution for possession was issued in favor of the plaintiff. Cherry and Dansereau sought and were granted a stay by a judge of the Housing Court allowing them until August 31, 2019, to vacate the property. Cherry and Dansereau failed to vacate the property.

On September 10, 2019, Dansereau filed a Chapter 7 bankruptcy petition that triggered an automatic stay. The plaintiff was relieved from the automatic stay and, on January 29, 2020, issued a new execution for possession.

The plaintiff moved for issuance of an alias execution on December 21, 2021, and a hearing was scheduled for January 10, 2022. On January 10, 2022, Cherry filed a motion to postpone the hearing due to contracting COVID-19. A judge of the Housing Court

denied that motion, held the hearing on January 10, 2022, and allowed the plaintiff's motion to issue an alias execution.[5]

On February 10, 2022, Cherry filed a motion for stay pending appeal pursuant to Mass. R. A. P. 6 (a), as appearing in 481 Mass. 1608 (2019), with a single justice of this court.[6] On February 24, 2022, the single justice denied Cherry's motion in a written order, determining, inter alia, that "the Housing Court judge did not abuse her discretion or make an error of law in holding the hearing on [January 10, 2022] or in allowing the plaintiff's motion to issue the execution."[7] The single justice highlighted Cherry's failure to demonstrate a likelihood of success on the merits of her claim that the Housing Court judge abused her discretion in denying Cherry's motion to stay the eviction.[8] The single justice subsequently denied Cherry's motion for reconsideration. Cherry filed a notice of appeal of the single justice's order on March 11, 2022.

Discussion. The record before us does not include the motion to stay brought before the single justice. See note 6, supra. Nonetheless, we review the February 24, 2022, single justice order "for errors of law and, if none appear, for abuse of discretion." Troy Indus., Inc. v. Samson Mfg. Corp., 76 Mass. App. Ct. 575, 581 (2010). A judge's discretionary decision constitutes an abuse of discretion where we conclude the judge made "a clear error of judgment in weighing the factors relevant to the decision . such that the decision falls outside the range of reasonable alternatives" (quotation and citations omitted). L.L. v. Commonwealth, 470 Mass. 169, 185 n.27 (2014).

The defendant contends that the single justice erred in denying her February 10, 2022, motion to stay pending appeal. In order to succeed on a motion to stay pending appeal, an appellant must successfully demonstrate "(1) the likelihood of appellant's success on the merits; (2) the likelihood of irreparable harm to appellant if the court denies the stay; (3) the absence of substantial harm to other parties if the stay issues; and (4) the absence of harm to the public interest from granting the stay." C.E. v. J.E., 472 Mass. 1016, 1017 (2015), quoting J.W. Smith & H.B. Zobel, Rules Practice § 62.3, at 409 (2d ed. 2007).

We discern no abuse of discretion. In weighing the relevant factors, the single justice denied the motion because the defendant did not demonstrate a likelihood of success on the merits of the appeal. On the record before us we do not disagree. The defendant references no facts demonstrating that the single justice's ruling was outside the range of reasonable alternatives or an abuse of discretion. See Gifford v. Gifford, 451 Mass. 1012, 1013 (2008), quoting Mezoff v. Cudnohufsky, 5 Mass. App. Ct. 874, 874 (1977) ("'Rarely, if ever, can it be said that a single justice is in error in denying relief' under Mass. R. A. P. 6"). To the extent that the defendant asserts that the denial of her motion to stay violated her equal protection rights and denied her a reasonable accommodation, we disagree. The Housing Court judge did provide a reasonable accommodation to the defendant in allowing defendant Cherry to appear for the January 10, 2022, hearing via Zoom, which she did. The defendant's conclusory and often contradictory arguments do not demonstrate otherwise.

Finally, to the extent that the defendant argues that the Housing Court judge was required to continue the January 10, 2022, hearing because the defendant had COVID (and that because she was disabled because of COVID, she was entitled to a lengthy stay), the argument is likewise unavailing. The defendant failed to provide a copy of the January 10, 2022, hearing transcript. On the record before us we are unable to discern any violation within the meaning of Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 849 (2019), or G. L. c. 93, § 103 (a), much less that the single justice abused her discretion.[9]

Order of the single justice affirmed.

FOOTNOTES

3. We acknowledge the amicus brief submitted by the Disability Law Center.

4. Our review is hampered by the confusing and unclear record provided by the defendant on appeal.

5. It appears that the plaintiff's representatives appeared in person at the January 10, 2022, hearing while defendant Theresa Cherry appeared at the hearing via Zoom.

6. The Appeals Court single justice docket contains an entry dated February 10, 2022, indicating "Motion for stay under M. R. A. P. 6 (a) filed by Theresa Cherry." Again, as far as we can discern, this is the motion for stay that was before the single justice and that is now the subject of the present appeal. However, the defendant failed to include a copy of that motion in the record appendix or elsewhere in the appellate record.

7. The single justice also issued an order on February 11, 2022, allowing the defendant's motion to file a one-day late notice of appeal under Mass. R. A. P. 14 (b), as appearing in 481 Mass. 1626 (2019), from the Housing Court's January 10, 2022, orders.

8. The single justice, in her discretion, did "grant a stay on the levy on the execution to [March 7, 2022], after which time the plaintiff may levy on the execution obtained from the Housing Court." The single justice further ruled that "No further stays from this court should be anticipated."

9. To the extent we do not discuss other arguments made by the parties, they have not been overlooked. "We find nothing in them that requires discussion." Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).