08/09/2024

Appendix A-1

Supreme Judicial Court for the Commonwealth of Massachusetts

John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724
Telephone (617) 557-1020

Housing Court - Metro South
Clerk for Civil Business
215 Main Street, Suite 160
Brockton, MA 02301

RE: No. SJC-13510

FANNIE MAE & another
vs.
ANTHONY MICHAEL BRANCH

NOTICE OF DECISION

A decision by the Supreme Judicial Court was issued in the above-captioned case.

Very truly yours,
The Clerk's Office

Dated: July 12, 2024

Appendix A-2

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH

At Boston, July 12, 2024

No. SJC-13510

FANNIE MAE & another vs. ANTHONY MICHAEL BRANCH.

pending in the Housing Court Department of the Trial Court, Metro South Housing Court Docket No. 18H82SP00281

ORDERED, that the following entry be made in the docket; viz., -

The order allowing Cardoso's intervention and joining him as a plaintiff in Fannie Mae's original claim is affirmed. Entry of summary judgment as to Fannie Mae's claim for possession is affirmed, as is entry of summary judgment dismissing Branch's counterclaims against Fannie Mae.

By the Court,

Maura Doony

Acting Clerk, Supreme Judicial Court for the Commonwealth

Dated: July 12, 2024

See opinion on file.

FANNIE MAE[1] & another[2] *vs.* ANTHONY MICHAEL BRANCH.

Plymouth. March 6, 2024. - July 12, 2024.

Present: BUDD, C.J., GAZIANO, KAFKER, WENDLANDT, & DEWAR, JJ.

Summary Process, Appeal. *Practice, Civil*, Summary process, Moot case, Intervention, Substitution, Counterclaim and cross-claim, Summary judgment. *Mortgage*, Real estate, Foreclosure, Validity. *Notice*, Foreclosure of mortgage.

In a postforeclosure summary process action, the judgment of possession in favor of the plaintiff was not rendered moot due to the transfer of the property, during the pendency of the defendant's appeal, from the plaintiff to a third party who intervened in the action, where an actual controversy remained, in that there was an active dispute over the intervener's claimed rights to possession and use and occupancy payments, which were derivative of the plaintiff's; and where the intervener thus retained an ongoing personal stake in such litigation. [347-349]

In a postforeclosure summary process action, the Housing Court judge properly allowed a motion to intervene as of right, pursuant to Mass. R. Civ. P. 24 (a), filed by a third party to whom the plaintiff sold the subject property during the pendency of the defendant's appeal from the judgment of possession in favor of the plaintiff [350-351]; further, the judge was well within his broad discretion in ordering the intervener to be joined as a plaintiff in the possession claim, pursuant to Mass. R. Civ. P. 25 (c), while the original plaintiff remained in the litigation as a defendant to counterclaims [351-352].

In a postforeclosure summary process action, the Housing Court judge properly entered summary judgment in favor of the plaintiff on its claim for possession, where the holding in *Pinti* v. *Emigrant Mtge. Co.*, 472 Mass. 226 (2015), i.e., that a foreclosure by statutory power of sale is invalid unless the notice of default strictly complies with paragraph 22 of the standard mortgage, did not apply to the notices in question, and no unfairness arising from the notices justified relief from foreclosure [352-354]; and where the loan servicer, as the authorized agent of the note holder, had authority to foreclose [354-355]; further, the judge properly dismissed counterclaims premised on alleged promises in support of which the defendant provided no evidence [355].

SUMMARY PROCESS. Complaint filed in the Southeast Division of the Housing Court Department on June 12, 2017.

[1]Also known as Federal National Mortgage Association.

[2]Roberto Pina Cardoso, intervener.

The case was heard by *Wilbur P. Edwards, Jr.*, J., on a motion for summary judgment; and after transfer to the Metro South Division of the Housing Court Department, a motion to intervene, substitute a party, and amend the judgment was heard by *Neil K. Sherring*, J.

After review by the Appeals Court, 102 Mass. App. Ct. 1121 (2023), the Supreme Judicial Court granted leave to obtain further appellate review.

Anthony Michael Branch, pro se.

Karl F. Stammen, Jr., for the intervener.

Thomas J. Santolucito for the plaintiff.

Grace C. Ross, pro se, amicus curiae, submitted a brief.

KAFKER, J. After being assigned the high bid at the 2016 foreclosure sale of Anthony Michael Branch's property in Brockton, the Federal National Mortgage Association, better known as Fannie Mae, commenced a summary process action against Branch in the Housing Court. Judgment for possession entered in Fannie Mae's favor, and Branch appealed. In December of 2018, during the pendency of the appeal, Fannie Mae sold the property to a third party, Roberto Pina Cardoso. Over the next four years, while Branch remained in possession of the property, Cardoso would successfully intervene and be joined as a party as of right with Fannie Mae and be awarded use and occupancy payments. In an unpublished May 2023 decision, however, a panel of the Appeals Court vacated the Housing Court's judgment of possession as moot, reasoning that after the sale to Cardoso, Fannie Mae's possessory interest was no longer superior to Branch's. The panel likewise declared moot Branch's appeal from the order allowing Cardoso to intervene but affirmed dismissal of Branch's counterclaims. See *Fannie Mae* v. *Branch*, 102 Mass. App. Ct. 1121 (2023) (memorandum and order pursuant to rule 23.0). The Appeals Court decision thereby required Cardoso to reestablish a right to possession and use and occupancy payments in a new and separate case in the Housing Court. We granted further appellate review.

We disagree with the Appeals Court's determinations of mootness. Because it is undisputed that Fannie Mae transferred its entire interest in the property — including any possessory interest — to Cardoso after foreclosure, we conclude that he maintains a live stake in adjudication of the judgment for possession. We therefore affirm the order allowing Cardoso to intervene and, reaching the summary judgment issues that the Appeals Court did not, affirm entry of judgment for possession in favor of Fannie Mae. We likewise affirm the dismissal of Branch's coun-

terclaims.[3]

Background. In 2009, Branch purchased the subject property using a loan from Pentagon Federal Credit Union (Pentagon), secured by a mortgage on the property. On February 28, 2013, Pentagon mailed Branch a notice informing him that his loan was in default.[4] Further notices followed on June 12, 2013, and June 30, 2014. Branch was unsuccessful in negotiating a loan modification, and when he did not cure the default, Pentagon elected to move forward with foreclosure. A foreclosure sale was scheduled but was subsequently canceled after Branch filed for bankruptcy in January 2016. Bankruptcy proceedings were terminated in June of 2016.

In August 2016, Pentagon gave notice of an impending foreclosure sale, both by mailed notice to Branch and publication in a local newspaper.[5] The sale was held on September 14, 2016. Pentagon was the high bidder and assigned its bid to Fannie Mae. On November 15, 2016, a foreclosure deed granting the property to Fannie Mae was recorded with the Plymouth County registry of deeds.[6]

On April 6, 2017, Fannie Mae served Branch with a fourteen-day notice to quit, followed on June 5, 2017, by a summary process summons and complaint, which sought both possession and use and occupancy payments. A trial date was set for June 28.

On June 19, 2017, Branch timely filed his answer and brought a number of counterclaims.[7] He also requested discovery, and the trial date was continued. In November 2017, Fannie Mae moved for partial summary judgment on its claim for possession and on Branch's counterclaims.[8] On March 21, 2018, the motion judge ruled in Fannie Mae's favor on all issues, entering a judgment for possession and dismissing Branch's counterclaims. Branch appealed. Shortly thereafter, Branch was also ordered to pay $1,800

[3]We acknowledge the amicus brief submitted by Grace C. Ross.

[4]The earliest missed payment in the record is June 1, 2012. Branch does not dispute that he was in default.

[5]Prior to the foreclosure sale, Branch attempted to work out a sale of the property on his own; he notified Pentagon of at least one offer, but it was rejected as too low.

[6]Various affidavits concerning the mortgage, foreclosure, and sale were also recorded.

[7]The counterclaims were based on promissory estoppel, negligent misrepresentation, violations of G. L. c. 93A, and violations of G. L. c. 244, § 35C.

[8]Fannie Mae did not move for summary judgment on its claim for use and occupancy payments.

per month to Fannie Mae for use and occupancy. Branch appealed from that order; that appeal took over four years to resolve.[9] See generally *Branch* v. *Federal Nat'l Mtge. Ass'n*, 491 Mass. 1009, 1009-1011 (2022).

On December 10, 2018, during the pendency of Branch's appeals, Fannie Mae sold the subject property to Cardoso, transferring "all the estate, right, title interest, lien equity and claim whatsoever" to Cardoso via quitclaim deed. See G. L. c. 183, § 17 (listing applicable quitclaim covenants). Cardoso filed a summary process complaint against Branch and successfully moved to intervene in the existing Appeals Court case.

In September 2020, a panel of the Appeals Court held that the dispute over use and occupancy payments owed to Fannie Mae was moot, as Fannie Mae no longer sought those payments after selling the property to Cardoso. The panel did, however, remand the case to the Housing Court and "grant Cardoso leave to file, and the Housing Court leave to consider, a motion to intervene or to substitute Cardoso as the plaintiff in the summary process action."

Cardoso thereafter filed such a motion on November 3, 2020. Branch opposed. The motion judge concluded that Cardoso "should be allowed to intervene as a party as of right," and "be joined with [Fannie Mae]." The successful intervention and joinder prompted Cardoso to voluntarily dismiss his own, seemingly duplicative, summary process action.[10] He also obtained an order for use and occupancy payments from Branch, and successfully defended that order on appeal.[11]

On April 14, 2023, over five years after initial entry of the judgment for possession, oral argument on Branch's appeal from that judgment was held before a panel of the Appeals Court. At argument, the panel sua sponte raised the question of mootness, and indeed, in its unpublished decision of May 23, 2023, the panel would rely on mootness to dispose of most of the issues

[9]He initially saw some success: a single justice of the Appeals Court reduced his payment to $500 per month.

[10]When Cardoso first commenced his action he was apparently unaware of the existing summary process action. Branch's answer to Cardoso's complaint requested dismissal on the grounds that "the issues are the same" as in the other action.

[11]In 2022, we affirmed an order of the single justice denying Branch's petition for relief from his obligation to make use and occupancy payments to Cardoso. *Branch*, 491 Mass. at 1011.

before it. The panel first vacated the judgment for possession, reasoning that it was moot "because [Fannie Mae] no longer has any possessory interest in the property." This decision, in the panel's view, obviated the need to consider Branch's foreclosure-related defenses and rendered moot the appeal from Cardoso's motion to intervene. The panel did, however, uphold dismissal of Branch's counterclaims. Cardoso's motion for reconsideration of the determinations of mootness was summarily denied. We subsequently granted Cardoso's application for further appellate review.

Discussion. 1. *Mootness.* We begin with the threshold question of mootness. The principle that courts do not decide moot cases "lies at the foundation of the common law." *Sullivan* v. *Secretary of the Commonwealth*, 233 Mass. 543, 546 (1919). A case becomes moot when "no actual controversy remains, or the party claiming to be aggrieved 'ceases to have a personal stake in its outcome.' " *DiMasi* v. *Secretary of the Commonwealth*, 491 Mass. 186, 190 (2023), quoting *Seney* v. *Morhy*, 467 Mass. 58, 61 (2014). In such cases, "a ruling . . . would offer no additional relief and would not alter [any] party's legal position." *Lynn* v. *Murrell*, 489 Mass. 579, 583 (2022). We hew to this rule for several important reasons: "because (a) only factually concrete disputes are capable of resolution through the adversary process, (b) it is feared that the parties will not adequately represent positions in which they no longer have a personal stake, (c) the adjudication of hypothetical disputes would encroach on the legislative domain, and (d) judicial economy requires that insubstantial controversies not be litigated."[12] *Wolf* v. *Commissioner of Pub. Welfare*, 367 Mass. 293, 298 (1975).

Scrutinizing the case before us, we conclude that the appeal is not moot. There remains an actual controversy, and a party claiming to be aggrieved retains a personal stake in the outcome of this case. In the Housing Court and on appeal, Branch's principal challenge to the claim for possession and to the use and occupancy payments has been attacking the validity of the foreclosure and, therefore, the validity of Fannie Mae's acquisition of a unified title to the property. See *Eaton* v. *Federal Nat'l Mtge. Ass'n*, 462 Mass.

[12]However, "mootness differs from other doctrines of justiciability in that it is a factor affecting [the court's] discretion, not its power, to decide a case" (quotations and citation omitted). *Murrell*, 489 Mass at 583. We may exercise that discretion to decide moot issues in certain circumstances. See *id.* at 583-584, citing *Ott* v. *Boston Edison Co.*, 413 Mass. 680, 683 (1992).

569, 575-576 (2012) (foreclosure extinguishes mortgagor's equitable right of redemption, reuniting equitable and legal titles in mortgagee). This necessarily implicates Cardoso's own right to possession. It is undisputed that Fannie Mae transferred its entire interest in the property — including any possessory interest — to Cardoso after foreclosure, and Cardoso has been allowed to intervene as a party as a matter of right and joined as a party with Fannie Mae. Cardoso's rights to possession and use and occupancy are thus derivative of Fannie Mae's, and although Fannie Mae's stake in the case has diminished, Cardoso's has not. See *Matter of a R.I. Select Comm'n Subpoena*, 415 Mass. 890, 894 (1993) (question of defunct commission's right to certain documents was not moot where commission's successor was properly added as party and successor was "entitled to all the documents that the commission was entitled to receive"). Cf. *Pelullo* v. *Croft*, 86 Mass. App. Ct. 908, 910 (2014) (case not moot where, during pendency of appeal, subject property sold and merged with adjacent parcels but legal issue would still affect resulting parcel).

The case then is not moot simply due to the transfer of the property from Fannie Mae to Cardoso, and the Appeals Court's decision to vacate Fannie Mae's judgment for possession on that basis ignored Cardoso's claimed rights to possession and ongoing use and occupancy payments.[13] It is plain that there is an active dispute over those rights, despite the transfer of the property from Fannie Mae to Cardoso, and Cardoso retains an ongoing personal stake in such litigation. See *Martin* v. *F.S. Payne Co.*, 409 Mass. 753, 758 (1991) (case not moot where parties retain stake in fee dispute, notwithstanding sale of defendant company and plaintiffs' attempts to disclaim any interest in adjudication). See also *Mullholland* v. *State Racing Comm'n*, 295 Mass. 286, 289 (1936) (case moot where "a decision by the court will not be applicable to existing rights"); *Sullivan*, 233 Mass. at 546 (case moot where "[i]t can have no practical result"); *Robinson* v. *Contributory Retirement Appeal Bd.*, 62 Mass. App. Ct. 935, 937 (2005) (case moot where plaintiff's supposed stake based on mere "supposition about . . . an unlikely event occur[ing] on some future date"). For these reasons, we conclude that this case is not moot.

We acknowledge that this case is different from the prototypical summary process proceeding, in which the same party obtains

[13]The Appeals Court decision recognized that, as a consequence of its ruling, Cardoso would be required to reestablish his rights via "a new summary process action initiated by [him]."

judgment and then seeks execution in short order. But we do not view this difference as meaningful to a mootness analysis, as Cardoso stands in Fannie Mae's shoes and has been properly joined as a party. See discussion *infra*.[14]

In sum, this case remains an " 'actual controversy,' that is, 'a real dispute . . . where the circumstances . . . indicate that, unless a determination is had, subsequent litigation as to the identical subject matter will ensue.' " *Boston Herald, Inc.* v. *Superior Court Dep't of the Trial Court*, 421 Mass. 502, 504 (1995), quoting *Boston* v. *Keene Corp.*, 406 Mass. 301, 304 (1989). It is therefore not moot, and accordingly, we turn to the remaining issues.

2. *Motion to intervene and substitute.* In the Housing Court, Cardoso filed a "Motion to Intervene, Substitute and Amend Judgment" in which he sought both to intervene and be substituted as a plaintiff "on the claim for possession, permitting him to proceed as [p]laintiff in all respects in this action." In ruling on the motion, the Housing Court judge concluded that, pursuant to Mass. R. Civ. P. 24 (a) and (b), 365 Mass. 769 (1974), Cardoso "should be allowed to intervene as a party as of right," and that, pursuant to Mass. R. Civ. P. 25 (c), 365 Mass. 771 (1974), "because [Fannie Mae's] interest in the premises has been transferred to him, [Cardoso] should be joined with [Fannie Mae]."[15]

As a consequence of its view that the judgment for possession was moot, the Appeals Court declared that the appeal from the allowance of Cardoso's motion to intervene was also moot. Because of our determination that the judgment is not moot, we now review that motion's merits.[16]

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[14]Our decision today is buttressed by the fact that this case implicates none of the identified hazards of deciding moot cases. See *Wolf*, 367 Mass. at 298. The material facts are concrete and undisputed. Cardoso is a party to the case, having successfully intervened in the appeal and in the Housing Court, and was joined with Fannie Mae as a party. He and Branch maintain live interests in the outcome and have vigorously litigated those interests. A ruling in this specific case will not impinge on legislative power. And reaching this decision will not be a waste of judicial resources — indeed, the opposite is likely true, as it obviates the need for Cardoso to pursue a new and identical summary process case.

[15]The judge's memorandum and order did not address Cardoso's request to amend the judgment, referring to the motion only as a "motion to intervene and be joined as a Plaintiff."

[16]Appellate review of a rule 24 (a) decision is de novo, although the decision may depend on a motion judge's subsidiary findings of fact, which are entitled

a. *Intervention.* Rule 24 of the Massachusetts Rules of Civil Procedure provides multiple avenues by a which a nonparty may move to intervene in an existing action. Rule 24 (a) mandates that such requests for intervention, if timely, "shall" be allowed as of right either when authorized by statute or

> "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

In contrast, rule 24 (b) permits, but does not require, intervention when a nonparty shows a conditional statutory right to do so or "when an applicant's claim or defense and the main action have a question of law or fact in common," subject to the court's consideration of "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Id.*

The motion judge determined that Cardoso must be permitted to intervene as of right pursuant to rule 24 (a). We agree. As present owner of the property, Cardoso undeniably has "an interest relating to the property or transaction which is the subject of the action." The soundness of his title hinges on whether Branch's interest was properly extinguished by foreclosure, which is the issue at the heart of the case; a disposition in Branch's favor "may as a practical matter impair or impede [Cardoso's] ability to protect [his] interest." *Id.* And after selling the property to Cardoso, Fannie Mae has refused to take any position in defense of its judgment for possession — it certainly cannot "adequately" represent Cardoso's interest.

Finally, we note that rule 24 (a) also requires that a motion to intervene be "timely." After judgment, this means that a party seeking to intervene "must establish a compelling interest in the litigation and must justify its failure to intervene at an earlier stage of the action." *Cruz Mgt. Co.* v. *Thomas*, 417 Mass. 782, 785 (1994). Cardoso meets both criteria, given that his compelling interest as owner of the property did not arise until Fannie

to deference. Rule 24 (b) and rule 25 decisions are reviewed for an abuse of discretion. See *Reilly* v. *Hopedale*, 102 Mass. App. Ct. 367, 384 (2023); *Bay Colony Constr. Co.* v. *Norwell*, 5 Mass. App. Ct. 801, 801 (1977). Here, the material facts regarding the transfer of the property are undisputed.

Mae's postjudgment sale to him. See *McDonnell* v. *Quirk*, 22 Mass. App. Ct. 126, 132-134 (1986) (in action challenging seller's title, buyer of land entitled to postjudgment intervention after seller abandoned defense). As Cardoso met all of rule 24 (a)'s requirements, the motion judge properly granted his request to intervene.[17]

b. *Substitution.* The decision to allow Cardoso to intervene was paired with a decision ordering that he be joined as a plaintiff to Fannie Mae's claims. Pursuant to Mass. R. Civ. P. 25 (titled "Substitution of parties") part (c) (titled "Transfer of interest"): "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party." The rule thus provides procedural options for the sake of convenience; "[a]n order of joinder [under rule 25(c)] is merely a discretionary determination by the trial court that the transferee's presence would facilitate the conduct of the litigation." *Styller* v. *Zoning Bd. of Appeals of Lynnfield*, 487 Mass. 588, 594 (2021), quoting 7C C.A. Wright, A.R. Miller, & M.K. Kane, Federal Practice and Procedure § 1958 (3d ed. 2021) (discussing Fed. R. Civ. P. 25[c], which is substantially identical to Mass. R. Civ. P. 25 [c]). A decision under rule 25 (c) does not alter the substantive rights of the parties. See *Styller, supra* at 594-595, citing *Citibank* v. *Grupo Cupey, Inc.*, 382 F.3d 29, 32-33 (1st Cir. 2004). See also *Shapiro* v. *McCarthy*, 279 Mass. 425, 429-430 (1932) ("cause of action exists in legal contemplation apart from those persons who may be parties to it").

Cardoso's intervention goes hand in hand with his rule 25 joinder; it would make little sense to allow the former but not the latter in the circumstances of this case. As for the judge's decision to order that Cardoso be joined with, rather than substituted for, Fannie Mae as a plaintiff, the presence of Branch's counterclaims seemingly compelled that choice. Those counterclaims are premised on allegedly tortious acts undertaken by Fannie Mae, not Cardoso, and unlike Fannie Mae's claim for possession, they are unaffected by the sale of the subject property. Thus, the classic substitution scenario — complete replacement of Fannie Mae by

[17]The motion judge separately concluded that Cardoso should be permitted to intervene under rule 24 (b). Although we need not reach that question, on the record before us it appears unlikely that the judge's decision constituted an abuse of discretion.

Cardoso — was not a viable option. Ordering Cardoso to be joined as a plaintiff in the possession claim while Fannie Mae remained in the litigation as defendant to Branch's counterclaims was well within the judge's broad discretion.

3. *Summary judgment on Fannie Mae's claims.* We turn next to an issue the Appeals Court did not reach, the propriety of entering summary judgment in favor of Fannie Mae on its claim for possession. "We review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law" (quotation and citation omitted). *Pinti* v. *Emigrant Mtge. Co.*, 472 Mass. 226, 231 (2015).

Without a valid foreclosure, Fannie Mae (and Cardoso) cannot prove the superior possessory interest supporting the judgment for possession. Branch thus offers two categories of arguments attacking the validity of the foreclosure. First, he argues that the foreclosure was invalid due to alleged infirmities in certain pre-foreclosure notices. Second, he maintains that Pentagon lacked authority to foreclose because it was the servicer of the loan but not the holder of the mortgage note. We conclude that entry of summary judgment was proper.

a. *Compliance with paragraph 22.* Paragraph 22 of Branch's mortgage contains standard language that requires that, before acceleration of the loan and sale of the property, the lender give notice to the borrower. Such notice must specify:

> "(a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by the Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale."

Branch argues that the three notices sent to him by Pentagon in 2013 and 2014 did not "strictly comply" with paragraph 22 of the mortgage, and thus the foreclosure is void. See *Pinti*, 472 Mass. at 243. We hold that the strict compliance set out by *Pinti* does not

apply to the three notices, each of which significantly antedated our decision in *Pinti*.

Massachusetts does not require judicial authorization for foreclosures. *U.S. Bank Nat'l Ass'n* v. *Ibanez*, 458 Mass. 637, 645-646 (2011) (*Ibanez*). Thus, "a mortgagee may conduct a foreclosure by exercise of the statutory power of sale set out in [G. L. c. 183,] § 21, where, as here, the mortgage itself gives the mortgagee a power of sale and includes by reference the statutory power." *Pinti*, 472 Mass. at 232, citing *Ibanez, supra* at 646. However, before a mortgagee can exercise the power of sale in a foreclosure, it must "first comply[ ] with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale." G. L. c. 183, § 21. Given "the substantial power that the statutory scheme affords to a [mortgagee] to foreclose without immediate judicial oversight, we adhere to the familiar rule that one who sells under a power [of sale] must follow strictly its terms" (quotation omitted). *Pinti, supra* at 232-233, quoting *Ibanez, supra*. In *Pinti*, we extended that requirement to the notice provisions of paragraph 22 for the first time, holding that a foreclosure by statutory power of sale is "invalid unless the notice of default strictly complies with paragraph 22 of the standard mortgage" agreement. *Federal Nat'l Mtge. Ass'n* v. *Marroquin*, 477 Mass. 82, 82-83 (2017) (*Marroquin*).

Pinti does not apply to the notices sent in this case. *Pinti*'s requirement of strict compliance with paragraph 22 only applies to (1) notices sent after the date of *Pinti*, i.e., after July 17, 2015, and (2) "any case where the issue was timely and fairly asserted in the trial court or on appeal before July 17, 2015." *Marroquin*, 477 Mass. at 83. Pentagon sent each of the notices in question well before the July 17, 2015 date of the *Pinti* decision. Nor is there any evidence in the record that Branch "timely and fairly" asserted the *Pinti* issue in the trial court or on appeal before July 17, 2015. The proceedings here did not begin until 2017, when Fannie Mae filed its summary process summons and complaint in the Housing Court. Accordingly, the *Pinti* standard does not apply to the notices.[18]

[18]Branch also appears to argue for the retroactive application of *Pinti* because, although the notices were sent before *Pinti*, the foreclosure sale auction took place on September 14, 2016, after *Pinti*. Other than suggesting that this timing could theoretically have allowed Fannie Mae to issue new notices that were compliant with *Pinti*, Branch identifies no prejudice to him from the

In the alternative, Branch argues that, even if *Pinti*'s *strict* compliance does not apply to the notices at issue, he is nevertheless entitled to relief because he never received notice that *substantially* complied with paragraph 22. We disagree. A mortgagor in his position — raising such a defect as a defense in a post-foreclosure summary process action — is required to show that the violation "rendered the foreclosure so fundamentally unfair that [he or] she is entitled to affirmative equitable relief." *U.S. Bank Nat'l Ass'n* v. *Schumacher*, 467 Mass. 421, 433 (2014) (*Schumacher*) (Gants, J., concurring), citing *Bank of Am., N.A.* v. *Rosa*, 466 Mass. 613, 621-625 (2013). At a minimum, such a showing must include evidence of prejudice flowing from the claimed noncompliance. See *Bank of N.Y. Mellon Corp.* v. *Wain*, 85 Mass. App. Ct. 498, 501 (2014). Branch has not, however, argued that the claimed defects in notice specifically caused him any harm. Nor does the evidence in the record establish any such harm.[19] In sum, we discern no unfairness arising from the notices that would justify relief from foreclosure.

b. *Authority to foreclose.* Branch next argues that Pentagon could not foreclose on the property because it was the loan servicer but not the actual mortgage note holder. We addressed this issue explicitly in *Eaton*, 462 Mass. at 584-586. It is true that, in *Eaton*, we held that a mortgagee exercising its statutory right to foreclose pursuant to G. L. c. 244, § 14, must "hold[ ] the underlying mortgage note." *Id.* at 584. But we also expressly allowed that the agent of a note holder could properly foreclose:

> "There is no applicable statutory language suggesting that the Legislature intended to proscribe application of general agency principles in the context of mortgage foreclosure sales. Accordingly, we interpret G. L. c. 244, §§ 11-17C (and particularly § 14), and G. L. c. 183, § 21, to permit one who, although not the note holder himself, acts as the authorized agent of the note holder, to stand 'in the shoes' of the 'mortgagee' as the term is used in these provisions." (Footnote omitted.)

notices, see *infra*, nor does he otherwise offer any compelling reason for us to revisit the retroactivity issues settled in *Pinti* and *Marroquin*. We decline to do so.

[19]To the extent Branch argues that the foreclosure should be undone because Pentagon failed to provide the notice required by G. L. c. 244, § 35A, those arguments fail for the same reason. See *Schumacher*, 467 Mass. at 433 (Gants, J., concurring).

Id. at 586. On the summary judgment record, Branch cannot contest that Pentagon was the authorized agent of the note holder, Fannie Mae, at the time of the foreclosure.[20] Pentagon consequently had authority to foreclose.

4. *Counterclaims.* Also before us is Branch's appeal from the dismissal of his counterclaims following Fannie Mae's motion for summary judgment. We agree with the Appeals Court's reasoning on, and treatment of, those claims, and need not address them at length here. In brief, even viewing the summary judgment record in the light most favorable to him, Branch provided no evidence to support his allegations that Pentagon agreed to delay foreclosure or accept less than the full loan payoff amount. See Mass. R. Civ. P. 56 (e), 365 Mass. 824 (1974) ("an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial"). As Branch's counterclaims for promissory estoppel and negligent misrepresentation were premised on these alleged promises, entry of summary judgment and dismissal of the counterclaims was proper.[21]

Conclusion. As we conclude that the appeal is not moot, we affirm the order allowing Cardoso's intervention and joining him as a plaintiff in Fannie Mae's original claim. We further affirm entry of summary judgment as to Fannie Mae's claim for possession, and entry of summary judgment dismissing Branch's counterclaims against Fannie Mae.

So ordered.

[20]Nor can Branch contest that Pentagon's attorney was authorized to act on Pentagon's behalf at the foreclosure sale.

[21]We also agree with the Appeals Court that Branch has waived his right to pursue his arguments regarding counterclaims for violation of G. L. c. 244, § 35C, and retaliation because he failed to adequately argue them before the Housing Court. See *Chelsea Hous. Auth.* v. *McLaughlin*, 482 Mass. 579, 584 (2019), citing *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469 (2000) ("[waiver] principle . . . requires that the lower court be fairly put on notice as to the substance of the issue"). Likewise, as did the Appeals Court, we conclude that Branch's arguments regarding his G. L. c. 93A counterclaim and his request for further discovery are insufficient under Mass. R. A. P. 16 (a) (9), as appearing in 481 Mass. 1628 (2019).

Appendix B -1

From: SJCCommClerk@sjc.state.ma.us
Subject: SJC-13510 - Notice of Docket Entry
Date: Sep 5, 2024 at 6:13:28 PM
To: tonybranch@icloud.com

Supreme Judicial Court for the Commonwealth of Massachusetts

Telephone

RE: Docket No. SJC-13510

FANNIE MAE & another
vs.
ANTHONY MICHAEL BRANCH

NOTICE OF DOCKET ENTRY

Please take note that the following entry was made on the docket of the above-referenced case:

September 5, 2024 - DENIAL of Motion for Reconsideration. (By the Court).

Very truly yours,
The Clerk's Office

Dated: September 5, 2024

To:
Thomas J. Santolucito, Esquire
Anthony Michael Branch
Karl F. Stammen, Esquire
Grace C. Ross

Sancta Maria Hosp., 5 Mass. App. 624, 628, 367 N.E.2d 856 (1977) ("intervener in an action or proceeding is, for all intents and purposes, an original party"). The appellant seeks this Court's determination on whether a joining intervener as a plaintiff can resurrect a vacated order.

Finally, where the Housing Court did not amend the judgment for possession at the request of the intervener, and the intervener failed to revisit the court on that point, it appears violative to the "Plaintiffs were not entitled to pursue their claim ... through piecemeal litigation, offering one legal theory to the court while holding others in reserve for future litigation should the first theory prove unsuccessful"). See Bagley v. Moxley, 407 Mass. 633, 638-39, 555 N.E.2d 229 (1990). The appellant was not fully heard on the Housing Court's partial allowance of the intervener's motion and claims due process requires that the issue be resolved as

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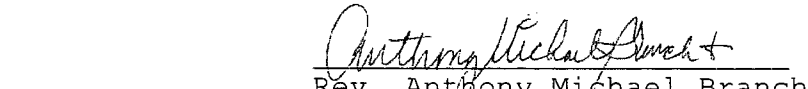
p.5) that Cardoso successfully moved to intervene, but Cardoso's motion was denied in the first instance. Cardoso's counsel indicated that he was unaware of the prior case (Fannie Mae), but that is contradicted by the evidence of Cardoso's bidding on the property and his live testimony under oath in Housing Court. (Decision, p. 6). The record is voluminous but does show Cardoso did not intervene in a timely manner but relied on Fannie Mae's filings.

there was no judgment for possession to the intervener (Cardoso), only to the Appellee Fannie Mae.

The appellant, therefore, requests this Court vacate its judgment of possession in favor of the intervener and remand the case to the Housing Court to hear and rule on a motion for discovery; vacate the judgment of possession and void the foreclosure in light of the mortgage and note contract violations; order a trial on the merits with respect to facts in dispute; vacate the use and occupancy damages; vacate the use and occupancy order consistent with the plaintiff's allowed motion before intervention; and any other relief the Court deems appropriate.

Date: August 12, 2024

Respectfully submitted,
ANTHONY MICHAEL BRANCH



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Appendix K-19

COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

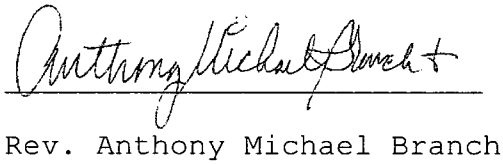
Suffolk, ss. SJC-13510

CERTIFICATE OF SERVICE

I, Anthony Michael Branch, hereby certify that a true copy of the Motion for Reconsideration served upon the Attorney for Roberto Pina Cardoso by email, e-file, and US postal mail today, by delivering a copy to Karl F. Stammen, Jr, Stammen & Associates 101 Federal Street Suite 1900, Boston, MA 02110, Email: stammenlaw@gmail.com. ***And to***, Counsel for Plaintiff, Fannie Mae a/k/a Federal National Mortgage Association, Thomas J. Santolucito, Esq., Harmon Law Offices, P.C., 150 California Street, Newton, MA 02458. Email: tsantolucito@harmonlaw.com.

Date: August 12, 2024

Respectfully submitted,
ANTHONY MICHAEL BRANCH



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Additional material from this filing is available in the Clerk's Office.