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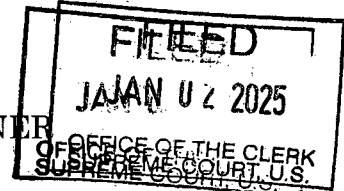
App. No. 24A470

ORIGINAL

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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

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ON WRIT OF CERTIORARI FROM  
MASSACHUSETTS SUPREME JUDICIAL COURT

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APPENDICES

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Margaly Philippe

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

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January 2, 2025

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App. No. 24A470

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**In the Supreme Court of the United States**

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

*v.*

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*ON WRIT OF CERTIORARI FROM  
MASSACHUSETTS SUPREME JUDICIAL COURT*

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**PETITION FOR WRIT OF CERTIORARI**

**APPENDIX b**

**Margaly Philippe**

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

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**January 2, 2025**

**Additional Parties under Rule 12.4**

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**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

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**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

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**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

PLYMOUTH, ss.

BROCKTON DIV. SUPERIOR COURT  
CIVIL NO. 2183CV00821WELLS FARGO, N.A., as Trustee for OPTION ONE  
MORTGAGE LOAN, TRUST 2007-FDXD1

vs.

MARGALY PHILLIPPE<sup>1</sup> & others<sup>2</sup>

**MEMORANDUM OF DECISION AND ORDER ON PHILLIPE'S  
MOTION FOR PRELIMINARY INJUNCTION (Paper # 18); WELLS  
FARGO TRUSTEE'S MOTION TO STRIKE DEFENDANT'S "RETURN  
OF SERVICE" AND PERMANENTLY CLOSE CASE (Paper #21); AND  
WELLS FARGO TRUSTEE'S MOTION FOR CLARIFICATION (Paper #23)**

This case involves an attempt by Margaly Phillippe ("Phillippe") to prevent her eviction from 55 Yolanda Drive in Brockton, Massachusetts ("the Property") despite an adverse summary process proceeding in the Housing Court. For the reasons discussed below, Phillippe's Motion For Preliminary Injunction is **DENIED**; Wells Fargo's Motion to Strike Defendant's "Return of Service" and Permanently Close Case is **ALLOWED**; and Wells Fargo's Motion For Clarification is **ALLOWED**.

**BACKGROUND**

Following a mortgage foreclosure, Wells Fargo purchased the Property on October 11, 2017. Wells Fargo then filed a summary process action in the MetroSouth Housing Court, Civil Action No. 18H82SP00241, seeking to evict Phillippe and her family from the Property. On

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<sup>1</sup>a/k/a Maggie Clerdonna

<sup>2</sup>Brianna Clerdonna and Kenzy Clerdonna

November 2, 2018, the Housing Court entered summary judgment and final judgment for possession in favor of Wells Fargo, finding that it had made a prima facie showing of legal title to the Property and right to possession. The Housing Court rejected Phillippe's arguments that the loan was predatory, Wells Fargo unfairly denied her a third loan modification, the assignment of the Property was invalid, Wells Fargo's purchase of the Property was defective, and Wells Fargo acted in bad faith. Thereafter, the Housing Court denied Phillippe's motion for reconsideration and her Rule 60 motion to vacate the judgment. Phillippe timely appealed these rulings.

On November 3, 2020, the Appeals Court affirmed the Housing Court judgment in favor of Wells Fargo. Phillippe's request for further appellate review was denied on January 14, 2021. See *Wells Fargo Bank, N.A. v. Phillippe*, 2020 WL 6437963 (Mass. App. Ct. Rule 23), rev. den., 489 Mass. 1113 (2021). Wells Fargo then sought an order for execution in the Housing Court, and Phillippe sought to stay execution based on an alleged lack of jurisdiction. The Housing Court denied Phillippe's motion, but thereafter, a scheduled eviction was stayed due to the Covid-19 pandemic moratorium.

On October 12, 2021, Phillippe attempted to file in this Court a document entitled "Petition to Court with Complete Jurisdiction to Permanently Enjoin Judgment Under Equity Upon Removal and For Dismissal Under Chapter 239 with Prejudice or Other Justice" ("the Petition") seeking to vacate the summary judgment in the Housing Court on the ground that she holds title to the Property and the Housing Court lacked jurisdiction to determine title in a summary process action. Phillippe also claims to have been the victim of predatory and discriminatory loan practices. In the Petition, Phillippe sought to have the Court declare the

Housing Court judgment void and vacate that judgment. Wells Fargo responded by filing a Motion to Strike Phillippe's Filings and Close the Case.

On October 25, 2021, this Court denied Phillippe's Petition with the following endorsement: "DENIED. The Respondent-Plaintiff's Motion for Summary Judgment was allowed in Housing Court. There is nothing to remove." Accordingly, the Court took no action on Wells Fargo's Motion to Strike.

On November 3, 2021, Phillippe filed a Motion to Supplement the Record. In response, Wells Fargo filed a Motion to Strike and Status Update. On November 9, 2021, this Court denied Phillippe's Motion to Supplement with the following endorsement: "DENIED. The Housing Court granted summary judgment there is no case to remove and hence no record to supplement." The same day, the Court denied Wells Fargo's Motion to Strike.

On November 16, 2021, the Court entered the following order on the docket: "Finding by the Court, it is ORDERED and ADJUDGED: The Case is hereby dismissed. The respondent-plaintiff's motion for summary judgment was Allowed in Housing Court. There is nothing to remove."

Thereafter, on November 19, 2021, Phillippe filed a series of motions in this Court for reconsideration, to re-open the case for transfer, to remove the case for lack of subject matter jurisdiction, to vacate the Housing Court judgment under Rule 60, and for an injunction. On December 7, 2021, the scheduled date of her eviction, Phillippe filed a Motion for a Stay under M.R.A.P. 6(a) at the Appeals Court. That day, a single justice of the Appeals Court (Ditkoff, J.) denied her motion, stating in relevant part:

The defendant purports to request a stay [of eviction] pending appeal, but the dockets in the Housing Court and the Superior Court reflect only a notice of appeal of the 2018 Housing Court judgment, which has already received full

review by this Court in No. 19-P-699 and has been affirmed. Accordingly, there is no appeal pending to allow relief under Mass. R.A.P. 6(a).

To the extent that the defendant is requesting other relief, it is denied. Although a party may unilaterally transfer a matter to the Housing Court, G.L. c. 185C, § 20, nothing permits a party unilaterally to transfer a matter from the Housing Court. Rather, a party that believes that the Housing Court lacks jurisdiction may move to dismiss the case, Mass. R. Civ. P. 12(b)(1), or to transfer it to a court with jurisdiction, see *Skawski v. Greenfield Investors Property Development, LLC*, 473 Mass. 580, 581 (2016).

In any event, the Housing Court plainly has jurisdiction over postforeclosure summary process cases. See G.L. c. 185C, § 3; *Bank of N.Y. v. Bailey*, 460 Mass. 327, 331 (2011). The defendant's argument that the plaintiff lacks standing to bring this summary process claim has already received full review by a panel of this court, and we determined that "Wells Fargo had standing to bring this summary process action." Neither the Housing Court nor the Superior Court may disregard a decision of this Court. . . .

Phillippe then filed for Chapter 7 bankruptcy on December 7, 2021, resulting in the cancellation of the scheduled foreclosure. Wells Fargo moved for relief from the automatic bankruptcy stay to evict Phillippe in accordance with the judgment and execution from the Housing Court. The Bankruptcy Court granted that relief on January 13, 2022. Because its execution had expired, Wells Fargo sought and received a new execution from the Housing Court on January 27, 2022, and scheduled the eviction for February 8.

On February 2, 2022, this Court denied most of Phillippe's new motions based on noncompliance with Superior Court Rule 9A but on February 8, the court entered a temporary restraining order enjoining the eviction of Phillippe and her family. Meanwhile, on February 7, Phillippe filed for an emergency stay of eviction in the Housing Court, which denied relief. She also sought a stay of levy on the execution in the Appeals Court under Mass. R. A. P. 6(a). On February 8, a single justice of the Appeals Court (Sullivan, J.) denied Phillippe's motion for a stay of execution.

This Court held a hearing on Phillippe's request for a preliminary injunction on February 15, 2022. In addition to opposing an injunction, Wells Fargo has filed a Motion to Strike Return of Service and Permanently Close Case and a Motion For Clarification.

### **DISCUSSION**

#### **Phillippe's Motion for Preliminary Injunction**

A party seeking a preliminary injunction must demonstrate a likelihood of success on the merits of her legal claims, that irreparable harm will result from the denial of an injunction, and that in light of her likelihood of success on the merits, the risk of irreparable harm to her outweighs the potential harm to the non-moving party in granting the injunction. *Doe v. Worcester Pub. Sch.*, 484 Mass. 598, 601 (2020). The granting of an injunction lies in the sound discretion of the court. *Foster v. Commissioner of Corr.*, 488 Mass. 643, 651 (2021).

Phillippe cannot demonstrate a likelihood of success on the merits of her claims for the simple reason that she has no pending legal claims in this Court. This Court denied her October 25, 2021 Petition for removal to Superior Court and dismissed this case on November 16, 2021. A single justice of the Appeals Court has confirmed that Phillippe's unilateral attempt to transfer or remove the Housing Court summary process case to this Court is not valid. Phillippe has never served or filed a proper complaint in this action, and therefore, there is no basis on which this Court can grant her a preliminary injunction. See *Johnson v. Superintendent, Mass. State Police*, 416 Mass. 616, 619 (1993). See also *Siqueira v. Greenwood*, 2017 WL 4159557 at \*2 (Mass. Land Ct.) (Long, J.) (where court lacks jurisdiction over case, it cannot issue injunctive relief).



Moreover, even if Phillippe had filed a valid complaint in this Court, the materials attached to her motion reveal no likelihood of success on the merits of her claims of a predatory loan, wrongful foreclosure, title to the Property, and wrongful eviction. Claim preclusion, or res judicata, makes a valid, final judgment conclusive on the parties, and bars further litigation of all matters that were or should have been adjudicated in that action, even if the claimant in a second action is prepared to present different legal theories or seeks different remedies. *Brookline v. Alston*, 487 Mass. 278, 297-298 (2021); *Heacock v. Heacock*, 402 Mass. 21, 23 (1988). All of Phillippe's purported claims to avoid eviction are barred by the res judicata effect of the Housing Court summary process action, which was affirmed by the Appeals Court. Phillippe cannot prevail in her quest to collaterally attack the final judgment of the Housing Court. See *Tompkins v. Tompkins*, 65 Mass. App. Ct. 487, 493 (2006) (once final judgment has entered, party's rights are limited to timely appeal or other direct challenge). See also *Pavlik v. Dmytryck*, 6 Mass. App. Ct. 915, 916 (1978) (party cannot collaterally attack judgment of one court by commencing action in different court).

Thus, Phillippe's request for a preliminary injunction must be denied. See *Foster v. Commissioner of Corr.*, 488 Mass. at 651 (likelihood of success on merits of complaint is touchstone of inquiry and "if the moving party cannot demonstrate that [s]he is likely to succeed in his quest, the remaining factors become matters of idle curiosity."). The temporary restraining order entered on February 9, 2022 is hereby dissolved.

Moreover, because this Court never accepted the Petition and Phillippe is entitled to no relief in this Court, this case is dismissed and the Clerk will enter final judgment under Mass. R. Civ. P. 54 and 58.

### **Wells Fargo's Request for Sanctions**

Wells Fargo requests sanctions against Phillippe in the amount of \$750 it incurred for the cancelled February 8, 2022 eviction as well as its attorney's fees and costs incurred in opposing Phillippe's motion for a preliminary injunction. Even where sanctions are not authorized by any statute or court rule, the court has inherent power to impose sanctions for the misconduct of a party which threatens the fair administration of justice. *Rental Prop. Mgmt. Serv. v. Hatcher*, 479 Mass. 542, 556 (2018); *Wong v. Luu*, 472 Mass. 208, 217-218 (2015). However, a court should exercise restraint and discretion in determining whether sanctions are warranted. *Rental Prop. Mgmt. Serv. v. Hatcher*, 479 Mass. at 556; *Wong v. Luu*, 472 Mass. at 218. See also *Avery v. Steele*, 414 Mass. 450, 457 (1993) (court has wide discretion to determine when party has acted in manner that warrants sanctions); *Balistreri v. Nestor*, 2019 WL 661512 at \*3 (Mass. App. Ct. Rule 1:28) (sanction of fees and costs against pro se litigant should be reserved for rare and egregious cases). This Court, in its discretion, declines to impose sanctions on Phillippe, with the assumption that she will not waste any more of the court's time pursuing a futile attempt to reverse the Housing Court judgment.

### **Wells Fargo's Motion For Clarification**

Wells Fargo seeks "clarification/confirmation from this Court that there is no order in this case, whether written or oral, that would prevent Wells Fargo Trustee from scheduling an eviction and levying on the Execution for Possession issued in the Eviction Case." Given this Court's October 25, 2021 denial of Phillippe's Petition for removal, the Court's November 16, 2021 dismissal of this case, and the Court's ruling today denying Phillippe's Motion for a

Preliminary Injunction and dismissing this case, no order of this Court prevents eviction in accordance with the final Housing Court judgment.

**Wells Fargo's Motion to Strike Return of Service and Permanently Close Case**

On February 15, 2022, the following was entered on the docket: "Service returned for Plaintiff Wells Fargo: Service through person in charge/agent." The file contains a summons served on Wells Fargo, apparently for Phillippe's Petition, but that summons is not accompanied by any complaint as required by Mass. R. Civ. P. 4. This Court will strike the summons (Docket No. 19) to the extent it purports to be valid proof of service of a complaint on Wells Fargo. As discussed above, Phillippe is entitled to no relief in this matter and this case is dismissed.<sup>3</sup>

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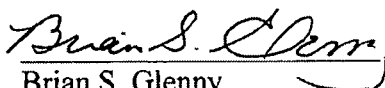
<sup>3</sup>Plaintiff's Motion to Strike Filings of Non-Party to Case (Paper #25) is **DENIED**.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that Phillippe's Emergency Motion For Preliminary Injunction and Stay Pending Scheduling (Paper #18) be **DENIED** and the temporary restraining order entered on February 9, 2022 is hereby **DISSOLVED**. Wells Fargo's request for sanctions is **DENIED**.

It is further **ORDERED** that Wells Fargo Trustee's Motion to Strike Defendant's "Return of Service" and Permanently Close Case (Paper #21) be **ALLOWED** and that Wells Fargo Trustee's Motion For Clarification (Paper #23) be **ALLOWED**.

It is hereby **ORDERED** that this action be **DISMISSED** and that final judgment enter under Mass. R. Civ. P. 54 and 58.

  
Brian S. Glenny  
Justice of the Superior Court

**DATED:** April 13, 2022

THE TRIAL COURT  
COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS

Housing Court Department  
Central Division  
No. 20H85SP000784

JPMORGAN CHASE BANK, NA,

Plaintiffs

v.

SHANE D'ANDREA, ELIZABETH D'ANDREA,  
JENNIFER WILSON and DENNIS BROWN,

Defendants

Orders

After hearing, the Court issues the following orders pertaining the plaintiff's motions to dismiss the plaintiff's claim for possession and the defendants' counterclaims:

1. The plaintiff's *Motion for Voluntary Dismissal* of its claim for possession is **ALLOWED** pursuant to M.R.Civ.P. 41(a)(2). The plaintiff, the post-foreclosure owner of the residential property at issue in this summary process action, sold the property to a purchaser for value on December 8, 2021. The Quit Claim deed was recorded at the Worcester South Registry of Deeds on December 30, 2021, at Book 66853, Page 22. Since the plaintiff no longer owns the property its claim for possession has been rendered moot.

2. The plaintiff's *Motion to Dismiss Defendants' Counterclaims* is **ALLOWED without prejudice**. The counterclaims pertaining to title (base upon challenges to the validity of the mortgage loan transaction and the foreclosure sale), including the foreclosure related G.L. c. 93A claims, are dismissed pursuant to M.R.Civ.P. 12(b)(1).

The Housing Court has subject matter jurisdiction to adjudicate the validity of a foreclosure sale in the context of an G.L. c. 239 eviction action where the former owner has challenged the validity of the foreclosure as defenses/counterclaims to the post-foreclosure claim of possession (whether a post-foreclosure owner has a superior right to possession to the right asserted by the former owner). *Bank of N.Y. v. Bailey*, 460 Mass. 327, 332-334 (2011); *Bank of Am., N.A. v. Rosa*, 466 Mass. 613, 621 (2013); *Federal Nat'l Mtge. Ass'n v. Rego*, 474 Mass. 329, 338 (2016). However, 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.

Since the plaintiff has sold the property, it no longer has standing under G.L. c. 239 to assert a claim to possession, and the issue of whether it had a superior right to possession in the context of an eviction action has been rendered moot.

The defendants' use and occupancy related G.L. c. 93A counterclaim is dismissed because the defendants (who were never tenants) may not assert tenancy related counterclaims in a summary process action pursuant to G.L. c. 239, § 8A.

Accordingly, the defendants' counterclaims shall be dismissed. The defendants may assert their claims pertaining to title to the property by bringing a civil action in a court of competent jurisdiction.

**SO ORDERED.**

/s/ Jeffrey M. Winik

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**Jeffrey M. Winik**  
**Associate Justice (Recall Appt.)**

January 26, 2022

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COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS:

HOUSING COURT DEPARTMENT  
NORTHEAST DIVISION  
SUMMARY PROCESS  
NO. 18H77SP005705

**DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE OF  
MORGAN STANLEY HOME EQUITY LOAN TRUST 2006-3 MORTGAGE  
PASS THROUGH CERTIFICATES SERIES 2006-3,**

Plaintiff

VS.

**GRACE RUNGU,**

Defendants

**Memorandum of Decision on (1) Plaintiff's Renewed Motion for Partial  
Summary Judgment and (2) Defendant's Cross-Motion for Summary Judgment**

Defendant Grace Rungu (hereinafter "Rungu") is the former owner of the residential property located at 44 Keene Street, in Lowell, Massachusetts (the "property"). The defendant occupies an apartment in property as her residence.

In November 2018 plaintiff Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3 (hereinafter "Deutsche Bank") commenced this summary process action against Rungu seeking to recover possession of the property. The complaint includes an account annexed seeking damages for the fair rental value of Rungu's use and occupancy of the property covering the period from September 11, 2018 (the date on which Deutsche Bank acquired title to the property after the August 22, 2018 foreclosure sale that extinguished Rungu's mortgaged legal interest in the property) to the present.

Rungu filed an amended answer to Deutsche Bank's complaint that included thirty-three (33) affirmative defenses that challenge Deutsche Bank's claim that it has a superior right to possession of the property. Rungu alleged generally that (1) the December 7, 2005 foreclosure sale through which Rungu acquired title to the property was not conducted in strict compliance with the statutory power of sale rendering the foreclosure void *ab initio*, rendering the January 9, 2016 foreclosure deed a nullity; (2) that the January 9, 2016

foreclosure deed was invalid because Rungu never bid (and never authorized anyone to bid on her behalf) at the December 7, 2005 foreclosure auction, and therefore MERS (and Deutsche Bank by assignment) never acquired an enforceable secured mortgage interest in the property, rendering the August 28, 2018 foreclosure sale void; (3) even if Rungu held some legal interest in the property as a result of the December 7, 2005 foreclosure, the August 2018 foreclosure sale did not convey to Deutsche Bank sole title to the property because the January 9, 2006 mortgage granted to MERS (and Deutsche Bank by assignment) did not accurately describe Rungu's legal interest in the property; and (4) the August 22, 2018 foreclosure sale was not conducted in strict compliance with the statutory power of sale rendering the foreclosure void *ab initio*.

This matter came before the court on the first set of cross-motions for summary judgment in 2019. In a memorandum and order dated April 19, 2019, the court (Del Puerto, J.) ruled that:

(1) Deutsche Bank's motion was denied with respect to Rungu's general defense that the 2005 foreclosure was void (which if proved would invalidate any subsequent secured mortgage interests in the property held by MERS and then Deutsche Bank by assignment that culminated in the 2018 foreclosure sale); Specifically the judge ruled that there existed disputed issues of material fact as to whether in 2005 (a) all necessary parties received notice of the 2005 foreclosure sale (Affirm. Def. 8); (b) whether a public auction took place at the scheduled date in 2005 (Affirm. Def. 8, 29);<sup>1</sup> and (c) whether MERS as mortgagee held a valid power of attorney (Affirm. Def. 33).<sup>2</sup> The judge did not consider

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<sup>1</sup> Affirm. Def. 8 states: "Plaintiff lacked standing to foreclose under the non-judicial power of sale in the subject mortgage under MGL c. 183, § 21 and MGL c. 244, § 14 or otherwise under the terms of the mortgage document because Plaintiff was not and is not a lawful, valid holder and/or owner of Defendant's mortgage loan or otherwise, Plaintiff or Plaintiff's predecessor(s) in interest conducted an unlawful foreclosure sale and therefore any such foreclosure was unlawful, invalid and void; Plaintiff does not have lawful, superior title to Defendant's property, Plaintiff lacks standing to pursue a summary process action and Plaintiff's claims must be dismissed pursuant to Mass.R.Civ.P. Rule 12(b)(1) and/or 12(b)(6).

Affirm. Def. 29 states: "Defendant did not acquire title by the purported foreclosure deed recorded at Bk. 19718 Pg. 213 because she was not a bidder at the auction and was not present at the auction as is alleged in the affidavit of sale recorded with the same. Therefore, since Defendant acquired no title by said foreclosure deed, she could not have mortgaged the property and as a result, any foreclosure proceeding on the basis of such mortgage is also void. Therefore, Plaintiff does not have superior title and has no standing.

<sup>2</sup> Affirm. def. 33 states: The attorney-in-fact acting as agent for MERS in the 2005 foreclosure had no valid power of attorney on record. As such, the entity carrying out the foreclosure on MERS behalf did not have the jurisdiction or authority to carry out the foreclosure. Therefore, the foreclosure is void



whether Rungu was barred from challenging the validity of the 2005 foreclosure because she did not assert her claim in compliance with the requirements of and within the limitations period set forth in G.L. c. 244, § 15 (commonly referred to as the "curative statute").

(2) Deutsche Bank's motion was allowed and Rungu's cross-motion was denied as being time barred with respect to the applicable statute of limitations with respect to Rungu's affirmative defenses of (a) fraud in the inducement (Affirm. Def. 2, 6, 20, 31); (b) impropriety in the loan modification process (Affirm. Def. 6); (c) breach of agreement to modify the mortgage (Affirm. Def. 2, 6); and (d) predatory lending (Affirm. Def. 20, 30).

The court, in the first summary judgment order, determined that the sole issues that remained for trial were "(a) whether [Deutsche Bank] has a superior right to possession arising from its (and/or its predecessor, MERS's) strict compliance with the terms of the mortgages and applicable law in the 2006 [sic] Foreclosure and the 2018 Foreclosure, *subject to Rungu's Affirmative Defenses 8, 29 and 33* and (b) any request for an award of damages pursuant to G.L. c. 186, § 3" (emphasis added).<sup>3</sup>

In July 2019 Deutsche Bank and Rungu filed a second set of cross motions for summary judgment addressed to the remaining issues identified by Judge Del Puerto in his April 9, 2019 order. Those motions were denied "at this juncture" by the court (Kerman, J.) in a summary order dated October 15, 2019. However in his order the judge stated that his denial "was without prejudice to renewal at or before the pretrial conference." The judge allowed Deutsche Bank to file a renewed summary judgment motion to address (1) the validity of the 2018 foreclosure *subject to Rungu's Affirmative Defenses 8, 29 and 33*, (2) whether to the curative statute of limitations set forth in G.L. c. 244, § 15 barred Rungu from challenging the validity of the 2005 foreclosure, and (3) whether Deutsche Bank is entitled to monetary damages for use and occupancy pursuant to G.L. c. 186, § 3.

In accordance with the October 15, 2019 order Deutsche Bank filed its renewed motion for partial summary judgment on November 7, 2019 together with a memorandum,

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and Defendant acquired no title from the same and therefore could not have given a valid mortgage to MERS as nominee for Plaintiff predecessor and therefore Plaintiff's foreclosure is void and therefore does not have superior title and does not have standing.

<sup>3</sup> The court inadvertently identified 2006 as the year of the first foreclosure sale. In fact it is undisputed that the first foreclosure auction sale was conducted on December 7, 2005 and the foreclosure deed was dated January 5, 2006.

supporting affidavits and exhibits. On February 20, 2020 Rungu filed her opposition to the plaintiff's renewed motion for partial summary judgment together with her renewed cross-motion for partial summary judgment.<sup>4</sup> The parties then filed supplemental memoranda and affidavits.

The parties presented oral argument to the court (Winik, J.) on the renewed motions for summary judgment in March 2020. Because of the lengthy stays required to comply with the eviction moratorium orders, the court heard further oral argument via a remote ZOOM session on December 30, 2020.

After reviewing the evidence set forth in the summary judgment record and considering the arguments of the respective parties, the court concludes as a matter of law based on the competent evidence and undisputed facts set forth in the summary judgment record that Deutsche Bank's renewed motion for partial summary judgment shall be **ALLOWED**, and Rungu's renewed motion for summary judgment shall be **DENIED**.

#### Undisputed Facts

The facts necessary to resolve the legal issues raised by the parties that I conclude are not in dispute are based on facts set forth in the summary judgment record (including the court's April 19, 2019 summary judgment order and the "agreed upon facts" set forth in Deutsche Bank's November 12, 2019 pre-trial memorandum) and facts derived from entries that appear in the court docket of this proceeding and other relevant proceedings.<sup>5</sup>

The property at issue includes land with a two-family dwelling located at 44-46 Keene Street, in Lowell, Massachusetts (the "property").

Norman J. Emond ("Emond") is Rungu's deceased husband. As is relevant to the issues in this case, in 1990 Alfred D'Arezzo ("Alfred") conveyed the property to himself

<sup>4</sup> In an order dated February 19, 2020 the court (Sullivan, J.) allowed Deutsche Bank's motion for interim use and occupancy. The court ordered Rungu to make monthly use and occupancy payments to Deutsche Bank commencing on March 1, 2020, and by the first day of each month thereafter pending disposition of this action. In an order dated March 2, 2020 the court (Winik, J.) denied without prejudice Rungu's motion for relief from the use and occupancy order. The court stated that Rungu could renew her motion with supporting financial documentation and affidavits.

<sup>5</sup> In Rungu's November 18, 2019 pre-trial memorandum she stipulates that "[s]tatement of agreed-upon facts is filed with Plaintiff's Pre-Trial Memorandum". The court takes judicial notice of the docket entries and filings in these housing court cases filed by Rungu in her capacity as owner/landlord of the 44 Keene Street property: 05H77SP001556; 06H77SP002265; 15H77SP004185; 16H77SP003312.

and Reynold J. D'Arezzo (a/k/a Reynold) as joint tenants.<sup>6</sup> Reynold is Emond's grandfather. Alfred died in 1997, leaving Reynold as the sole owner of the property. In 1998 Reynold conveyed the property to himself and Emond as joint tenants.

Rungu and Emond occupied the property as their marital home beginning in 2000 or thereabouts.

Reynold died in 2004, leaving Emond as the sole owner of the property. In June 2004 Emond borrowed \$185,250.00 from Optima Mortgage Corporation ("Optima"). The loan was secured by a mortgage dated June 18, 2004 granted to Mortgage Electronic Registration Systems, Inc. (MERS") acting as nominee for Optima.

Emond died intestate on March 14, 2005 leaving Rungu and his minor daughter (Nakitta Emond) as his sole survivors. Rungu was appointed as the administratrix of Emond's estate in August 2005. She was represented by attorney James M. Harrington. Attorney Harrington also represented Rungu in her personal capacity in matters related to her purchase of the property.<sup>7</sup>

Prior to his death in March 2005 Emond was in default on his mortgage loan payments due to Optima, and MERS had commenced the foreclosure process. At the time of Emond's death the principal remaining balance due on Emond's mortgage loan was \$185,158.00, plus interest and fees in the amount of \$23,742.00, for a total amount due Optima of \$208,900.00.<sup>8</sup> After Emond's death MERS proceeded with steps to foreclose against the Estate of Emond (with Rungu as the administratrix). The documents in the

<sup>6</sup> Rungu has alleged that under the rule in *Fulton v. Katsowney*, 342 Mass. 503 (1961) (interpreting G.L. 184, § 7 prior to the 1973 amendment), Alford and Reynold in fact held title as tenants in common (as opposed to joint tenants) based upon a recently conducted title examination that purportedly disclosed a title defect dating back to a 1937 deed). Rungu claims that Reynold held only a 50% tenancy at will interest in the property at his death, and it was only this interest that passed to Emond, and upon Emond's death passed to his estate. She contends that neither Emond in 2004 nor Rungu in 2005 could have mortgaged a 100% interest in the property based upon the conveyance set forth in the 1937 deed, rendering the mortgage descriptions inaccurate. From this premise she argues that the 2005 and 2018 foreclosures did not effectively convey a 100% interest in property to MERS in 2005 or to Rungu in 2018. For reasons set forth in this memorandum and order I have ruled that as between Rungu and Deutsche Bank, Rungu cannot challenge the validity 2005 or 2018 foreclosure sales based upon her interpretation of *Fulton v. Katsowney*.

<sup>7</sup> While it is not entirely clear, there is evidence in the summary judgment record that would allow a fact finder to infer that during in the months after Emond's death Rungu and Attorney Sullivan worked together with Emond's mortgagee (and Rungu's prospective lender) to implement a plan that enabled Rungu to use the impending foreclosure as a vehicle through which she was able acquire title to (and continue to reside in) her marital home.

<sup>8</sup> These facts are set forth in the Schedule of Real Estate for the Estate filed with the probate court by Rungu in her capacity as administratrix of Emond's estate.

summary judgment establish that on December 7, 2005 MERS foreclosed by making an open, peaceable and unopposed entry on the property; and on that same date MERS conducted an auction sale in the exercise of the power of sale contained in the mortgage. Rungu was the high bidder at the auction with a bid of \$248,000.00. Rungu signed the memorandum of sale acknowledging that on December 7, 2005 she agreed to purchase the property for the sum of \$248,000.00, and that she paid \$5,000.00 as a deposit to bind the purchase.<sup>9</sup>

Rungu financed the purchase of the property by obtaining a mortgage loan from Aegis Funding Corporation ("Aegis"). On January 9, 2006 Rungu executed a promissory note to Aegis in the amount of \$210,800.00.<sup>10</sup> The \$210,800.00 promissory note was secured by a first mortgage on the property granted to MERS as nominee for the lender and the lender's successors and assigns. The first mortgage was dated January 9, 2006 and executed by Rungu.<sup>11</sup> Rungu initialed each page of the note and mortgage. It cannot be disputed that Aegis paid over to Rungu the amount borrowed, and that Rungu used those funds to pay the outstanding mortgage lien.<sup>12</sup> MERS executed a foreclosure deed to Rungu dated January 5, 2006.<sup>13</sup>

The adjustable-rate promissory note dated January 9, 2006 has two stamped and signed endorsements on page 5 (5 of 5). The first endorsement was to Aegis Funding Corporation. The second endorsement was a blank endorsement signed by Aegis's Funding Corporation's assistant secretary.

On July 22, 2009 MERS executed an assignment of the Rungu Mortgage to Deutsche Bank;<sup>14</sup> however the assignment identifies the assignee incompletely as

<sup>9</sup> Rungu argues that she was not present at the foreclosure auction. It does not matter whether it was Rungu or her attorney, Harrington, who was present and bid on behalf of Rungu. What is undisputed is that Rungu signed the memorandum of sale.

<sup>10</sup> This is the exact amount that was owed to Optima to cover principal, interest and fees associated with the foreclosure.

<sup>11</sup> The first mortgage was recorded on January 10, 2006 at the Middlesex North District Registry of Deeds (hereinafter the "registry") at Book 19718, Pg. 236.

<sup>12</sup> The property was listed in the Emond estate inventory with a fair market value of \$248,000.00. The inventory identified that the property was subject to a mortgage securing an outstanding loan with a principal balance of \$185,158.00 plus interest and fees due at the time of his death of \$23,742.00. After payment to Optima of the total mortgage lien amount due (\$210,800.00) the estate was left with \$39,100.00 in equity.

<sup>13</sup> The court assumes MERS delivered the deed to Rungu at the closing on January 9, 2006.

<sup>14</sup> The assignment was recorded on July 30, 2009 with the registry at Book 23260, page 142.

"Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3" (omitting "Mortgage Pass Through Certificates, Series 2006-3"). On March 29, 2012 (for reasons that do not appear in the summary judgment record) MERS recorded at the registry of deeds a second assignment of the Rungu Mortgage to Deutsche Bank dated March 28, 2012. The second assignment contained the same incomplete assignee identification as appeared in the first assignment. On May 3, 2017 MERS executed a "Confirmatory Assignment of Mortgage that was recorded on May 10, 2017. The confirmatory assignment "is being recorded to correct an Assignment of Mortgage recorded with the [registry of deeds] on 7/30/2009, at Book 23260, Page 142 to more accurately identify the Assignee." The confirmatory assignment identifies the assignee of the Rungu mortgage as "Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3" (plaintiff Deutsche Bank).<sup>15</sup>

Specialized Loan Servicing LLC (hereinafter "SLS") serviced Rungu's loan for Aegis and Deutsche Bank.

Rungu acted in a manner consistent with her status as the owner of the property and mortgagor from the year she acquired title to the property in 2006 until the 2018 foreclosure. Rungu made regular monthly mortgage payments to Aegis between 2006 and February 2009. She received (or attempted to collect) rent from the tenants who occupied the rental unit at the property. In fact between 2006 and 2016 Rungu commenced three summary process actions in the Northeast Division of the Housing Court seeking to recover possession of the rental unit at the property alleging nonpayment of rent. In all three cases she alleged in her complaint that she was the owner of the property. The court takes judicial notice of the filings in the following cases: 06H77SP002265, 15H77SP004185, and 16H77SP003312.

Finally, among the recorded documents submitted by Rungu is a document signed by Rungu, dated September 8, 2018 and entitled *Affidavit of Clarification of Title, and Discharge By Operation of Law Under Chap 183 Sect 5B*<sup>16</sup>. The affidavit was prepared in an apparent attempt to establish that Rungu was entitled to protection from foreclosure under the "obsolete mortgage" statute, G.L. c. 260, § 33 (she suggested that a purported

<sup>15</sup> The confirmatory assignment was recorded at the registry on May 10, 2017 in Book 31104, Page 52.

<sup>16</sup> Rungu's affidavit was recorded with the registry at Book 32398, Page 1-14.

July 23, 2009 acceleration of her mortgage loan moved the maturity date of her loan to July 23, 2009, and that five year period measured from the maturity date in which the mortgagee had to foreclose had expired).<sup>17</sup> However, of relevance to the issues before the court on summary judgment are the facts sworn to by Rungu in that affidavit, to wit, her acknowledgement that (1) on January 9, 2006 she purchased the property as shown in the deed from MERS recorded at the registry at Book 19718, Page 233, and (2) that she executed a mortgage with Aegis that was recorded at the registry at Book 19718, Page 236. In Paragraph 3 of her affidavit Rungu confirms that the mortgage identifies MERS as "nominee/mortgagee" (notwithstanding her statement that it constituted an "undisclosed reference").<sup>18</sup>

There is no evidence in the summary judgment record that between January 2006 and December 2017 Rungu ever attempted to disavow the loan or mortgage. There is no evidence in the summary judgment record that during this eleven-year period she ever claimed (or otherwise notified or informed Aegis, MERS, Deutsche Bank, SLS or any other entity) that she had not acquired title to the property in 2006 through a foreclosure deed from her deceased husband's former mortgagee, that her purchase of the property had not been financed through a loan from Aegis in 2006, that in 2006 she had not received \$248,000.00 from Aegis as set forth in the promissory note and the mortgage she signed, that she did not consider herself to be the owner of the property or the landlord for the tenants who occupied the rental unit that was part of the property, or that she did not receive rent from such tenants.

Rungu fell behind on her mortgage loan payment obligations beginning in March

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<sup>17</sup> Rungu has not raised the "obsolete mortgage" defense in her answer or in her summary judgment papers. In any event, it is established law that acceleration of a mortgage loan upon default does not change the original maturity date set forth in the mortgage. The Supreme Judicial Court has stated with clarity that under G.L. c. 260, § 33 where the term or maturity date of the mortgage is stated (as is the case with the Rungu mortgage), "[t]he limitations period for stated term mortgages is five years after expiration of the term or maturity date . . ." *Deutsche Bank National Trust Company, Trustee v. Fitchburg Capital, LLC*, 471 Mass. 248, 252 (2015).

<sup>18</sup> On March 15, 2019 Rungu filed a letter from her counsel together with a proposed affidavit of Rungu entitled "Affidavit Under M.G.L. c. 183 § 5B" signed and dated March 15, 2019. The proposed affidavit sought to present additional supplemental facts and to modify (and effectively disavow) the factual statements set forth in her September 8, 2018 recorded affidavit. Deutsche Bank moved to strike the March 15, 2019 affidavit. In an order dated April 18, 2019 the court (Del Puerto, J.) allowed the motion, and Rungu's proposed March 15, 2019 affidavit was stricken. Rungu remains bound by the factual assertions set forth in her September 8, 2018 affidavit.

2009. She did not make a mortgage loan payment after February 2009.

SLS, acting as loan servicer for Deutsche Bank, sent Rungu a (1) *90 Day Right to Cure Mortgage Default* notice, dated December 14, 2107, setting forth that she was in default on her mortgage loan payment obligation under the first mortgage promissory note and that she had a right to cure pursuant to G.L. c. 244, § 35A, and (2) notice that she could request a loan modification pursuant to G.L. c. 244, § 35B.<sup>19</sup>

Rungu did not cure the mortgage loan default prior to the August 22, 2018 foreclosure sale.

On December 14, 2017 SLS, acting as loan servicer for Deutsche Bank, executed a pre-foreclosure *Affidavit Regarding Note Secured by Mortgage Being Foreclosed*. The affidavit affirms that with respect to Rungu's \$248,000.00 mortgage loan and first mortgage (1) the requirements of G.L. c. 244, § 35B were complied with, and (2) in compliance with G.L. c. 244, § 35C as of the date of the affidavit Deutsche Bank was "the holder of the promissory note secured by the above mortgage."<sup>20</sup>

On July 23, 2018 Deutsche Bank, through its legal counsel, prepared a legally sufficient *Notice of Foreclose Sale and of Deficiency After Foreclosure of Mortgage* and Notice of Foreclosure Sale. The notices stated that Deutsche Bank intended to conduct a foreclosure sale of the property and that Rungu would be liable for any deficiency owed on the mortgage note that remained after the foreclosure sale. The notice was addressed to Rungu at her residence and mailed by certified mail at least 30 days prior to the scheduled date of the foreclosure sale.

Deutsche Bank, through its legal counsel, mailed to Rungu and had published in the Lowell Sun, a newspaper of general circulation in Lowell, on three successive weeks (July 27, August 3 and 10, 2018) a G.L. c. 244, § 14 compliant notice that stated that the foreclosure sale would take place at 1 p.m. on August 22, 2018 at the property.

On August 22, 2018, a Certificate of Entry was executed by two witnesses in the presence of a notary. The witnesses certified that on August 22, 2018 an attorney-in-fact and agent of Deutsche Bank made an open, peaceable and unopposed entry on the Rungu

<sup>19</sup> See Affidavit of Melaney Atencio, Eviction Manager of SLS, dated January 25, 2019.

<sup>20</sup> The affidavit was recorded at the Registry of Deeds on June 13, 2018 at Book 32173, Page 255.

property.<sup>21</sup>

On August 22, 2018 at 1 p.m., a licensed auctioneer conducted a public foreclosure auction at the property. Deutsche was the high bidder at the foreclosure auction for the sum of \$248,000.00.

On September 11, 2018 Deutsche Bank executed and delivered a foreclosure deed that conveyed good, clear and marketable title to the property to Deutsche Bank for consideration paid of \$248,000.00. On September 11, 2018 a vice president of SLS, acting as agent for Deutsche Bank executed a second Affidavit Regarding Note Secured by Foreclosed Mortgage. On September 27, 2018 Elena Peterson, Esq., acting on behalf of Deutsche Bank, executed a G.L. c. 244, § 15 compliant affidavit of sale.<sup>22</sup>

Rungu has remained in possession of the property since the August 22, 2018 foreclosure sale. Rungu never entered into a tenancy with Deutsche Bank (or any other person) and never paid Deutsche Bank any amount for her continued use and occupancy of the property until she was ordered by the court to make interim use and occupancy payments of \$1,200.00 commencing March 2020.<sup>23</sup> She occupies the property at the sufferance of Deutsche Bank.

The undisputed evidence in the summary judgment record (based on the January 22, 2019 affidavit of Paul Ratha Yem, a real estate broker licensed by the Commonwealth of Massachusetts) is that the fair rental value of the portion of the property occupied by Rungu (44 Keene Street) is \$1,200.00 per month.<sup>24</sup>

On October 23, 2018 Deutsche Bank served Rungu with 72-hour notice to vacate the property (dated October 23, 2018).

### Discussion

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty*

<sup>21</sup> The certificate was recorded with the registry on October 9, 2018, at Book 32472, Page 60.

<sup>22</sup> The foreclosure deed, affidavit of sale, and second affidavit of continuing note holder status were recorded at the registry on October 9, 2018 at Book 32472, Page 60.

<sup>23</sup> The court (Sullivan, J.) issued an interim use and occupancy payment order on February 19, 2020.

<sup>24</sup> Rungu did not submit any evidence pertaining to the fair rental value of the unit at the property she occupies.



*Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs. Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party “to show with admissible evidence the existence of a dispute as to material facts.” *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with “vague and general allegations of expected proof.” *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v. Cranney*, 436 Mass. 638, 648 (2002) (“[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment”).

To prevail in a summary process action involving foreclosed property (where the validity of the foreclosure is challenged) the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. To prove this element of its claim for possession the post-foreclosure plaintiff must show “that the title was acquired strictly according to the power of sale provided in the mortgage.” *Wayne Inv. Corp. v. Abbott*, 350 Mass. 775, 775 (1966). See *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226 (2012); *Bank of New York v. Bailey*, 460 Mass. 327 (2011).

Deutsche Bank argues that based on the undisputed evidence in the summary judgment record it has established that the August 22, 2018 foreclosure was valid, it acquired lawful title to the property on September 18, 2018, and that its right to possession of the Unit is superior to any right asserted by Rungu. Deutsche Bank further argues that it has established its claim for use and occupancy damages for the period October 2018 to February 2020 in the amount of \$34,800.00.

Rungu argue that Deutsche Bank cannot show that it has a superior right to possession of the property because the November 30, 2016 foreclosure was void *ab initio*, rendering the subsequent sale of the property to Deutsche Bank a nullity. Rungu challenges

the validity of the 2005 foreclosure and the 2018 foreclosure. I shall discuss each foreclosure separately.

2005 Foreclosure. Rungu argues that the 2005 foreclosure was void because the mortgagee, MERS, did not comply strictly with G.L. c. 244, s 14 and the power of sale contained in Emond's mortgage because (1) Countrywide Home Loans Inc. ("Countrywide") did not have a power of attorney in writing authorizing it to conduct the foreclosure on behalf of MERS, and (2) MERS did not send a copy of the notice of sale to the legal guardian of Emond's minor daughter. Rungu further argues that she never acquired an ownership interest in the property as a result of the foreclosure sale. She alleges that was not present at the December 7, 2005 foreclosure auction, she did not submit a bid, and did not otherwise participate in the foreclosure sale. From these factual assertions she argues that she could not have acquired title to the property through the foreclosure deed executed by MERS. Rungu argues that because she did not hold title to the property the mortgage did not grant to MERS (and by assignment Deutsche Bank) and legal interest in the property, rendering void the 2018 foreclosure. Rungu makes this argument even though Rungu signed the memorandum of sale, executed a promissory note to Aegis in the amount of \$210,800.00, received the loan funds from Aegis, and granted a mortgage on the property to MERS to secure that \$210,800.00 promissory note. Rungu's second argument is that although she does not dispute that she received notice of the 2005 foreclosure sale (as executrix of Emond's estate); she argues that the 2005 foreclosure sale was void because the mortgagee failed to give Emond's then minor daughter written notice of the foreclosure sale.

Deutsche Bank argues that Rungu is barred from challenging the validity of the 2005 foreclosure because she did not assert her claim within the limitations period set forth in G.L. c. 244, § 15 (commonly referred to as the "curative statute"). Deutsche Bank is correct.

G.L. c. 244, § 15, enacted in 2015, establishes in subsection (c) a general three-year statute of limitations with respect to a challenge to the validity of a foreclosure sale. The limitation period is extended in certain circumstances set forth in subsection (d).

Subsection (c) provides that if an affidavit of sale

*"is executed in accordance with this section, it shall, after 3 years from the date of its recording, be conclusive evidence in favor of an arm's length third party purchaser for value at or subsequent to the*

foreclosure sale that the power of sale under the foreclosed mortgage was duly executed and that the sale complied with this chapter and section 21 of said chapter 183. . . *Absent a challenge as set forth in clause (i) or (ii) of subsection (d), title to the real property acquired by an arm's length third party purchaser for value shall not be set aside*" [emphasis added].

Subsection (d) provides that

"[s]ubsection (c) shall not apply if: (i) an action to challenge the validity of the foreclosure sale has been commenced in a court of competent jurisdiction by a party entitled to notice of sale under section 14 or a challenge has been asserted as a defense or a counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to section 3 of chapter 185C, by a party entitled to notice of sale under said section 14 *and a true and correct copy of the complaint or pleading asserting a challenge has been duly recorded before the deadline in the registry of deeds for the county or district in which the subject real property lies or in the land court registry district before the deadline*; or (ii) a challenge to the validity of the foreclosure sale is asserted as a defense or counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to said section 3 of said chapter 185C, by a party entitled to notice of sale under said section 14 *who continues to occupy the mortgaged property as that party's principal place of residence, regardless of whether the challenge was asserted prior to the deadline, and a true and correct copy of any pleading asserting the challenge in the legal action was duly recorded in the registry of deeds for the county or district in which the subject property lies or is duly filed in the land court registry district within 60 days from the date of the challenge or before the deadline, whichever is later* [emphasis added].

The requirements set forth in subsection (d) are in the conjunctive. Thus a party challenging a foreclosure must file a pleading in court setting forth a legal challenge *and* record the pleading in the applicable registry of deeds within 60 days from the date of the court filing. See *Kenney v. Brown, et al.* (Land Court, No. 16 Misc. 000530 RBF, July 27, 2017, Foster, J.).<sup>25</sup>

Rungu has asserted a challenge to the validity of the 2018 foreclosure (that foreclosed on her mortgaged interest in the property) by contesting the validity of the December 7, 2005 foreclosure sale (that foreclosed on Emond's mortgaged interest in the property) and the January 5, 2006 foreclosure deed that conveyed to Rungu title to the

<sup>25</sup> The trial court memorandum and order can be found at 2017 WL 3445359.

property. She first asserted this legal claim through an amended answer she filed in this summary process action on January 7, 2019 (her original answer was filed on November 23, 2018). Since Rungu has occupied the property as her principal residence continuously since the 2005 foreclosure she is subject to the more liberal limitations period set forth in G.L. c. 244, § 15, subsection (d) (ii). For purposes of calculating the 60-day recording requirement I shall use the January 7, 2019 date.

Accordingly, to preserve her right to contest the 2005 foreclosure Rungu must show that she recorded her amended summary process answer with the registry of deeds within 60 days of January 7, 2019. However, there is no evidence in the summary judgment record that Rungu ever recorded her amended summary process answer at the registry of deeds.

Rungu argues that Deutsche Bank, as the foreclosing party, is not entitled to the benefit of the limitations period set forth in G.L. c. 244, § 15 because Deutsche Bank does not qualify as an "arm's length third party purchaser for value" within the meaning of the statute.<sup>26</sup> Rungu mis-identifies the relevant "arm's length third-party purchaser for value" for purposes of determining whether Deutsche Bank is entitled to the benefit of the § 15 limitations period. The relevant "arm's length third-party purchaser for value" at the time of the 2005 foreclosure sale was Rungu. While the legal analysis might give even an experienced conveyancing attorney a headache, it logically follows that it is Rungu who would be barred from challenging Deutsche Bank's ownership of the property based upon a challenge to the December 7, 2005 foreclosure sale if she was the "arm's length third party purchaser for value" of the property within the meaning of the statute.

Rungu argues that she could not be considered to be an "arm's length third party purchaser for value" of the property because she did not participate at the 2005 foreclosure auction and sale (and did not authorize an agent to act on her behalf) rendering her bid (or the bid that was made on her behalf) and the resulting conveyance of the foreclosure deed to her a nullity. The undisputed competent evidence in the summary judgment record does not support Rungu's argument.

<sup>26</sup> Subsection (A) provides that "Arm's length third party purchaser for value", an arm's length purchaser who pays valuable consideration, including a purchaser's heirs, successors and assigns, but not including the foreclosing party or mortgage note holder or a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder or an investor or guarantor of the underlying mortgage note including, but not limited to, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Federal Housing Administration.

The undisputed facts sufficient to establish Rungu's ownership of the property are clear and overwhelming. First, Rungu signed the memorandum of sale acknowledging that on December 7, 2005 she agreed to purchase the property out of foreclosure for the sum of \$248,000.00 and paid \$5,000.00 as a deposit to bind the purchase. Second, Rungu financed the purchase of the property by obtaining a mortgage loan from Aegis. On January 9, 2006 Rungu executed a promissory note to Aegis in the amount of \$210,800.00.<sup>27</sup> Third, the \$210,800.00 promissory note was secured by a first mortgage on the property Rungu granted to MERS. The first mortgage was dated on January 9, 2006 and executed by Rungu.<sup>28</sup> Rungu initialed each page of the note and mortgage. It cannot be disputed that Aegis paid over to Rungu the amount borrowed, and that Rungu used those funds to pay over to Aegis the amount due to satisfy the outstanding mortgage lien. And MERS executed and conveyed a foreclosure deed to Rungu giving her clear title to the property.

Nonetheless, Rungu argues that the 2006 foreclosure deed is void because she had not authorized her attorney, James A. Harrington, to bid on her behalf at the foreclosure auction and that he did not tell her that she was the successful bidder. Attorney Harrington represented Rungu on matters pertaining to Emond's estate (Rungu was the appointed administratrix) and represented Rungu on matters pertaining to the purchase of the property.

Inconveniently, Rungu omits to point to any evidence in the record that would explain how she came to accept the 2006 mortgage loan, sign the promissory note and mortgage, use the proceeds from the loan to pay the purchase price for the property, receive a foreclosure deed for the property from MERS, continue to live at the property as her principal residence to the present, make monthly mortgage payments due on the 2006 promissory note to Aegis between 2006 and March 2009, and act in a manner consistent with her status as the owner/landlord of the property (including bringing at least three summary process actions in the Northeast Division of the Housing Court between 2006 and 2018 in which she identified herself as the owner and sought to recover possession of the rental unit at the property from her tenants). In fact, as recently as September 2018

<sup>27</sup> This is the exact amount that was owed to Optima to cover principal, interest and fees associated with the foreclosure.

<sup>28</sup> The first mortgage was recorded on September 7, 2005 at the Worcester South District Registry of Deeds (hereinafter the "Registry of Deeds") at Book 37261, Pg. 206.

Rungu recorded an affidavit with the registry of deeds in which she acknowledged that (1) on January 9, 2006 she purchased the property as shown in the deed from MERS recorded with the registry at Book 19718, Page 233, and (2) that she executed a mortgage with Aegis that was recorded with the registry at Book 19718, Page 236. See *Affidavit of Clarification of Title, and Discharge By Operation of Law Under Chap 183 Sect 5B* (signed by Rungu, dated September 8, 2018, and recorded with the registry at Book 32398, Page 1-14).<sup>29</sup>

Even if, as Rungu maintains, she had not expressly directed Attorney Harrington to act on her behalf at the foreclosure auction sale she is bound by his conduct under the doctrine of implied authority or apparent authority.<sup>30</sup> As for implied authority, Attorney

<sup>29</sup> See Fn. 18, *supra*. Further, "[t]he doctrine of judicial estoppel prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding." *InterGen N.V. v. Grina*, 344 F. 3d, 134, 144 (1<sup>st</sup> Cir. 2003). See *Paixao v. Paixao*, 429 Mass. 307, 308-311 (1999); *Olis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 639-642 (2005). See also *Chiao-Yun Ku v. Framingham*, 53 Mass. App. Ct. 727, 729 (2002); *Commonwealth v. Gardner*, 67 Mass. App. Ct. 744, 747-748 & n.5 (2006). Here Rungu's denial that she purchased the property in 2006 is inconsistent with the position she took in the three summary process cases she initiated and with the position she took in her September 8, 2018 affidavit recorded during the pendency of the current action.

<sup>30</sup> Agency is a fiduciary relationship that arises from the manifestation of consent by one person (the principal) to another (the agent) authorizing the agent to act on the principal's behalf or for the principal's benefit, and subject to the principal's control. The principal is responsible for any acts of the agent that are done within the scope of the authority given to the agent by the principal.

There are three essential characteristics of an agency relationship: (1) the power of the agent to alter the legal relationships between the principal and third parties and the principal and himself, (2) the existence of a fiduciary relationship toward the principal with respect to matters within the scope of the agency, and (3) the right of the principal to control the agent's conduct with respect to matters within the scope of the agency. *Theos & Sons, Inc. v. Mack Trucks, Inc.*, 431 Mass. 736 (2000). Agency can arise in two ways: by actual authority or by apparent authority.

Actual authority is the manifestation of an agency relationship created by agreement. "Actual authority can be express or implied. See Restatement (Second) of Agency, *supra* at § 7 comment c. Actual authority results when the principal explicitly manifests consent, either through words or conduct, that the agent is authorized act on behalf of the principal. See *Commonwealth Aluminum Corp. v. Baldwin Corp.*, 980 F. Supp. 598, 611 (D. Mass. 1997); Restatement (Second) of Agency, *supra* at § 7 b. Implied authority is actual authority that evolves by implication from the conduct of the parties. Implied authority exists where the agreement can be implied from the principal's words or conduct, the conduct of the parties and the circumstances of the particular case. See *T.D. Downing Co. v. Shawmut Corp.*, 245 Mass. 106, 113 (1923) ("relation of principal and agent may arise wholly by implication from the conduct of the parties and the circumstances of the particular case")." *Theos & Sons v. Mack Trucks, Inc.*, *supra*, at 743-744 fn. 13 (2000). "Actual authority, either express or implied, is the agent's power to affect the principal's relations with third parties as manifested to the agent by the principal." *Id.*

"Apparent or ostensible authority results from conduct by the principal which causes a third person reasonably to believe that a particular person . . . has authority to enter into negotiations or to make representations as his agent." [Citations omitted]. If a third person goes on to change his position in reliance on this reasonable belief, the principal is estopped from denying that the agency is authorized." *Hudson v. Massachusetts Property Ins. Underwriting Association*, 386 Mass. 450, 457 (1982); see *Linkage Corporation v. Trustees of Boston University*, 425 Mass. 1, 16 (1997). It is not necessary that the agent actually know that he is authorized to act for the principal. It is enough that the principal, by words or by deed, inferred or implied to the third person that another is acting as its agent.

Harrington's authority to act can be implied from the fact that Rungu signed the memorandum of sale, the promissory note and the mortgage. Her actions affirmed Attorney Harrington's authority to act on her behalf. As for apparent authority, Attorney Harrington's authority to act on behalf of Rungu with respect to the foreclosure auction and sale is apparent from the fact that Aegis lent her a significant amount of money in exchange for her execution of a note and mortgage securing the note. Aegis changed its position to its material detriment in reliance on Rungu's conduct that manifested her representation that she owned the property. Deutsche Bank relied on that same representation when it sought to foreclose on the mortgage in 2018.

The undisputed evidence in the summary judgment record establishes as a matter of law that Rungu was an "arm's length third party purchaser for value" when she acquired title to the property in January 2006.

Further, Rungu argues that Deutsche Bank, as the foreclosing party, is not entitled to the benefit of the limitations period set forth in G.L. c. 244, § 15 because it cannot show that with respect to the 2005 foreclosure the affidavit of sale was "properly" recorded. She claims that Countrywide, the entity that executed and recorded the power of sale (and other documents on behalf of MERS) was not acting as an "attorney in fact" for MERS and thus did not act as an agent "duly authorized" by MERS to execute and record the affidavit of sale required under subsection G.L. c. 244, § 15, subsection (b).

The statute does not require that an affidavit of sale be "properly" recorded. The statute requires only that "... an affidavit fully and particularly stating the person's acts . . . shall be recorded in the registry of deeds . . . If the affidavit shows that the requirements of the power of sale and the law have been complied with in all respects, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed." Even if the execution of the affidavit was imperfect for some reason, the statute places a limitation on the time within which a challenge to the sufficiency of document may be brought. In any event, Deutsche Bank has identified a document in the summary judgment record - an executed and recorded MERS Corporate Resolution - establishing that MERS had authorized Countrywide to sign documents on its behalf at the time of the 2005 foreclosure. The existence of the Corporate Resolution rendered the execution of a separate power of attorney unnecessary.

Therefore, I rule as a matter of law that in accordance with the provisions of G.L.

c. 244, § 15, Rungu is barred from challenging the validity of the December 7, 2005 foreclosure sale.<sup>31</sup> I further rule as a matter of law that Rungu was the successful bidder at the December 7, 2005 foreclosure sale and acquired title to the property through a foreclosure deed executed by MERS and delivered to Rungu in January 2006.<sup>32</sup>

2018 Foreclosure. With respect to the validity of the December 2018 foreclosure Rungu makes four arguments (that she asserts remain to be determined after the first summary judgment order dated April 19, 2019). First, Rungu claims there exists a disputed issue of fact as to whether Deutsche Bank held Rungu's mortgage note at the time of the 2018 foreclosure. Second, Rungu maintains that the 2009 mortgage assignment from MERS to Deutsche Bank was invalid. Rungu argues that because Rungu's mortgage loan was not registered in the MERS database (a provision set forth in the MERS Corporate Resolution authorizing the signatory of the mortgage to act on behalf of MERS), the signatory who executed the assignment on behalf of MERS acted without authority. Third, Rungu claims that the foreclosure was invalid because Deutsche Bank does not hold sole title to the property (and thus neither did Rungu) based upon the existence of "a title issue dating back to a 1937 deed." Rungu's fourth argument, that the 2006 mortgage was invalid because the 2005 foreclosure sale never took place, has been rejected by me for the reasons set forth at pages 11 to 17, *supra*. I shall address the three remaining contentions.

Note Holder. Rungu contends that in the course of discovery Deutsche

<sup>31</sup> In accordance with G.L. c. 244, § 15:

(a) Rungu is barred from challenging the validity of the 2005 foreclosure based upon an alleged defect in title purportedly traced back to 1937 (that would have left Rungu holding only an undivided 50% interest in the property, and thus would have conveyed only a 50% interest in the property to MERS to secure the 2006 loan from Aegis). Further, Rungu never raised the 1937 title issue in her 29<sup>th</sup> affirmative defense; and

(b) Rungu is also barred for this reason from challenging the validity of the 2005 foreclosure based upon the purported failure to send Emond's minor daughter notice of the foreclosure sale.

<sup>32</sup> In addition to acquiring title through foreclosure by exercise of the power of sale, the undisputed evidence in the summary judgment record establishes that MERS also acquired title to the property as a result of MERS's open and peaceful foreclosure by entry on December 7, 2005. Foreclosure by entry under G.L. c. 244, § 1 and foreclosure by exercise of the statutory power of sale under G.L. c. 183, § 21 are separate and distinct methods to foreclosure. Upon the recording by MERS of the Certificate of Entry on December 7, 2005, recorded with the registry on January 10, 2006, title would have fully vested in MERS three years from January 10, 2006 (on January 10, 2009). Once title fully vested in MERS on January 10, 2009, the sole remaining issue would be whether the January 2006 deed from MERS to Rungu constituted a valid conveyance of title to the property *nunc pro tunc* to 2006 (rendering enforceable the 2006 promissory note and mortgage). Since I have determined that the 2005 foreclosure upon exercise of the power of sale was valid, I do not decide this sole remaining foreclosure by entry issue.



Bank produced two different versions of Rungu's promissory note. Rungu acknowledges that on December 6, 2018, in response to discovery Deutsche Bank provided Rungu with a copy of the promissory note (with Bates-stamp Number SLS\_Rungu0000001 thru 000101). The note contained two endorsements; one from Aegis Funding Corporation to Aegis Mortgage Corporation, and the second blank endorsement from Aegis Mortgage Corporation. It is obvious that the blank endorsement came after the first endorsement. Rungu further acknowledges that an affidavit provided by Melaney Atencio (eviction manager for SLS) in support of Deutsche Bank's motion for summary judgment included a copy of the note with the same endorsements as the one provided by Deutsche Bank in its December 6, 2018 discovery response.

Rungu alleges that there exists a disputed issue of fact regarding whether Rungu's note was in fact endorsed in blank by Aegis Mortgage Corporation because (1) in response to a February 28, 2019 request for information her attorney directed to SLS (apparently unrelated to any outstanding discovery request in this litigation), SLS sent Rungu's attorney a copy of the note that did not have the two stamped endorsements, and (2) on October 29, 2019 Deutsche Bank provided Rungu with an additional copy of the note in response to a supplemental discovery request (with Bates-stamp Number SLS\_Runguo000108 thru 000112). This copy of the note did not have the two stamped endorsements. However, Rungu relies on too thin a reed of inference to support her claim that there exist a disputed issue of fact on the issue of whether Deutsche Bank was the noteholder prior to the foreclosure.

Rungu's attorney concedes that he observed the original note (with the two endorsements affixed to the last page) that was in possession of Deutsche Bank. Further, the settled case law establishes that "... a foreclosing mortgage holder ... may establish that it either held the note or acted on behalf of the note holder at the time of the foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G.L. c. 183, § 54B." *Eaton v. Fannie Mae*, 462 Mass. 569, 589, n. 28 (2012); *Strawbridge v. Bank of N.Y. Mellon*, 991 Mass. App. Ct. 827, 830-831 (2017), appeal den'd. 478 Mass. 1105 (2017).

The summary judgment record includes a copy of the 2006 note which includes the two endorsements (on the last page, page 5), the second of which shows that the note had

been endorsed in blank. Further the record establishes that on December 14, 2017 SLS, acting as loan servicer for Deutsche Bank, executed a pre-foreclosure *Affidavit Regarding Note Secured by Mortgage Being Foreclosed*. The affidavit affirms that in compliance with G.L. c. 244, § 35C as of the date of the affidavit Deutsche Bank was "the holder of the promissory note secured by the above mortgage." Finally, the record establishes that on September 11, 2018 a vice president of SLS, acting as agent for Deutsche Bank executed a second Affidavit Regarding Note Secured by Foreclosed Mortgage affirming that Deutsche Bank held Rungu's promissory note secured by the mortgage.<sup>33</sup> Rungu has not pointed to any evidence in the summary judgment record that would create a question of fact as to the authority of each affiant to act on behalf of Deutsche Bank.

Accordingly, in accordance with G.L. c. 183, § 54B, I rule that Deutsche Bank held the Rungu promissory note at the time of the August 22, 2018 foreclosure.

2009 Mortgage Assignment. Rungu argues that the signatory of the 2009 mortgage assignment would have authority to execute the assignment "only if the loan is registered on the MERS system and the Defendant's loan was not registered in MERS." Rungu claims that there exists a disputed issue of fact as to whether Rungu's mortgage loan was registered in the MERS database, and that this disputed issue of fact is sufficient to defeat Deutsche Bank's motion for summary judgment. I disagree.

It is undisputed that between 2006 and 2009 MERS held Rungu's mortgage as nominee for the lender, Aegis. It is also undisputed that on July 22, 2009, an authorized agent for MERS (Francis J. Nolan, acting as Assistant Secretary and Vice President) executed an Assignment of Mortgage by which MERS assigned the Rungu Mortgage to Deutsche Bank.<sup>34</sup>

<sup>33</sup> The court will not speculate as to why copies of the note without the stamped endorsements were provided. There is, however, no dispute that the original note contains the two stamped endorsements. It is probable that the copies of the note without the stamped endorsements were copies made at the time of the January 2006 closing and placed in the closing file.

<sup>34</sup> The assignment was recorded on July 30, 2009 with the registry at Book 23260, Page 142. The assignment identified the assignee incompletely as "Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3" (omitting "Mortgage Pass Through Certificates, Series 2006-3"). On May 8, 2017 MERS executed a "Confirmatory Assignment of Mortgage that was recorded on May 10, 2017. The confirmatory assignment "is being recorded to correct an Assignment of Mortgage recorded with the [registry] on 7/30/2009, at Book 23260, Page 142 to more accurately identify the Assignee." The confirmatory assignment identifies the assignee of the Rungu mortgage as "Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3" (plaintiff Deutsche Bank).

I rule that in accordance with settled law where "the record title holder of the mortgage satisfied the dictates of G.L. c. 183, § 54B, the homeowners have no basis for arguing that the assignment is void." *Bank of New York Mellon Corp. v. Wain*, 85 Mass. App. Ct. 498, 503 (2014). Deutsche Bank, in compliance with G.L. c. 183, § 54B, provided undisputed evidence in the record sufficient to establish that the 2009 assignment and the 2017 confirmatory assignment were executed before a notary public, by an officer of Deutsche Bank, and recorded at the registry of deeds.

I further rule as a matter of law that Rungu does not have standing to challenge the sufficiency of the 2009 assignment (and 2017 confirmatory assignment) from MERS to Deutsche Bank based upon a purported failure to comply with the MERS Corporate Resolution that authorized the MERS agent to execute assignments of mortgages that are registered in the MERS system. Rungu's claim is based solely upon Attorney Kiah's apparently unsuccessful online computer search efforts to locate the Rungu mortgage in the MERS data base, which "results" include attached screen shots of his search (as set forth in his affidavit). The hearsay statements set forth in Attorney Kiah's affidavit do not constitute competent admissible evidence and are insufficient to raise a disputed issue of fact as to whether the signatory of the assignment was authorized to act on behalf of MERS. Further, Rungu has not submitted any competent evidence from MERS directly (either in the form of facts set forth in an affidavit or facts obtained through discovery) to support her contention that the Rungu mortgage was not registered in the MERS data base. In fact, Rungu acknowledges (at page 30 of her February 18, 2020 summary judgment memorandum) that the confirmatory assignment executed on May 8, 2017 includes "at the top the MERS ID. (the MERS MIN No. 100014720008650710)." The fact that Attorney Kiah, conducting an online search using his computer, was unable to locate the Rungu's mortgage loan in the MERS database does not constitute competent evidence sufficient to raise a disputed issue of fact as to whether the mortgage loan was registered on the MERS system.

Even if there was sufficient evidence to present a disputed issue of fact as to whether the Rungu mortgage loan was registered on the MERS system (and assuming, *arguendo*, that Rungu could challenge the validity of the mortgage assignment notwithstanding Deutsche Bank's compliance with G.L. c. 183, § 54B), Rungu would not have standing to challenge the validity of the assignment for a different reason. The alleged

noncompliance with the MERS corporate resolution would at best have rendered the assignment voidable rather than void. Rungu is neither a party to nor a third-party beneficiary of the MERS Corporate Resolution or the 2009 mortgage assignment through which Deutsche Bank obtained its legal interest in the property. Rungu is not seeking to assert any rights under the Corporate Resolution or the assignment; rather she is challenging the validity of Deutsche Bank's exercise of the power of sale based upon which she claims is a defective mortgage assignment to Deutsche Bank. Rungu's argument is similar to the arguments presented in earlier cases where the foreclosed party challenged the validity of a foreclosure based upon a claim that the mortgage assignment out of a securitized trust was invalid based upon a purported failure of the mortgagee/lender to comply with the terms of the trust. In *Strawbridge v. Bank of New York Mellon*, 91 Mass. App. Ct. at p. 832 (2017), the Appeals Court held that the former owner was without standing to challenge an assignment where the purported defect would have rendered the assignment voidable, not void. See also, *Sullivan v. Kondaur Capital Corp.*, 85 Mass. App. Ct., 202, 205-206 (2014); *Culhane v. Aurora Loan Servs. of Neb.*, 708 F. 3d 282 (1<sup>st</sup> Cir. 2013).<sup>35</sup>

Claimed 1937 Title Issue. Rungu argues - based upon the language set forth in a 1937 deed - that Rungu's predecessor in interest (Emond) held only an undivided 50% tenancy in common interest in the property at the time of his death. Rungu reasons that the rule set forth in *Fulton v. Katsowney*, 342 Mass. 503 (1961) (interpreting G.L. 184, § 7 prior to the 1973 amendment) is applicable to this case.<sup>36</sup> Rungu relies on a recently conducted title examination that purportedly identified the *Fulton v.*

<sup>35</sup> Under Massachusetts law, a "void" contract or agreement is one that is of no effect whatsoever; it is a mere nullity, and incapable of confirmation or ratification. *Allis v. Billings*, 47 Mass. 415, 417 (1843). A "voidable" contract or agreement is one that is "injurious to the rights of one party, which he may avoid at his election." *Ball v. Gilbert*, 53 Mass. 397, 404 (1847). If necessary, MERS had the power to exercise its option to ratify the action taken by its agent with respect to the assignment even if at the time of performance the agent's act was not in compliance with the corporate resolution. See, *Cabot Corp. v. AVX Corp.*, 448 Mass. 629, 637-643 (2007). Here, Rungu cannot argue that at the time of the assignment MERS in fact held the mortgage and that its interest in the mortgage was assignable.

<sup>36</sup> Rungu states (page 30 of her February 18, 2030 memorandum) that *Fulton v. Katsowney*, at page 504-505, set forth the following rule interpreting G.L. c. 184, § 7 with respect to deeds executed prior to the 1973 amendment: if there are more than two grantees in a deed, and after the list of grantees the phrase "as joint tenants and not as tenants in common" follows, then statutory presumption of § 7, as it existed at the time of the grant, is that there is only a joint tenancy estate in the last two grantees unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy." I.E., if G conveys to A, B, and C "as joint tenants and not as tenants in common," a joint tenancy would be created only between B and C. B and C would hold as tenants in common with A.

*Katsowney* issue in the language of the conveyance set forth in a 1937 deed. Rungu claims that it was only Reynold's undivided 50% tenancy in common interest in the property at his death that passed to Emond, and upon Emond's death passed to his estate. Rungu contends that neither Emond in 2004 nor Rungu in 2005 could have held or mortgaged a 100% interest in the property based upon the conveyance set forth in the 1937 deed, rendering the mortgage descriptions in each instrument inaccurate. From this premise she argues that the 2005 and 2018 foreclosures were defective because they did not effectively convey a 100% interest in property to MERS in 2005 or to Rungu in 2018. Rungu is incorrect.

First, I have already ruled that Rungu is barred from challenging the validity of the 2005 foreclosure (and the validity of the title that was conveyed to Rungu upon delivery of the foreclosure deed) based upon an alleged *Fulton v. Katsowney* title issue dating back to 1937. Rungu cannot use that same alleged title issue to challenge the 2018 foreclosure.

Second, Rungu's factual basis for asserting the existence of a title issue dating back to the 1937 deed is based entirely upon a title report prepared by Attorney John Kriegel. The title report or abstract references non-certified registry of deed records and does not include any opinion regarding whether the title contains a *Fulton v. Katsowney* error. Further, Attorney Kriegel in his November 16, 2019 affidavit does not render an opinion as to whether such a title error exists.<sup>37</sup> In ¶ 1 of his affidavit Attorney Krieger states only that "[b]ack title disclosed the possible existence of missing interests in the back title due to the results of a *Fulton v. Katsowney* ... error" (emphasis added). Speculation does not constitute an admissible expert opinion.

Third, Rungu acted in a manner consistent with the known facts when in 2005 and 2006 she was the high bidder at the foreclosure auction sale and acquired title to the property. She granted a mortgage to MERS conveying her legal interest in the property to secure the loan she obtained from Aegis. MERS assigned that mortgage interest to Deutsche Bank. When Rungu defaulted on her loan obligations Deutsche Bank had every right to foreclose on whatever interest in the property Rungu had granted through her conveyance of the mortgage.

The issue in this summary process action is whether Deutsche Bank has a superior

<sup>37</sup> While I have determined that Attorney Kriegel did not offer a competent expert opinion, Deutsche Bank's November 19, 2019 motion to strike the Kriegel affidavit is DENIED.

interest in the property to whatever interest in the property Rungu might have. That remains true whether Rungu held sole title to the property or held an undivided 50% interest in the property. Rungu had the right to grant a mortgage to MERS conveying whatever legal interest she held in 2006 and Deutsche Bank had the legal right (as successor mortgagee through assignment) to foreclose on Rungu's mortgaged interest in property. Once Rungu's equity of redemption was extinguished upon foreclose, she no longer held any legal or equitable interest in the property. The purported other tenant(s) in common or co-tenants (that Rungu claims hold an undivided 50% interest in the property) never challenged the 2005 foreclosure, the 2018 foreclosure or Deutsche Bank's right to bring this summary process action seeking to recover possession of the property from Rungu. Rungu does not have standing in this summary process action assert the rights of these purported tenant(s) in common.

Validity of 2018 Foreclosure. To properly exercise the power of sale to foreclose on a mortgage in accordance with G.L. c. 183, §21 and G.L. c. 244, §11-17 the mortgage must either hold the mortgage note or be authorized to act as the authorized agent of the note holder. *Eaton v. Federal National Mortgage Association*, 462 Mass. 569, 589 (2012) (Fn. 28 states that the mortgagee "may establish [its note holder status] at the time of the foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G. L. c. 183, § 54B"). See also, *Strawbridge v. Bank of N.Y. Mellon*, 91 Mass. App. Ct. 827, 830-831 (2017). In response to *Eaton*, the legislature enacted G.L. c. 244, § 35C. Section 35C provides that "a creditor shall not cause publication of a notice of foreclosure, as required under Section 14, when the creditor knows or should know that the mortgagee is neither the holder of the mortgage note nor the authorized agent of the note holder." Section 35C requires that "prior to publishing a notice of a foreclosure sale, as required by section 14, the . . . duly authorized agent of the creditor, shall certify compliance with this subsection in an affidavit based upon a review of the creditor's business records."

I rule that the right to cure/default notice sent to Rungu complied strictly with the mortgage and G.L. c. 244, § 35A. Rungu has presented no evidence to challenge the legal sufficiency of the right to cure/default notice under the terms of mortgage and the statutory power of sale.

I rule that Deutsche Bank, through its legal counsel, prepared a written Notice of Intent to Foreclose or the Notice of Sale that was complied strictly with the provisions of G.L. c. 244, § 14. The Notice of Sale was addressed to Rungu at her residence and mailed by certified mail at least 30 days prior to the scheduled date of the foreclosure sale. Rungu has presented no evidence to challenge the legal sufficiency of the notice of sale.

From the date the notice of intent to sell was sent to Rungu (July 23, 2018) and continuing to the date of the foreclosure sale on August 22, 2018 the evidence in the summary judgment record establishes that Deutsche Bank was the holder of Rungu's promissory note and mortgage.

Validity of 2018 Foreclosure as it Relates to Claim for Possession. In a summary process action, the introduction in evidence of certified copies of the foreclosure deed and the affidavit of sale (in statutory form or that meets the particular requirements of G.L. c. 244, § 15) are sufficient to establish the plaintiff's prima facie case for possession. *Federal National Mortgage Association v. Hendricks*, 463 Mass. 635, 642 (2012), citing to *Bank of N.Y. v. Bailey*, 460 Mass. 327, 334 (2011) and *Deutsche Bank Nat'l Trust Co. v. Gabriel*, 81 Mass. App. Ct. 564, 568-570 (2012).

"If a plaintiff makes a prima facie case, it is incumbent on a defendant to counter with his own affidavit or acceptable alternative demonstrating at least the existence of a genuine issue of material fact to avoid summary judgment." *Hendricks*, at 642. Rungu have not pointed to any evidence in the summary judgment record sufficient to raise a genuine disputed issue of material fact regarding Deutsche Bank's prima facie showing that it complied with the statutory power of sale and the mortgage when it conducted the August 22, 2018 foreclosure sale of Rungu's property.

Based upon the undisputed facts set forth in the summary judgment record I rule as a matter of law that (1) Rungu was in default on her mortgage loan obligations continuously since 2009; (2) at the time of the foreclosure sale Deutsche Bank was the mortgagee of Rungu's mortgage and held Rungu's promissory note; (3) on August 22, 2018 Deutsche Bank foreclosed on Rungu's interest in the property in strict compliance with the provisions of G.L. c. 244, §§ 11-15. See *Bank of New York v. Bailey*, 460 Mass. 327 (2011); *Eaton v. Federal National Mortgage Association*, supra.; *Federal National Mortgage Association v. Hendricks*, supra. and *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226 (2015); (4) Deutsche Bank was the high bidder at the August 22, 2018 foreclosure sale; (5) the August

22, 2018 foreclosure sale extinguished Rungu's equity of redemption and thus extinguished her legal and equitable interest in the property; (6) the Affidavit of Sale executed on September 11, 2018 complies with the provisions of G.L. c. 244, § 15. See, *Federal National Mortgage Association v. Hendricks*, supra.; (7) on September 11, 2018 Deutsche Bank conveyed the property (being the foreclosed interest in the property to Deutsche Bank by means of a foreclosure deed; (8) Deutsche Bank has been a lawful owner of property continuously since September 11, 2018; (9) Rungu never occupied the property as a residential tenant at the time of the foreclosure and never entered into a residential tenancy with Deutsche Bank (or any other person with an interest in the property) after the foreclosure; (10) Rungu has remained in possession of the property as a sufferance occupant; (11) on October 26, 2018 Deutsche Bank served Rungu with a legally sufficient notice to vacate the property (dated October 23, 2018); however Rungu has failed to vacate and surrender possession of the property; and (12) Deutsche Bank's right to possession of the property is superior to any possessory interest that Rungu currently has as a sufferance occupant of the property.

Accordingly, I rule as a matter of law that Deutsche Bank is entitled to recover possession of the property from Rungu. Summary judgment shall enter in favor of Deutsche Bank on its claim for possession against Rungu.

Deutsche Bank's Claim for Use and Occupancy Damages. A sufferance occupant is liable to pay rent for such time as he remains in possession of the property. G.L. c. 186, § 3.

Rungu has remained in possession of the property continuously since September 11, 2018 at the sufferance of a lawful owner of the property, Deutsche Bank. Rungu has never paid Deutsche Bank any rent for her continued use and occupancy of the property from September 11, 2018 to February 2021.

There is a two-family dwelling (identified, As 44-46 Keene Street) situated on the property. Although Deutsche Bank is seeking to recover possession of the entire parcel of land, Deutsche Bank's use and occupancy claim seeks to recover damages only for that portion of the property (identified as the apartment at 44 Keene Street) that Rungu occupies as her residence. The undisputed evidence in the summary judgment record (based on the January 22, 2019 affidavit Paul Ratna Yem, a licensed real estate broker doing business in Massachusetts) establishes that the fair rental value of the property occupied by Rungu has



been \$1,200.00 per month. Rungu have not presented any competent evidence to raise a disputed issue of material fact pertaining to the fair rental value of the property.

I find and rule that the fair and reasonable rental value for Rungu's use and occupancy of the property has been \$1,200.00 per month from October 2018 to February 2021; and that the amount due Deutsche Bank from Rungu for this twenty-nine (29) month and twenty (20) day period totals \$35,600.00.<sup>38</sup>

Accordingly, I rule as a matter of law that Deutsche Bank is entitled to recover use and occupancy damages from Rungu in the amount of \$35,600.00.<sup>39</sup>

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**ORDER FOR ENTRY OF JUDGMENT CONSISTENT WITH HOUSING COURT  
DEPARTMENT STANDING ORDER 5-20**

Based upon all the credible evidence submitted as part of the summary judgment record in light of the governing law, it is **ORDERED** that:

1. Judgment shall enter (in accordance with ¶3 of this order) for Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3 against defendant Grace Rungu on the plaintiff's claim for possession;
2. Judgment shall enter (in accordance with ¶3 of this order) for plaintiff Deutsche Bank National Trust Company, As Trustee Of Morgan Stanley Home Equity Loan Trust 2006-3 Mortgage Pass Through Certificates Series 2006-3 and against defendant Grace Rungu on the plaintiff's claim for use and occupancy damages in the amount of \$35,600.00, plus statutory costs and interest;
3. The plaintiff shall file by March 2, 2021 an affidavit setting forth the amount of use and occupancy payments Rungu has made to Deutsche Bank since the February 19, 2020 order. The court will thereafter amend the amount of damages set forth in ¶2 to credit such payments that Rungu made to

<sup>38</sup> For the month of September 2018 the amount due was \$800.00 (\$40.00 per day x 20 days).

<sup>39</sup> Rungu is subject to a \$1,200.00 per month interim use and occupancy payment order (commencing March 2020) issued by the court (Sullivan, J.) on February 19, 2020. The summary judgment record does not include evidence as to what amounts, if any, Rungu has paid pursuant to the order.

Deutsche Bank since March 2020; and then judgment shall enter forthwith in accordance with ¶s 1 and 2 of this order as amended;

4. Execution for possession and damages shall issue on June 1, 2021; however the plaintiff shall not levy on the execution for possession prior to July 1, 2021 or on the day next after the date on which any applicable eviction moratorium order/regulation expires or is rescinded, **WHICHEVER IS LATER.**
5. The defendant shall pay the plaintiff \$1,200.00 per month for her use and occupancy of the property by the 5<sup>th</sup> day of the month commencing in March 2021, and by the 5<sup>th</sup> day of each month thereafter while defendant remains in possession of the property.

**SO ORDERED.**



**JEFFREY M. WINIK**  
**ASSOCIATE JUSTICE (Recall Appt.)**

February 23, 2021

COMMONWEALTH OF MASSACHUSETTS  
THE TRIAL COURT

WORCESTER, ss

HOUSING COURT DEPARTMENT  
CENTRAL DIVISION  
DOCKET NO: 18-SP-5830

U.S. BANK NATIONAL ASSOCIATION AS  
TRUSTEE ON BEHALF OF THE HOLDERS  
OF THE ASSET BACKED SECURITIES  
CORPORATION HOME EQUITY LOAN  
TRUST SERIES AMQ2006-HE7 ASSET  
BACKED PASS THROUGH CERTIFICATES,  
SERIES, AMQ 2006-HE7

PLAINTIFF

V.

THERESA CHERRY, ROBERT DANEREAU  
CHRISTOPHER CHERRY  
DEFENDANTS

**RULING ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT<sup>1</sup>**

A hearing was held on April 24, 2019. After reviewing the written submissions and oral argument the Court rules as follows:

**UNDISPUTED FACTS**

1. Defendants, Theresa A. Cherry and Robert Dansereau, ("Defendants") on August 9, 2005, executed a promissory note payable to Ameriquest Mortgage Company, in the principal amount of \$230,697.00, (the "Note"). A true and accurate copy of the Note is **Exhibit A to Plaintiff's Memorandum** and is incorporated by reference.

<sup>1</sup> The Defendants did not file an Opposition. Instead they filed a Motion to Dismiss. As the Defendants are self-represented the Court will treat the Motion to Dismiss as the opposition to the present Motion.

2. To secure their obligation under the Note, the Defendants granted a mortgage to Ameriquest Mortgage Company (the "Mortgage") in their real property 21 Baxter Street, Worcester, Massachusetts, which Mortgage was recorded in the Worcester County Registry of Deeds in Book 39655 at Page 185. A true and accurate copy of the Mortgage is Exhibit B to Plaintiff's Memorandum and is incorporated by reference.
3. The Mortgage was assigned to Plaintiff, by virtue of an assignment of mortgage dated August 21, 2006, (the "Assignment of Mortgage") and the Assignment of Mortgage was recorded on January 11, 2017, in the Worcester County Registry of Deeds in Book 56598, at Page 303. A true and accurate copy of the Assignment of Mortgage is Exhibit C to Plaintiff's Memorandum.
4. Defendants breached their obligations, under the Note and Mortgage by failing to make the required monthly loan payments when due.
5. On or about July 19, 2016, a Notice of Right to Cure, pursuant to G.L.c. 244, §35A, and Paragraph 22 of the Mortgage was sent to the Defendants indicating *inter alia*, that the loan was in default and outlined the timeline to cure the default. A true and accurate copy of the notice is Exhibit D to Plaintiff's Memorandum and is incorporated by reference.
6. On or about July 19, 2016, a Notice of Right to Request a Loan Modification, pursuant to G.L. c. 244, §35B, was sent to the Defendants. A true and accurate copy of the notice is Exhibit E to Plaintiff's Memorandum and is incorporated by reference.

7. Defendants did not assert in a court action prior to the foreclosure that they disputed the payment default.
8. On or about June 27, 2018, the Notice of Sale was mailed to the mortgagor. True and accurate copies of the Notices of Sale are Exhibit F of Plaintiff's Memorandum and are incorporated by reference.
9. This foreclosure sale took place on or about July 24, 2018, with a Certificate of Entry recorded on November 23, 2018, in Book 59728 at Page 199 in the Worcester County Registry of Deeds. A true and accurate copy of the Certificate of Entry is Exhibit G of Plaintiff's Memorandum and is incorporated by reference.
10. The Plaintiff has recorded a foreclosure deed evidencing its ownership of the Property. The deed was recorded November 23, 2018, in the Worcester County Registry of Deeds in Book 59728, at Page 200. A true and accurate copy of the foreclosure deed is Exhibit H of Plaintiff's Memorandum and is incorporated by reference.
11. Plaintiff recorded its affidavit of continuing note holder status in the Worcester County Registry of Deeds on November 23, 2018, in Book 59728 at Page 204, establishing that Plaintiff held the underlying promissory note at all relevant times. A certified copy of the affidavit is Exhibit I of Plaintiff's Memorandum and is incorporated by reference.
12. Plaintiff recorded its affidavit regarding compliance with G.L. c. 244 §35A and §35B, in the Worcester County Registry of Deeds on February 2, 2018, in Book 58400 at Page 379 establishing that Plaintiff complied with the pre-foreclosure

statutory requirements. A certified copy of the affidavit is Exhibit J of Plaintiff's Memorandum and is incorporated by reference.

13. Defendants executed a loan modification in April 2012. A true and accurate copy of the Loan Modification is Exhibit K of Plaintiff's Memorandum and is incorporated by reference.

14. In this case, the assignment of mortgage was on record prior to the sending of the notices under G.L.c 244, §14.

#### STANDARD FOR SUMMARY JUDGMENT

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleadings, depositions, answers to interrogatories, admissions, documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976).

In weighing the merits of a motion for summary judgment, the court must determine whether the factual disputes are genuine, and whether a fact genuinely in dispute is material. *Town of Norwood v Adams-Russell Co., Inc.*, 401 Mass. 677, 683 (1988) citing *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986). The substantive law will identify which facts are material and only disputes over facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Carey v New England Organ Bank*, 446 Mass. 270, 278 (2006); *Molly A. v Commissioner of the Department of Mental Retardation*, 69 Mass.App.Ct. 267, 268 n. 5 (2007). In order to determine if a dispute about a material fact is genuine, the court must decide whether "the

evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." *Anderson v Liberty Lobby, Inc.*, 477 U.S. at 248.

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

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

To prevail in a summary process action involving foreclosed property where the validity of the foreclosure is challenged, the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. To prove this element of its claim for possession, the post-foreclosure plaintiff must show "that the title was acquired strictly according to the power of sale provided in the mortgage." *Wayne Inv. Corp. v. Abbott*, 350 Mass. 775, 775 (1966). See *Pinti v. Emigrant Mortg. Co., Inc.*, 472 Mass. 226 (2012); *Bank of New York v. Bailey*, 460 Mass. 327 (2011). A foreclosure deed and affidavit that meets the requirements of G.L. c. 244, §15 is evidence that the power of sale was duly executed and constitutes prima facie evidence of the plaintiff's case in chief. See *Federal National Mortgage Association v. Hendricks*, 463 Mass. 635, 641-642 (2012).

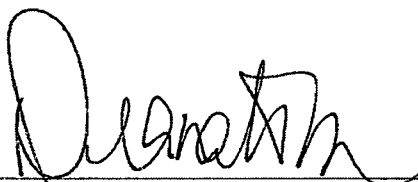
Once a plaintiff makes a prima facie case, the burden shifts to the opposing party to demonstrate, through the use of evidence that would be admissible at trial, specific facts showing that there exists a genuine issue for trial. If a defendant fails to show the existence of a genuine issue of material fact in response to a motion for summary judgment by contesting factually a prima facie case of compliance with G.L. c. 244, §14, such failure generally should result in judgment for the plaintiff. *Federal National Mortgage Association v. Hendricks*, 463 Mass. at 642.

### RULING

The Court must find that based upon the undisputed facts the Plaintiff has met its prima facie burden that it is entitled to possession of the real property at 21 Baxter Street, Worcester, MA. Therefore the burden shifts to the Defendants to show that there is a genuine issue of material fact such that it defeats the Plaintiff's claim. Here the Defendants' argument is that the Plaintiff lacks standing due to form and timing of the assignment of the mortgage to the Plaintiff. Even if the assignment were defective as the Defendants allege, that would render the assignment voidable, not void and the Defendants lack standing to challenge such. See *Abate v. Fremont Inv. & Loan*, 2012 Mass. LCR LEXIS 134, 22-23 (Mass. Land Ct.2012).

**For the above stated reasons the Plaintiff's Motion For Summary Judgment for Possession and as to Defendants' counterclaims is ALLOWED and Judgment shall enter for the Plaintiff for possession.**

May 2, 2019

  
Diana H. Horan, First Justice



App. No. 24A470

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**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 c**

**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**

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



Outlook

---

**FAR-29622 - Notice: FAR denied**

---

From SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us>

Date Thu 6/27/2024 6:01 PM

To liz3211@live.com <liz3211@live.com>

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-29622

JPMORGAN CHASE BANK, N.A.

vs.

SHANE D'ANDREA & others

Central Housing Court No. 20H85SP000784

A.C. No. 2022-P-0481

**NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW**

Please take note that on June 27, 2024, the application for further appellate review was denied.

Very truly yours,  
The Clerk's Office

Dated: June 27, 2024

To: Dallin Rex Wilson, Esquire  
Anne Virginia Dunne, Esquire  
Elizabeth D'Andrea

## FAR-29406 - Notice: FAR denied

**SJC Full Court Clerk SJCCommClerk@sjc.state.ma.us via geeseinfight.com**

12:50 PM

to grace

Supreme Judicial Court for the Commonwealth of Massachusetts

RE: Docket No. FAR-29406

DEUTSCHE BANK NATIONAL TRUST COMPANY, trustee

vs.

GRACE RUNGU

Housing Court. Northeast No. 18H77SP005705

A.C. No. 2021-P-0931

### NOTICE OF DENIAL OF APPLICATION FOR FURTHER APPELLATE REVIEW

Please take note that on January 12, 2024, the application for further appellate review was denied.

Francis V. Kenneally Clerk

Dated: January 12, 2024

To: Jeffrey B. Loeb, Esquire

Kevin Polansky, Esquire

Christine Kingston, Esquire

Lyndsey Stults, Esquire

Grace Rungu

Dawn Thompson

Sarah McKee

Karen Merritt

Jeb Mays

Esther Ngotho

Lynne Layton

James Jennings

Jay H. Lively

Grace C. Ross

Alton King,

## Fwd: FAR-29406 - Notice of docket entry

----- Forwarded message -----

From: **SJC Full Court Clerk** <[SJCCommClerk@sjc.state.ma.us](mailto:SJCCommClerk@sjc.state.ma.us)>

Date: Fri, Apr 19, 2024, 6:00 PM

Subject: FAR-29406 - Notice of docket entry

To: <[Kenyaqueen321@gmail.com](mailto:Kenyaqueen321@gmail.com)>

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: No. FAR-29406

DEUTSCHE BANK NATIONAL TRUST COMPANY, trustee

vs.

GRACE RUNGU

### NOTICE OF DOCKET ENTRY

Please take note the following entry was made on the docket.

Petition for en banc further appellate review filed by Grace Rungu. (4/19/2024: (Treating as a motion for reconsideration) The motion is denied).

Very truly yours,

The Clerk's Office

Dated: April 19, 2024

To:

Jeffrey B. Loeb, Esquire

Kevin Polansky, Esquire

Christine Kingston, Esquire

Lyndsey Stults, Esquire

Grace Rungu

Dawn Thompson

Sarah McKee

Karen Merritt

Jeb Mays

Esther Ngotho


Lynne Layton

James Jennings

Jay H. Lively

Grace C. Ross

Alton King, Jr.

 Outlook

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**FW: FAR-29588 - Notice: FAR denied**

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From Maura Looney <maura.looney@jud.state.ma.us>

Date Thu 11/21/2024 6:56 PM

To tazmdevel2456@gmail.com <tazmdevel2456@gmail.com>; liz3211@live.com <liz3211@live.com>

Please see below.

I redacted the pro se email address.

If I can assist in any other manner, do not hesitate to contact me.

Best,

Maura A. Looney, Clerk

Supreme Judicial Court

Office of the Clerk for the Commonwealth John Adams Courthouse, Room 1-400 One Pemberton Square

Boston, MA 02108-1724

t617-557-1189

-----Original Message-----

From: SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us>

Sent: Friday, April 19, 2024 1:11 PM

To: XXXXXXXXXXXXXXXXXXXXXXXXXX

Subject: FAR-29588 - Notice: FAR denied

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. FAR-29588

U.S. BANK NATIONAL ASSOCIATION, trustee

vs.

THERESA A. CHERRY

Appeals Ct-Single Justice No. 2022-J-0058; 18H85SP005830 A.C. No. 2022-P-0248

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: Jennifer Marie Iarocci, Esquire  
Shawn Michael Masterson, Esquire  
Patrick M. Toney, Esquire  
Steven Michael Stoehr, Esquire  
Kelsey Bagge, Esquire  
Theresa A. Cherry  
Matthew Steele, Esquire



App. No. 24A470

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**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 d**

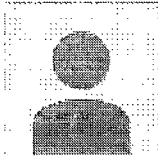
**Margaly Philippe**

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

---

**January 2, 2025**

FAR-29662 - Notice of docket entry



SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us>

Mon, Aug 5,  
7:24 PM

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: No. FAR-29662

MARGALY PHILIPPE

vs.

WELLS FARGO BANK, N.A., trustee

NOTICE OF DOCKET ENTRY

Please take note that on August 5, 2024, the following entry was made on the docket.

DENIAL of petition to reconsider denial of FAR application.

Very truly yours,

The Clerk's Office

Dated: August 5, 2024


To:

Margaly Philippe

Kevin Polansky, Esquire

Peter M. Ayers, Esquire

Tommy L. Morris

 Outlook

---

**FAR-29622 - Notice of docket entry**

---

From SJC Full Court Clerk <SJCCommClerk@sjc.state.ma.us>

Date Mon 8/5/2024 7:24 PM

To liz3211@live.com <liz3211@live.com>

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: No. FAR-29622

JPMORGAN CHASE BANK, N.A.

vs.

SHANE D'ANDREA & others

**NOTICE OF DOCKET ENTRY**

Please take note that on August 5, 2024, the following entry was made on the docket.

DENIAL of petition to reconsider denial of FAR application.

Very truly yours,

The Clerk's Office

Dated: August 5, 2024

To:

Dallin Rex Wilson, Esquire

Anne Virginia Dunne, Esquire

Elizabeth D'Andrea

## FAR-29406 - Notice of docket entry

From: **SJC Full Court Clerk** <[SJCCommClerk@sjc.state.ma.us](mailto:SJCCommClerk@sjc.state.ma.us)>

Date: Mon, Aug 5, 2024, 7:24 PM

Subject: FAR-29406 - Notice of docket entry

To: <[Kenyaqueen321@gmail.com](mailto:Kenyaqueen321@gmail.com)>

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: No. FAR-29406

DEUTSCHE BANK NATIONAL TRUST COMPANY, trustee

vs.

GRACE RUNGU

### NOTICE OF DOCKET ENTRY

Please take note that on August 5, 2024, the following entry was made on the docket.

DENIAL of petition to reconsider denial of FAR application.

Very truly yours,

The Clerk's Office

Dated: August 5, 2024

To:

Jeffrey B. Loeb, Esquire

Kevin Polansky, Esquire

Christine Kingston, Esquire

Lyndsey Stults, Esquire

Grace Rungu

Dawn Thompson

Sarah McKee

Karen Merritt

Jeb Mays

Esther Ngotho

Lynne Layton

James Jennings

Jay H. Lively

Grace C. Ross

Alton King, Jr.

Dated: August 5, 2024

Appendix 7 d

To:

Jennifer Marie Iarocci, Esquire  
Shawn Michael Masterson, Esquire  
Patrick M. Toney, Esquire  
Steven Michael Stoehr, Esquire  
Kelsey Bagge, Esquire  
Theresa A. Cherry  
Matthew Steele, Esquire

24-6280

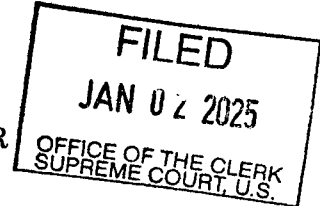
App. No. 24A470

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**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*

---

**MOTIONS FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

**Margaly Philippe**

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

---

**January 2, 2025**

24-6280  
App. No. 24A470

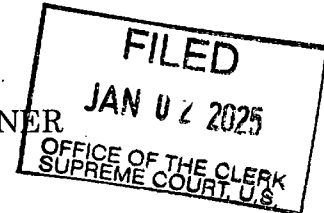
ORIGINAL

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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

---

APPENDIX e

---

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

---

January 2, 2025

---

## Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## Fourteenth Amendment

### Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

### Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

### Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.



## Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

## Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**15 USCS § 1601**

Current through Public Law 118-157, approved December 17, 2024.

**United States Code Service > TITLE 15. COMMERCE AND TRADE (Chs. 1 – 123) > CHAPTER 41. CONSUMER CREDIT PROTECTION (§§ 1601 – 1693r) > CONSUMER CREDIT COST DISCLOSURE (§§ 1601 – 1667f) > GENERAL PROVISIONS (§§ 1601 – 1616)**

**§ 1601. Congressional findings and declaration of purpose**

**(a) Informed use of credit.** The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this title [15 USCS §§ 1601 et seq.] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

**(b) Terms of personal property leases.** The Congress also finds that there has been a recent trend toward leasing automobiles and other durable goods for consumer use as an alternative to installment credit sales and that these leases have been offered without adequate cost disclosures. It is the purpose of this title [15 USCS §§ 1601 et seq.] to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.

**History****HISTORY:**

May 29, 1968, P. L. 90-321, Title I, Ch. 1, § 102, 82 Stat. 146; Oct. 28, 1974, P. L. 93-495, Title III, § 302, 88 Stat. 1511; March 23, 1976, P. L. 94-240, § 2, 90 Stat. 257.

United States Code Service  
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## **42 USCS § 1981, Part 1 of 4**

Current through Public Law 118-157, approved December 17, 2024.

**United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 – 164) > CHAPTER 21. CIVIL RIGHTS (§§ 1981 – 2000h-6) > GENERALLY (§§ 1981 – 1996b)**

### **§ 1981. Equal rights under the law**

(a) **Statement of equal rights.** All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) **“Make and enforce contracts” defined.** For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) **Protection against impairment.** The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

### **History**

#### **HISTORY:**

R.S. § 1977; Nov. 21, 1991, *P. L. 102-166*, Title I, § 101, *105 Stat. 1071*.

United States Code Service  
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End of Document



User Name: jay.lively22@gmail.com

Date and Time: Friday, January 3, 2025 3:50:00 AM EST

Job Number: 241890467

## Document (1)

1. 42 USCS § 1982

Client/Matter: -None-

Search Terms:

Search Type: Natural Language

Narrowed by:

Content Type

Narrowed by  
-None-



## **42 USCS § 1982**

Current through Public Law 118-157, approved December 17, 2024.

**United States Code Service > TITLE 42. THE PUBLIC HEALTH AND WELFARE (Chs. 1 – 164) > CHAPTER 21. CIVIL RIGHTS (§§ 1981 – 2000h-6) > GENERALLY (§§ 1981 – 1996b)**

### **§ 1982. Property rights of citizens**

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All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

### **History**

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#### **HISTORY:**

R. S. § 1978.

United States Code Service  
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End of Document

## 42 U.S. Code § 1983 - Civil action for deprivation of rights

- U.S. Code
- Notes

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub. L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. 104-317, title III, § 309(c), Oct. 19, 1996, 110 Stat. 3853.)

## 42 U.S. Code § 1985 - Conspiracy to interfere with civil rights

**(1) Preventing officer from performing duties**

If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district, or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official duties;

**(2) Obstructing justice; intimidating party, witness, or juror**

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

**(3) Depriving persons of rights or privileges**

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted

authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

(R.S. § 1980.)



**42 USC 12101: Findings and purpose**

Text contains those laws in effect on January 4, 1995

**From Title 42-THE PUBLIC HEALTH AND WELFARE****CHAPTER 126-EQUAL OPPORTUNITY FOR INDIVIDUALS WITH DISABILITIES****Jump To:**

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**§12101. Findings and purpose****(a) Findings**

The Congress finds that-

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

**(b) Purpose**

It is the purpose of this chapter-

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

( Pub. L. 101-336, §2, July 26, 1990, 104 Stat. 328 .)

**REFERENCES IN TEXT**

This chapter, referred to in subsec. (b), was in the original "this Act", meaning Pub. L. 101-336, July 26, 1990, 104 Stat. 327, which is classified principally to this chapter. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

**SHORT TITLE**

Section 1(a) of Pub. L. 101-336 provided that: "This Act [enacting this chapter and section 225 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, amending section 706 of Title 29, Labor, and sections 152, 221, and 611 of Title 47, and enacting provisions set out as notes under sections 12111, 12131, 12141, 12161, and 12181 of this title] may be cited as the 'Americans with Disabilities Act of 1990'."

## **Massachusetts Constitution Article I as Amended in 1976**

### **PART THE FIRST**

#### *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts*

Article CVI.

Article I of Part the First of the Constitution is hereby annulled and the following is adopted:-

All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equality under the law shall not be denied or abridged because of sex, race, color, creed or national origin.

### **Chapter 15 of Acts of 1692**

#### **CHAP. 0015. AN ACT FOR PREVENTION OF FRAUDS AND PERJURIES.**

For prevention of many fraudulent practices which are commonly endeavoured to be upheld byperjury and subornation of perjury,-

Be it enacted and ordainedby the Governour, Council and Representatives convened in General Court, and by the authority of the same,

[Sect. 1.] That from and after the last day of December in this present year, one thousand six hundred ninety and two, all leases, estates, interests of freehold or

term of years, or any uncertain interest of, in, or out of any messuages, lands, tenements or hereditaments, made or created by livery and seisin only, or by parole, and not put in writing and signed by the parties so making or creating of the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parole leases or estates, or any former law or usage to the contrary notwithstanding: except, nevertheless, all leases not exceeding the term of three years from the making thereof whereupon the rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.

And, moreover, that no leases, estates or interests, either of freehold or term of years, or any uncertain interest of, in, to or out of any messuages, lands, tenements or hereditaments, shall, at any time after the said last day of December, be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendring the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

And be it further enacted by the authority aforesaid,

[Sect. 2.] That from and after the said last day of December, no action shall be brought (1) whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; (2) or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; (3) or to charge any person upon any agreement made upon consideration of marriage; (4) or upon any contract or\* sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some Other person thereunto by him lawfully authorized.

And be it further enacted by the authority aforesaid,

[Sect. 3.] That from and after the said last day of December, all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else shall be utterly void and of none effect.

[Sect. 4.] And, moreover, no devise in writing of lands, tenements or hereditaments, or any clause thereof, shall, at any time after the said last day of December, be revocable otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing or obliterating the same by

the testator himself, or in his presence and by his directions and consent; (2) but all devises and bequests of lands and tenements shall remain and continue in full force until the same be bixrnt, cancelled, torn or obliterated by the testator, or his direction in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same; any former law or usage to the contrary notwithstanding. And be it

further enacted by the authority aforesaid, [Sect. 5.] That from and after the said last day of December, all declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by"his last will in writing, or else they shall be utterly void and of none effect: provided, alicays, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this act had not been made, anything herein before contained to the contrary notwithstanding. And be it further enacted,

[Sect. 6.] That all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same by such last will or devise, or else shall be utterly void and of none effect.

And be it further enacted by the authority aforesaid,

[Sect. 7.] That from and after the said last day of December, no contract for the sale of any goods, wares and merchandizes, for the rice of ten pounds or upwards, shall be allowed to be good, except the uyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

And, for prevention of fraudulent practices in setting up nuncupative wills, which have been the occasion of much perjury,-

Be it enacted by the authority aforesaid,

[Sect. 8.] That from and after the aforesaid last day of December, no nuncupative will shall be good, whereby the estate thereby bequeathed shall exceed the value of thirty pounds, that is not proved by the oaths of three witnesses (at the least) that were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect; nor unless such, nuncupative will

were made in the time of the last sickness of the deceased, and in the house of his or their habitation or dwelling, or where he or she hath been resident for the space of ten days or more next before the making of such will, except where such person was surprized or taken sick, being from his own home, and dyed before he returned to the place of his or her dwelling.

And be it further enacted,

[Sect. 9.] That after six months passed after the speaking of the pretended testamentary words, no testimony shall be received to prove any will nuncupative, except the said testimony, or the substance thereof, were committed to writing within six days after the making of the said will.

And be it further enacted,

[Sect. 10.] That no letters testamentary or probate of any nuncupative will shall pass the seal of any court till fom-teen days at the least after the decease of the testator be fully expired, nor shall any nuncupative will be at any time received to be proved, unless process have first issued to call in the widow or next of kindred to the deceased, to the end they may contest the same if they please. And be it further enacted,

[Sect. 11.] That no will in wiiting, concerning any goods or chattels or personal estate, shall be repealed, nor shall any clause, devise or bequest therein be altered or changed by any words or will, by word of mouth only, except the same be in the life of the testator, committed to writing, and read to the testator and allowed by him, and proved to be so done by three witnesses at the least: provided, always, that notwithstanding this act, any souldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages and personal estate as he or they might have done before the making of this act. \\_Passed October 22.

### **Chapter 93, Section 102: Equal rights; violations; civil actions; costs**

Section 102. (a) All persons within the commonwealth, regardless of sex, race, color, creed or national origin, shall have, except as is otherwise provided or permitted by law, the same rights enjoyed by white male citizens, to make and enforce contracts, to inherit, purchase, to lease, sell, hold and convey real and personal property, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) A person whose rights under the provisions of subsection (a) have been violated may commence a civil action for injunctive and other appropriate equitable relief, including the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(c) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that any individual is denied any of the rights protected by subsection (a).

(d) An aggrieved person who prevails in an action authorized by subsection (b), in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

### **Chapter 93, Section 103: Equal rights; age and handicap; violations; remedies**

Section 103. (a) Any person within the commonwealth, regardless of handicap or age as defined in chapter one hundred and fifty-one B, shall, with reasonable accommodation, have the same rights as other persons to make and enforce contracts, inherit, purchase, lease, sell, hold and convey real and personal property, sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article CXIV of the Amendments to the Constitution.

(b) Any person whose rights under the provisions of subsection (a) have been violated may commence a civil action for injunctive and other appropriate equitable relief, including, but not limited to, the award of compensatory and exemplary damages. Said civil action shall be instituted either in the superior court for the county in which the conduct complained of occurred, or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

(c) A violation of subsection (a) shall be established if, based upon the totality of circumstances, it is shown that any individual is denied any of the rights protected by subsection (a).

(d) An aggrieved person who prevails in an action authorized by subsection (b), in addition to other damages, shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be determined by the court.

### **MGL Chapter 183 §21 "Statutory power of sale" in mortgage**

Section 21. The following "power" shall be known as the "Statutory Power of Sale", and may be incorporated in any mortgage by reference:

(POWER.)

But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by public auction on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, on or near one of said parcels, or at such place as may be designated for that purpose in the mortgage, first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.

**MGL Chapter 183 §64**

**Discrimination in residential mortgage loans on basis of location of property**

Section 64. No mortgagee shall discriminate, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction, in the granting, withholding, extending, modifying or renewing, or in the fixing of the rates, terms, conditions or provisions of any residential mortgage loan or in any written application therefor on residential real property located in the commonwealth of four or fewer separate households occupied or to be occupied in whole or in part by the applicant, that is within the reasonable service area of such mortgagee, on the basis such property is located in a specific neighborhood or geographical area; provided, however, that it shall not be a violation of this section if the residential mortgage loan is made pursuant to a specific public or private program, the purpose of which is to increase the availability of mortgage loans within a specific neighborhood or geographical area. Nor shall any mortgagee use lending or underwriting standards, policies, systems or practices, that discriminate in practice or that discriminate in effect, on a basis that is arbitrary or unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction. The preceding sentence shall not preclude a mortgagee from:

(a) requiring reasonable and uniformly applied application fees,



(b) utilizing income standards which are reasonable in relation to the amount of the loan requested and which shall be disclosed to each prospective applicant, or

(c) uniformly refusing to accept applications because of a lack of lendable funds.

Nor shall any mortgagee make any oral or written statement, in advertising or otherwise, to applicants or prospective applicants that would discourage in an arbitrary manner or in a manner that is unsupported by a reasonable analysis of the lending risks associated with a residential mortgage transaction, a reasonable person from making or pursuing an application.

The mortgagee shall inform each applicant in writing of the specific reasons for any adverse action on the application for such mortgage loan or for an extension, modification, or renewal of such loan. If the reason for any adverse action taken by a mortgagee is based in whole or in part on the location or condition of the collateral property, the mortgagee shall inform the applicant in writing of the estimated market value of the subject property on which it relied and the lending standards which it used in taking such adverse action. A mortgagee shall not be liable to any seller or agent of the seller of such property on account of the disclosure of the market value of such property estimated according to a reasonable appraisal rendered to the lender as part of the application process.

For the purposes of this section, adverse action shall mean refusal either to grant financing at the terms and for the amount requested or to make a counter offer acceptable to the applicant.

Nothing contained in this section shall preclude a mortgagee from considering sound underwriting practices and the credit-worthiness of the applicant in the contemplation of any such loan. Such practices shall include the following:

- (a) the willingness and the financial ability of the borrower to repay the loan;
- (b) the market value of any real estate proposed as security for any loan;
- (c) diversification of the mortgagee's investment portfolio; and
- (d) the exercise of judgement and care under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their affairs.

Any person claiming to have been aggrieved as a result of a violation of this section may bring a civil action in the district court, or housing court where applicable, of the county in which the particular mortgagee involved is located; provided, however, that a person must first exhaust his administrative remedies through the appropriate mortgage review board established pursuant to section fourteen A of chapter one hundred and sixty-seven.

Upon a finding that a mortgagee has committed a violation of this section, the court may award actual damages or punitive damages in the amount of five thousand

dollars, whichever is greater, but in no event less than two thousand five hundred dollars, and may, in its discretion, award court costs and attorney's fees.

If the court finds as a fact that any person claiming to have been aggrieved by this section has intentionally misrepresented a material fact in the mortgage application or if the court finds as a fact that the suit is frivolous, the court may award actual damages or punitive damages in the amount of five hundred dollars, whichever is greater, to the mortgagee, and may in its discretion award court costs and attorney's fees.

## **MGL Chapter 183C**

### **Section 1: Title**

Section 1. This chapter may be known and cited as the Predatory Home Loan Practices Act.

### **Section 2: Definitions**

Section 2. As used in this chapter, the following words shall, unless the context requires otherwise, have the following meanings:—

"Annual percentage rate", the annual percentage rate for a loan calculated according to the Federal Truth In Lending Act (15 U.S.C. 1601 et seq.) and the regulations promulgated thereunder by the federal Bureau of Consumer Financial Protection or chapter 140D and the regulations promulgated thereunder by the commissioner of banks.

"Benchmark rate", the interest rate which the borrower can reduce by paying bona fide discount points; this rate shall not exceed the weekly average yield of United States Treasury securities having a maturity of 5 years, on the fifteenth day of the month immediately preceding the month in which the loan is made, plus 4 percentage points.

"Bona fide loan discount points", loan discount points which are: (1) knowingly paid by the borrower; (2) paid for the express purpose of lowering the benchmark rate; and (3) in fact reducing the interest rate or time-price differential applicable to the loan from an interest rate which does not exceed the benchmark rate.

"Broker", any person who for compensation directly or indirectly solicits, processes, places or negotiates home mortgage loans for others or who closes home mortgage loans which may be in the person's own name with funds provided by others and which loans are thereafter assigned to the person providing the funding of the loans; provided, that broker shall not include a person who is an attorney providing legal services in association with the closing of a home mortgage loan who is not also funding the home loan and is not an affiliate of the lender.

"Commissioner", the commissioner of banks.

"Conventional mortgage rate", the most recently published annual yield on conventional mortgages published by the Board of Governors of the Federal Reserve System, as published in statistical release H.15 or any publication that may supersede it, as of the applicable time set forth in 12 C.F.R. 1026.32(a)(1)(i).

"Conventional prepayment penalty", any prepayment penalty or fee that may be collected or charged in a home loan, and that is authorized by law other than this chapter, provided the home loan (1) does not have an annual percentage rate that exceeds the conventional mortgage rate by more than 2 percentage points; and (2) does not permit any prepayment fees or penalties that exceed 2 per cent of the amount prepaid.

"High cost home mortgage loan", a consumer credit transaction that is secured by the borrower's principal dwelling, other than a reverse mortgage transaction, a home mortgage loan that meets 1 of the following conditions:—

(i) the annual percentage rate at consummation will exceed by more than 8 percentage points for first-lien loans, or by more than 9 percentage points for subordinate-lien loans, the yield on United States Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender; and when calculating the annual percentage rate for adjustable rate loans, the lender shall use the interest rate that would be effective once the introductory rate has expired.

(ii) Excluding either a conventional prepayment penalty or up to 2 bona fide discount points, the total points and fees exceed the greater of 5 per cent of the total loan amount or \$400; the \$400 figure shall be adjusted annually by the commissioner of banks on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1.

"Lender", an entity that originated 5 or more home mortgage loans within the past 12 month period or acted as an intermediary between originators and borrowers on 5 or more home mortgage loans within the past 12 month period, provided that lender shall not include a person who is an attorney providing legal services in association with the closing of a home loan who is not also funding the home loan and is not an affiliate of the lender. For the purposes of this chapter, lender shall also mean a broker.

"Obligor", a borrower, co-borrower, cosigner, or guarantor obligated to repay a home mortgage loan.

"Points and fees", (i) items required to be disclosed pursuant to sections 1026.4(a) and 1026.4(b) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(1) and 209 CMR 32.04(2) of the Code of Massachusetts Regulations, as amended from time to time, except interest or the time-price differential; (ii) charges for items

listed under sections 1026.4(c)(7) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(3)(g) of the Code of Massachusetts Regulations, as amended from time to time, but only if the lender receives direct or indirect compensation in connection with the charge, otherwise, the charges are not included within the meaning of the term "points and fees"; (iii) the maximum prepayment fees and penalties that may be charged or collected under the terms of the loan documents; (iv) all prepayment fees of penalties that are incurred by the borrower if the loan refinances a previous loan made or currently held by the same lender; (v) all compensation paid directly or indirectly to a mortgage broker, including a broker that originates a home loan in its own name in a table-funded transaction, not otherwise included in clauses (i) or (ii); (vi) the cost of all premiums financed by the creditor, directly or indirectly for any credit life, credit disability, credit unemployment or credit property insurance, or any other life or health insurance, or any payments financed by the creditor directly or indirectly for any debt cancellation or suspension agreement or contract, except that insurance premiums or debt cancellation or suspension fees calculated and paid on a monthly basis shall not be considered financed by the creditor. Points and fees shall not include the following: (1) taxes, filing fees, recording and other charges and fees paid to or to be paid to a public official for determining the existence of or for perfecting, releasing or satisfying a security interest; and, (2) fees paid to a person other than a lender or to the mortgage broker for the following: fees for flood certification; fees for pest infestation; fees for flood determination; appraisal fees; fees for inspections performed before closing; credit reports; surveys; notary fees; escrow charges so long as not otherwise included under clause (i); title insurance premiums; and fire insurance and flood insurance premiums, if the conditions in sections 1026.4(d)(2) of Title 12 of the Code of Federal Regulations or 209 CMR 32.04(4)(b) of the Code of Massachusetts Regulations, as amended from time to time, are met. For open-end loans, the points and fees shall be calculated by adding the total points and fees known at or before closing, including the maximum prepayment penalties that may be charged or collected under the terms of the loan documents, plus the minimum additional fees the borrower would be required to pay to draw down an amount equal to the total credit line.

"Total loan amount", the total amount the consumer will borrow, as reflected by the face amount of the note.

### **Section 3: Certification from counselor with third-party nonprofit organization**

Section 3. A creditor may not make a high-cost home mortgage loan without first receiving certification from a counselor with a third-party nonprofit organization approved by the United States Department of Housing and Urban Development, a housing financing agency of this state, or the regulatory agency which has jurisdiction over the creditor, that the borrower has received counseling on the advisability of the loan transaction. Counseling shall be allowed in whole or in part by telephonic means. The commissioner shall maintain a list of approved counseling

programs. A high cost home mortgage loan originated by a lender in violation of this section shall not be enforceable. At or before closing a high cost home mortgage loan, the lender shall obtain evidence that the borrower has completed an approved counseling program.

#### **Section 4: Obligor's ability to make payments; presumption**

Section 4. A lender shall not make a high-cost home mortgage loan unless the lender reasonably believes at the time the loan is consummated that 1 or more of the obligors, will be able to make the scheduled payments to repay the home loan based upon a consideration of the obligor's current and expected income, current and expected obligations, employment status, and other financial resources other than the borrower's equity in the dwelling which secures repayment of the loan.

There shall be a presumption that the borrower is able to make the scheduled payments if, at the time the loan is made, and based on the monthly payments as calculated based on the index plus the margin at the time the loan is made, in the case of loans with lower introductory rates: (1) the borrower's scheduled monthly payments on the loan, including principal, interest, taxes, insurance, and assessments, combined with the scheduled payments for all other debt, do not exceed 50 per cent of the borrowers documented and verified monthly gross income, if the borrower has sufficient residual income as defined in the guidelines established in 38 CFR 36.4337(e) and VA form 26-6393 to pay essential monthly expenses after paying the scheduled monthly payments and any additional debt.

#### **Section 5: Prepayment fees and penalties**

Section 5. A high-cost home mortgage loan shall not contain any provision for prepayment fees or penalties.

#### **Section 6: Limitation on financing of points and fees**

Section 6. A high-cost home mortgage loan shall not include the financing of points and fees greater than 5 per cent of the total loan amount or \$800, whichever is greater.

#### **Section 7: Interest rate increases**

Section 7. A high-cost home mortgage loan shall not contain a provision that increases the interest rate after default. This section shall not apply to interest rate changes in a variable rate loan otherwise consistent with the home loan documents provided that the change in the interest rate is not triggered by the event of default or the acceleration of indebtedness.

#### **Section 8: Limitation on scheduled payments**

Section 8. A high-cost home mortgage loan shall not contain a scheduled payment that is more than twice as large as the average of earlier scheduled payments. This subsection shall not apply when the payment schedule is adjusted to the seasonal or irregular income of the borrower.

**Section 9: Demand for repayment**

Section 9. A high-cost home mortgage loan shall not contain a demand feature that permits the lender to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance, except in the following circumstances:

- (1) there is fraud or material misrepresentation by the consumer in connection with the loan that is not induced by the lender, its employees, or agents;
- (2) the consumer fails to meet the repayment terms of the agreement for any outstanding balance and after the consumer has been contacted in writing and afforded a reasonable opportunity to pay the outstanding balance as outlined within the repayment terms of the agreement; or
- (3) there is any bona fide action or inaction by the consumer that adversely and materially affects the lender's security for the loan, or any right of the lender in such security as provided in the loan agreement.

**Section 10: Periodic payment schedule**

Section 10. A high-cost home mortgage loan shall not contain a payment schedule with regular periodic payments such that the result is an increase in the principal amount.

**Section 11: No fee to modify or defer payment**

Section 11. A lender shall not charge a borrower a fee or other charge to modify, renew, extend or amend a high-cost home mortgage loan or to defer a payment due under the terms of a high-cost home mortgage loan.

**Section 12: Consolidation of payments**

Section 12. A high-cost home mortgage loan shall not include terms pursuant to which more than 2 periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower.

**Section 13: Forum for disputes**

Section 13. Without regard to whether a borrower is acting individually or on behalf of others similarly situated, any provision of a high cost home mortgage loan that allows a party to require a borrower to assert any claim or defense in a forum that is less convenient, more costly, or more dilatory for the resolution of a dispute than a judicial forum established in the commonwealth where the borrower may otherwise properly bring a claim or defense or limits in any way any claim or defense the borrower may have is unconscionable and void.

**Section 14: Lender's payment of contractor**

Section 14. A lender shall not pay a contractor under a home improvement contract from the proceeds of a high cost home mortgage loan other than (i) by an instrument

payable to the borrower or jointly to the borrower and contractor, or (ii) at the election of the borrower, through a third party escrow agent in accordance with terms established in a written agreement signed by the borrower, the lender and the contractor before the disbursement of funds.

### **Section 15: Affirmative claims and defenses available; applicability**

Section 15. (a) Any person who purchases or is otherwise assigned a high-cost home mortgage loan shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original lender or broker of the loan; provided that this subsection shall not apply if the purchaser or assignee demonstrates by a preponderance of the evidence that it:

- (1) has in place at the time of the purchase or assignment of the subject loans, policies that expressly prohibit its purchase or acceptance of assignment of any high-cost home mortgage loans;
- (2) requires by contract that a seller or assignor of home loans to the purchaser or assignee represents and warrants to the purchaser or assignee that either (i) the seller or assignor will not sell or assign any high-cost home mortgage loans to the purchaser or assignee or (ii) that the seller or assignor is a beneficiary of a representation and warranty from a previous seller or assignor to that effect; and
- (3) exercises reasonable due diligence at the time of purchase or assignment of home loans or within a reasonable period of time after the purchase or assignment of the home loans, intended by the purchaser or assignee to prevent the purchaser or assignee from purchasing or taking assignment of any high-cost home mortgage loans; provided, however, that reasonable due diligence shall provide for sampling and shall not require loan by loan review.

(b) Limited to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan plus amounts required to recover costs, including reasonable attorneys' fees, a borrower acting only in an individual capacity may assert claims that the borrower could assert against a lender of the home loan against any subsequent holder or assignee of the home loan as follows:

- (1) A borrower may bring an original action for a violation of this chapter in connection with the loan within 5 years of the closing of a high-cost home mortgage loan;
- (2) A borrower may, at any time during the term of a high-cost home mortgage loan, employ any defense, claim, counterclaim, including a claim for a violation of this chapter, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become 60 days in default, or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan.

(c) This section shall be effective notwithstanding any other provision of law; provided, that nothing in this section shall be construed to limit the substantive rights, remedies or procedural rights available to a borrower against any lender, assignee or holder under any other law. The rights conferred on borrowers by subsections (a) and (b) are independent of each other and do not limit each other.

#### **Section 16: Default in connection with refinancing**

Section 16. A lender shall not recommend or encourage default on an existing loan or other debt prior to and in connection with the closing or planned closing of a high-cost home mortgage loan that refinances all or any portion of the existing loan or debt.

#### **Section 17: Application of chapter; violations**

Section 17. (a) This chapter shall apply to any lender who attempts to avoid its application by dividing any loan transaction into separate parts for the purpose of evading this chapter.

(b) A lender making a high-cost home mortgage loan who, when acting in good faith, fails to comply with this chapter, shall not be considered to have violated this chapter if the lender establishes that either: (1) Within 30 days of the loan closing and prior to the institution of any action under this chapter, the lender notifies the borrower of the compliance failure and makes appropriate restitution and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either: (i) make the high-cost home mortgage loan satisfy the requirements of this chapter or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan; or, (2) the compliance failure was not intentional and resulted from a bona fide error notwithstanding the maintenance procedures reasonably adapted to avoid the errors, and within 60 days after the discovery of the compliance failure and before the institution of any action under this chapter or the receipt of written notice of the compliance failure, the borrower is notified of the compliance failure, appropriate restitution is made and whatever adjustments are necessary are made to the loan, at the choice of the borrower, to either (i) make the high-cost home mortgage loan satisfy the requirements of this chapter or (ii) change the terms of the loan in a manner beneficial to the borrower so that the loan will no longer be considered a high-cost home mortgage loan. Examples of a bona fide error may include clerical errors, errors in calculation, computer malfunction and programming, and printing errors. An error in legal judgment with respect to a person's obligation under this chapter shall not be considered a bona fide error.

#### **Section 18: Relief; remedies**

Section 18. (a) A violation of this chapter shall constitute a violation of chapter 93A.

(b) An aggrieved borrower or borrowers may bring a civil action for injunctive relief or damages in a court of competent jurisdiction for any violation of this chapter.



(c) In addition the court shall, as the court may consider appropriate: (1) issue an order or injunction rescinding a home mortgage loan contract which violates this chapter, or barring the lender from collecting under any home mortgage loan which violates this chapter; (2) issue an order or injunction barring any judicial or non-judicial foreclosure or other lender action under the mortgage or deed of trust securing any home mortgage loan which violates this chapter; (3) issue an order or injunction reforming the terms of the home mortgage loan to conform to this chapter; (4) issue an order or injunction enjoining a lender from engaging in any prohibited conduct; or (5) impose such other relief, including injunctive relief, as the court may consider just and equitable.

(d) In addition, any lender found to be in violation of this chapter shall be subject to sections 2A and 2D of chapter 167.

(e) Originating or brokering a home loan that violates a provision of this section shall constitute a violation of this chapter.

### **Section 19: Regulations**

Section 19. The commissioner shall promulgate regulations necessary to carry out the provisions of this chapter.

### **MGL Chapter 185C §3**

#### **Concurrent jurisdiction; powers of superior court department; enforcement authority**

Section 3. The divisions of the housing court department shall have common law and statutory jurisdiction concurrent with the divisions of the district court department and the superior court department of all crimes and of all civil actions arising in the city of Boston in the case of that division, in the counties of Berkshire, Franklin, Hampden and Hampshire in the case of the western division and within the cities and towns included in the Worcester county division, northeastern division and southeastern division, in the case of those divisions, under chapter forty A, sections twenty-one to twenty-five, inclusive, of chapter two hundred and eighteen, sections fourteen and eighteen of chapter one hundred and eighty-six and under so much of sections one hundred and twenty-seven A to one hundred and twenty-seven F, inclusive, and sections one hundred and twenty-seven H to one hundred and twenty-seven L, inclusive, of chapter one hundred and eleven, so much of chapter ninety-three A, so much of section sixteen of chapter two hundred and seventy, so much of chapters one hundred and forty-three, one hundred and forty-eight, and two hundred and thirty-nine, jurisdiction under the provisions of common law and of equity and any other general or special law, ordinance, by-law, rule or regulation as is concerned directly or indirectly with the health, safety, or welfare,

Section 12. The person selling shall, within ten days after the sale, file in the clerk's office a report on oath of the sale and of his doings, and the court may confirm the sale or set it aside and order a re-sale. Any person interested may appear or be summoned, and the order of the court confirming the sale shall be conclusive evidence against all persons that the power of sale was duly executed.

### **Section 13: Necessary parties**

Section 13. Unless the defendant is seized in fee simple in possession of the whole equity of redemption of the land demanded, an order for a sale shall not be made until all parties interested in the equity of redemption and whose estate or interest therein would be affected by such sale have been summoned to appear.

### **Section 14: Foreclosure under power of sale; procedure; notice; form**

Section 14. The mortgagee or person having estate in the land mortgaged, or a person authorized by the power of sale, or the attorney duly authorized by a writing under seal or the legal guardian or conservator of such mortgagee or person acting in the name of such mortgagee or person, may, upon breach of condition and without action, perform all acts authorized or required by the power of sale; provided, however, that no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice of the sale has been published once in each of 3 successive weeks, the first publication of which shall be not less than 21 days before the day of sale, in a newspaper published in the city or town where the land lies or in a newspaper with general circulation in the city or town where the land lies and notice of the sale has been sent by registered mail to the owner or owners of record of the equity of redemption as of 30 days prior to the date of sale, said notice to be mailed by registered mail at least 14 days prior to the date of sale to said owner or owners to the address set forth in section 61 of chapter 185, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on the deed or on the petition for probate by which the owner or owners acquired title, if any, or if in either case no owner appears, then mailed by registered mail to the address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent for the last preceding 3 years, then mailed by registered mail to the address of any of the parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least 14 days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of 30 days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by

mail to such person under this section and such waiver shall constitute compliance with such notice requirement for all purposes. If no newspaper is published in such city or town, or if there is no newspaper with general circulation in the city or town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such city, town or county, and having a circulation in that city, town or county, shall be sufficient for the purposes of this section.

The following form of foreclosure notice may be used and may be altered as circumstances require; but nothing in this section shall be construed to prevent the use of other forms.

(Form.)

#### MORTGAGEE'S SALE OF REAL ESTATE.

By virtue and in execution of the Power of Sale contained in a certain mortgage given by .....to .....dated .....and recorded with

.....

Deeds, Book ....., page ....., of which mortgage the undersigned is the present holder, .....

(If by assignment, or in any fiduciary capacity, give reference to the assignment or assignments recorded with ....Deeds, Book ....., page ....., of which mortgage the undersigned is the present holder, .....).

for breach of the conditions of said mortgage and for the purpose of foreclosing the same will be sold at Public Auction at .....o'clock, .....M. on the ..... day of .....A.D. (insert year), ..... (place) ..... all and singular the premises described in said mortgage,

(In case of partial releases, state exceptions.)

To wit: "(Description as in the mortgage, including all references to title, restrictions, encumbrances, etc., as made in the mortgage.)"

Terms of sale: (State here the amount, if any, to be paid in cash by the purchaser at the time and place of the sale, and the time or times for payment of the balance or the whole as the case may be.)

Other terms to be announced at the sale.

(Signed) \_\_\_\_

Present holder of said mortgage.\_\_\_\_

A notice of sale in the above form, published in accordance with the power in the mortgage and with this chapter, together with such other or further notice, if any.

as is required by the mortgage, shall be a sufficient notice of the sale; and the premises shall be deemed to have been sold and the deed thereunder shall convey the premises, subject to and with the benefit of all restrictions, easements, improvements, outstanding tax titles, municipal or other public taxes, assessments, liens or claims in the nature of liens, and existing encumbrances of record created prior to the mortgage, whether or not reference to such restrictions, easements, improvements, liens or encumbrances is made in the deed; provided, however, that no purchaser at the sale shall be bound to complete the purchase if there are encumbrances, other than those named in the mortgage and included in the notice of sale, which are not stated at the sale and included in the auctioneer's contract with the purchaser.

For purposes of this section and section 21 of chapter 183, in the event a mortgagee holds a mortgage pursuant to an assignment, no notice under this section shall be valid unless (i) at the time such notice is mailed, an assignment, or a chain of assignments, evidencing the assignment of the mortgage to the foreclosing mortgagee has been duly recorded in the registry of deeds for the county or district where the land lies and (ii) the recording information for all recorded assignments is referenced in the notice of sale required in this section. The notice shall not be defective if any holder within the chain of assignments either changed its name or merged into another entity during the time it was the mortgage holder; provided, that recited within the body of the notice is the fact of any merger, consolidation, amendment, conversion or acquisition of assets causing the change in name or identity, the recital of which shall be conclusive in favor of any bona fide purchaser, mortgagee, lienholder or encumbrancer of value relying in good faith on such recital.

#### **Section 14A: Foreclosure database; annual report on developments and trends in residential property foreclosures**

Section 14A. The commissioner of the division of banks, hereinafter referred to as the commissioner, shall maintain a foreclosure database that shall include, but not be limited to, foreclosure activity by mortgage lenders, mortgage holders and mortgage servicers, as well as the mortgage brokers and loan originators who placed these mortgage loans in the commonwealth, including information relative to the original mortgagee and any subsequent assignee. Based on the information received, the commissioner shall produce a report, at least annually, to track developments and trends of mortgage foreclosures on residential property in the commonwealth including, but not limited to, an analysis of the pre-foreclosure notices submitted to the commissioner compared to the final foreclosure notices, and any trends or patterns relative to the geographic location of the residential properties and interest rates. The report shall be available to the public upon request, and the commissioner shall make it available in any other manner that he may choose.

**MGL Ch. 244 §15: Copy of notice; affidavit; recording; evidence; effect of legal challenges**

Section 15. (a) For the purposes of this section, the following words shall have the following meanings unless the context clearly requires otherwise:

"Arm's length third party purchaser for value", an arm's length purchaser who pays valuable consideration, including a purchaser's heirs, successors and assigns, but not including the foreclosing party or mortgage note holder or a parent, subsidiary, affiliate or agent of the foreclosing party or mortgage note holder or an investor or guarantor of the underlying mortgage note including, but not limited to, the Federal National Mortgage Association, the Federal Home Loan Mortgage Corporation and the Federal Housing Administration.

"Deadline", 3 years from the date of the recording of the affidavit.

(b) The person selling or the attorney duly authorized by a writing or the legal guardian or conservator of the person selling shall, after the sale, cause a copy of the notice and an affidavit fully and particularly stating the person's acts or the acts of the person's principal or ward which shall be recorded in the registry of deeds for the county or district in which the land lies, with a note of reference thereto on the margin of the record of the mortgage deed if it is recorded in the same registry. If the affidavit shows that the requirements of the power of sale and the law have been complied with in all respects, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed.

(c) If an affidavit is executed in accordance with this section, it shall, after 3 years from the date of its recording, be conclusive evidence in favor of an arm's length third party purchaser for value at or subsequent to the foreclosure sale that the power of sale under the foreclosed mortgage was duly executed and that the sale complied with this chapter and section 21 of said chapter 183. An arm's length third party purchaser for value relying on an affidavit shall not be liable for a foreclosure if the power of sale was not duly exercised. Absent a challenge as set forth in clause (i) or (ii) of subsection (d), title to the real property acquired by an arm's length third party purchaser for value shall not be set aside.

(d) Subsection (c) shall not apply if: (i) an action to challenge the validity of the foreclosure sale has been commenced in a court of competent jurisdiction by a party entitled to notice of sale under section 14 or a challenge has been asserted as a defense or a counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to section 3 of chapter 185C, by a party entitled to notice of sale under said section 14 and a true and correct copy of the complaint or pleading asserting a challenge has been duly recorded before the deadline in the registry of deeds for the county or district in which the subject real property lies or in the land court registry district before the deadline; or (ii) a challenge to the validity of the foreclosure sale is asserted as a defense or

counterclaim in a legal action in a court of competent jurisdiction, including the housing court department pursuant to said section 3 of said chapter 185C, by a party entitled to notice of sale under said section 14 who continues to occupy the mortgaged premises as that party's principal place of residence, regardless of whether the challenge was asserted prior to the deadline, and a true and correct copy of any pleading asserting the challenge in the legal action was duly recorded in the registry of deeds for the county or district in which the subject property lies or is duly filed in the land court registry district within 60 days from the date of the challenge or before the deadline, whichever is later.

An attested true and correct copy of the complaint or pleading described in this subsection shall be accepted for recording in the registry of deeds or, in the case of registered land, in the land court registry district.

After the entry of a final judgment in a legal challenge under clause (i) or (ii) and the final resolution of any appeal of that judgment, the affidavit shall immediately become conclusive evidence of the validity of the sale if the final judgment concludes that the power of sale was duly exercised. If the final judgment concludes that the power of sale was not duly exercised, the foreclosure sale and affidavit shall be void. If the final judgment does not determine the validity of the foreclosure sale and the deadline for the affidavit to become conclusive has not expired, any party entitled to notice of sale under section 14 may file or assert another legal challenge to the validity of the foreclosure sale under said clause (i) or (ii).

(e) The recording of an affidavit and the expiration of the deadline shall not relieve an affiant or any other person on whose behalf an affidavit was executed and recorded from liability for failure to comply with this section, section 14 or any other requirements of law with respect to the foreclosure.

(f) A material misrepresentation contained in an affidavit shall constitute a violation of section 2 of chapter 93A.

#### **Section 15A: Mortgagee taking possession or conveying title; notice**

Section 15A. A mortgagee taking possession of mortgaged premises prior to foreclosure or a mortgagee conveying title to mortgaged premises pursuant to the provisions of this chapter shall, within thirty days of taking possession or conveying title, notify all residential tenants of said premises, and the office of the assessor or collector of taxes of the municipality in which the premises are located and any persons, companies, districts, commissions or other entities of any kind which provide water or sewer service to the premises, of said taking possession or conveying title.

#### **Section 16: Repealed, 1971, 423, Sec. 22**

#### **Section 17: Conveyance by mortgagor; effect**

Section 17. A sale or transfer by the mortgagor shall not impair or annul any right or power of attorney given in the mortgage to the mortgagee to sell or transfer the land as attorney or agent of the mortgagor.

#### Section 17A: Limitation of actions

Section 17A. Actions on mortgage notes, whether witnessed or not, or on other obligations to pay a debt secured by mortgage of real estate, to recover judgments for deficiencies after foreclosure by sale under a power contained in the mortgage, and actions on such notes or other obligations which are subject to a prior mortgage, to recover the amount due thereon after the foreclosure by sale of such prior mortgage under power contained therein, shall, except as hereinafter provided, be commenced within two years after the date of the foreclosure sale or, if the principal of the note or other obligation does not become payable until after the foreclosure sale, then within two years after the time when the cause of action for the principal accrues.

Such actions in cases where the foreclosure sale shall have occurred or the cause of action shall have accrued prior to January first, nineteen hundred and forty-six shall be commenced within two years after said date. Nothing in this section shall extend any other period of limitation.

#### Section 17B: Notice of intention to foreclose; necessity; form; notice and affidavit

Section 17B. No action for a deficiency shall be brought after June thirtieth, nineteen hundred and forty-six by the holder of a mortgage note or other obligation secured by mortgage of real estate after a foreclosure sale by him taking place after January first, nineteen hundred and forty-six unless a notice in writing of the mortgagee's intention to foreclose the mortgage has been mailed, postage prepaid, by registered mail with return receipt requested, to the defendant sought to be charged with the deficiency at his last address then known to the mortgagee, together with a warning of liability for the deficiency, in substantially the form below, not less than twenty-one days before the date of the sale under the power in the mortgage, and an affidavit has been signed and sworn to, within thirty days after the foreclosure sale, of the mailing of such notice. A notice mailed as aforesaid shall be a sufficient notice, and such an affidavit made within the time specified shall be prima facie evidence in such action of the mailing of such notice. The notice and affidavit, respectively, shall be in substantially the following forms:

##### *Notice of Intention to Foreclose and of Deficiency After Foreclosure of Mortgage.*

To A.B. Street

You are hereby notified, in accordance with the statute, of my intention, on or after , to foreclose by sale under power of sale for breach of condition, the mortgage held by me on property on Street in in the County of dated and recorded with deeds Book page to secure a note (or other obligation) signed by you, for the

whole, or part, of which you may be liable to me in case of a deficiency in the proceeds of the foreclosure sale.

Yours very truly,  
C.D. Holder of said mortgage.

*Affidavit.*

I hereby certify on oath that on the    day of    (insert year) I mailed by registered mail, postage prepaid and return receipt requested, the notice, a copy of which appears below, directed to the persons or person at the addresses therein named which were the last addresses of such persons known to me at the time of mailing.

(Here insert copy)

Signed and sworn to before me this    day of    (insert year)

.....

**Chapter 203, Section 1: Trusts in realty; necessity of writing**

Section 1. No trust concerning land, except such as may arise or result by implication of law, shall be created or declared unless by a written instrument signed by the party creating or declaring the trust or by his attorney.

**MGL Chapter 259 §1**

**Section 1: Actionable contracts; necessity of writing**

Section 1. No action shall be brought:

First, To charge an executor or administrator, or an assignee under an insolvent law of the commonwealth, upon a special promise to answer damages out of his own estate;

Second, To charge a person upon a special promise to answer for the debt, default or misdoings of another;

Third, Upon an agreement made upon consideration of marriage;

Fourth, Upon a contract for the sale of lands, tenements or hereditaments or of any interest in or concerning them; or,

Fifth, Upon an agreement that is not to be performed within one year from the making thereof;

Unless the promise, contract or agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or by some person thereunto by him lawfully authorized.