United States Court of Appeals

For the First Circuit

No. 23-1107

JACQUELYN V. FITZHUGH,

Plaintiff - Appellant, v.

WELLS FARGO BANK, N.A., as Indenture Trustee for the Impac CMB Trust Series 2005-3, Defendant - Appellee.

Before Barron, Chief Judge,

Kayatta and Rikelman, Circuit Judges.

JUDGMENT Entered: August 11, 2025

Plaintiff-appellant Jacquelyn V. Fitzhugh appeals from the district court's grant of judgment on the pleadings in defendant's favor. We review the district court's decision de novo. See Great Lakes Inc. SE v. Andersson, 66 F.4th 20, 25 (1st Cir. 2023) (standard of review). Having carefully reviewed the parties' briefs and relevant portions of the record, we affirm.

First, Fitzhugh has not addressed the district court's dismissal of Counts II or IV with

her appellate brief, so any claims of error as to those counts are waived. See Sparkle Hill, Inc. v. Interstate Mat Corp., 788 F.3d 25, 30 (1st Cir. 2015) (this court "do[es] not consider any arguments for reversing a decision of the district court when the argument is not raised in a party's opening brief," particularly when "the opening brief presents no argument at all challenging [the] express grounds upon which the district court prominently relied in entering judgment").

Second, Fitzhugh's claim that the district court erred in considering the documents that defendant submitted with its motion for judgment on the pleadings is waived for lack of developed argumentation. See Quintana-Dieppa v. Dept. of Army, 130 F.4th 1, 12 n.12 (1st Cir. 2025) ("It is not enough merely to mention an argument in the most skeletal way, leaving it to the court to do [a party's] work, create the ossature for the argument, and put flesh on its bones." (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (other citation omitted). Even if the claim were not waived, no error is apparent, as the relevant documents were either publicly-filed or central to Fitzhugh's claims. See Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007) (quoting Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). Third, no error is apparent in the district court's dismissal of Count I, Fitzhugh's claim that defendant failed to comply with Mass. Gen. Laws ch. 244, § 14. The presumptively-valid, publicly-filed § 35C affidavit and assignments of mortgage established defendant held both the Note and Mortgage, and Fitzhugh's conclusory allegations to the contrary were insufficient to overcome the foregoing. See Back Beach Neighbors Comm. v. Town of Rockport, 63 F.4th 126, 130 (1st Cir. 2023) (stating "we credit neither conclusory legal allegations nor factual allegations that are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture"); see also Cheng v. Neumann, 51 F.4th 438, 445 (1st Cir. 2022) ("It is a well-settled rule that when a written instrument contradicts the allegations in the complaint to which it is attached, the exhibit trumps the allegation." (quoting Clorox Co. P.R. v. Proctor & Gamble Comm'l Co., 228 F.3d 24, 32 (1st Cir. 2000) (further citation omitted).

Finally, no error is apparent in the district court's conclusion that Fitzhugh lacked standing to bring Count IV, her quiet title claim. See Rezende v. Ocwen Loan Servicing, LLC, 869 F.3d 40, 43 (1st Cir. 2017) ("A mortgagor lacks standing to bring a quiet title action as long as the mortgage remains in effect . . . because under Massachusetts law, a quiet title action 'cannot be maintained unless both actual possession and the legal title are united in the plaintiff.'" (quoting Daley v. Daley, 14 N.E.2d 113, 116 (Mass. 1938))).

Accordingly, the judgment of the district court is affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Anastasia Dubrovsky, Clerk

cc:

Glenn Francis Russell Jr.

Marissa I. Delinks

Hale Yazicioglu Lake, Donald W. Seeley Jr.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JACQUELYN V. FITZHUGH,

Plaintiff,

v.

WELLS FARGO BANK, N.A., AS INDENTURE TRUSTEE FOR THE IMPAC CMB TRUST SERIES 2005-3,

CIVIL ACTION NO. 1:22-cv-10217-PBS

FINAL JUDGMENT
January *20*, 2023

Plaintiff, Jacquelyn v. Fitzhugh ("Plaintiff"), filed this lawsuit on February 8, 2022 in Massachusetts Superior Court, Essex County, challenging defendant Wells Fargo Bank, N.A., as Indenture Trustee for the IMPAC CMB Trust Series 2005-3's ("Defendant") mortgage on, and foreclosure of, the real property known as 46 Bloomfield Street, Lynn, Massachusetts (the "Property"). Through the Complaint, Plaintiff sought to bar Defendant from foreclosing on the basis that Defendant is not a

"mortgagee" and has otherwise violated M.G.L. c. 244, § 14 (Count I); that Defendant did not conduct an examination under M.G.L. c. 244, § 358 regarding Plaintiffs eligibility for a loan modification (Count II); that title to the Property should be quieted in favor of Plaintiff (Count Ill); and that Plaintiff rescinded the underlying mortgage loan pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635 and the Massachusetts Consumer Credit Cost Disclosure Act ("MCCCDA"), G.L. c. 140D (Count IV).

On February 10, 2022, Defendant removed Plaintiffs lawsuit to this Court on the basis of federal question jurisdiction under 28 U.S.C. § 1331, and diversity jurisdiction under 28 U.S.C. § 1332. *(See* ECF No. 1.) On March 3, 2022, Defendant filed its answer to the Complaint. *(See* ECF No. 14.) On July 26, 2022, Defendant moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. *(See* ECF No. 26.) On December 8, 2022, Magistrate Judge Jennifer C. Boal issued a Report and Recommendation (the

"Recommendation"), in which she recommended that this Court grant Defendant's motion for judgment on the pleadings. *(See* ECF No. 37.) On January 3, 2023, this Court adopted the Recommendation and granted Defendant's motion for judgment on the pleadings. *(See* ECF No. 39.)

Thus. for the reasons set forth above, as well as those set forth in the Recommendation, the
Court ORDERS ADJUDGES AND DECLARES
that judgment shall enter for Defendant against Plaintiff as to Count I of the Complaint on Plaintiffs claim that Defendant lacks authority
to foreclose under M.G.L. c. 244, § 14; the Court further ORDERS ADJUDGES AND DECLARES that judgment shall enter for Defendant against Plaintiff as to Count II of the Complaint on Plaintiff's claim that Defendant violated M.G.L.
c. 244, § 35B; the Court further ORDERS ADJUDGES AND DECLARES that judgment shall

enter for Defendant against Plaintiff as to Count III of the Complaint on Plaintiff's claim for quiet title pursuant to M.G.L. c. 240, §§ 6-10; the Court further ORDERS ADJUDGES AND DECLARES that judgment shall enter for Defendant against Plaintiff as to Count IV of the Complaint on Plaintiffs claim pursuant to the Truth in Lending Act, 15 U.S.C. § 1635, and the Massachusetts Consumer Credit Cost Disclosure Act, M.G.L. c. 140D.

SO ORDERED

. Saris
United States District Judge

1/20/2023

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

JACQUELYN V. FITZHUGH, Plaintiff, v. WELLS FARGO BANK, N.A. AS INDENTURE TRUSTEE FOR THE IMPAC CMB TRUST SERIES 2005-3, Defendant.	)	Civil Action No. 22-10217-PBS

REPORT AND RECOMMENDATION ON DEFENDANT'S
MOTION FOR JUDGMENT ON THE PLEADINGS
[Docket No. 26]

December 8, 2022

Boal, M.J.

Plaintiff Jacquelyn V. Fitzhugh filed this action challenging the right of defendant Wells Fargo Bank, N.A., as Indenture Trustee for the IMPAC CMB Trust Series 2005-3 ("Wells Fargo") to conduct a foreclosure sale of her property. Wells Fargo has moved for judgment on the pleadings pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. Docket No. 26.[1] For the following reasons, this Court recommends that Judge Saris grant Wells Fargo's motion.

[1] On August 11, 2022, Judge Saris referred this case to the undersigned for full pretrial management, including report and recommendation on dispositive motions. Docket No. 30.

I. FACTS[2]

A. The Note And The Mortgage

On January 14, 2005, Fitzhugh received a quitclaim deed to 46 Bloomfield Street, Lynn, Massachusetts (the "Property") in return for consideration in the amount of $387,500. Complaint at ¶ 3. Also on that date, Fitzhugh executed a note in favor of Geneva Mortgage Corporation, Inc. ("Geneva") in the amount of $310,200. Id. at ¶ 4. To secure her obligations under the Note, Fitzhugh executed a mortgage dated January 14, 2005, in the original principal amount of $310,200 in favor of Geneva which encumbered the Property and was recorded with the Southern Essex Registry of Deeds (the "Registry") in Book 23870, Page 405 (the "Mortgage") (together with the Note, the "Loan"). Id. at ¶ 9 and Ex. C.

The following assignments of the Mortgage have been recorded with the Registry:

- **January 19, 2005**: From Geneva to IMPAC Funding Corporation, recorded on September 28, 2005 at Book 24883, Page 549. Id. at ¶ 13; Declaration of Donald W. Seeley Jr. (Docket No. 28) ("Seeley Decl.") at Ex. B.
- **February 24, 2005**: From IMPAC Funding Corporation to Wells Fargo Bank N.A. as Indenture Trustee for the Registered Holders of IMH Asset Corp. Collateralized Asset Backed Bonds, Series 2005-3, recorded on September 28, 2005 at Book 24883, Page 550. Complaint at ¶ 14; Ex. C to Seeley Decl.

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[2] Because this case is before the Court on a motion for judgment on the pleadings, this Court "'glean[s] the facts from the operative pleading,' accepting those facts as true." Lambert v. Fiorentini, 949 F.3d 22, 25 (1st Cir. 2020) (citing Grajales v. P.R. Ports Auth., 682 F.3d 40, 43 (1st Cir. 2021)). This Court also "consider[s] 'documents the authenticity of which are not disputed by the parties; . . . documents central to plaintiffs' claim; [and] documents sufficient referred to in the complaint' . . . even when the documents are incorporated into the movant's pleadings." Id. (citing Curran v. Cousins, 509 F.3d 36, 44 (1st Cir. 2007)).

- **March 12, 2008**: From Geneva to IMPAC Funding Corporation, recorded on April 29, 2008 at Book 27730, Page 425. Complaint at ¶ 18.
- **April 1, 2011**: From Wells Fargo Bank N.A. as Indenture Trustee for the Registered Holders of IMH Assets Corp., Collateralized Asset Backed Bonds Series 2005-3 to Deutsche Bank National Trust Company, as Trustee Under the Pooling and Servicing Agreement relating to IMPAC Secured Assets Corp. Mortgage Pass-Through Certificates, Series 2006-4, recorded on April 7, 2011 at Book 30336, Page 430. Id. at ¶ 20; Ex. D to Seeley Decl.
- **August 16, 2016**: from Deutsche Bank National Trust Company, as Trustee Under the Pooling and Servicing Agreement relating to IMPAC Secured Assets Corp., Mortgage Pass-Through Certificates, Series 2006-4 to Wells Fargo Bank, N.A., as Indenture Trustee for the Registered Holders of IMH Asset Corp., Collateralized Asset-Backed Bonds, Series 2005-3, recorded on August 25, 2016 at Book 35201, Page 111. Complaint at ¶ 22; Ex. E to Seeley Decl.
- **October 6, 2017**: from Wells Fargo Bank, N.A., as Indenture Trustee for the Registered Holders of IMH Asset Corp., Collateralized Asset-Backed Bonds, Series 2005-3 to Wells Fargo Bank, N.A., as Indenture Trustee for the IMPAC CMB Trust Series 2005-3, recorded on October 27, 2017 at Book 36286, Page 495. Complaint at ¶ 25; Ex. F to Seeley Decl.

B. Fitzhugh's Purported Rescission Of The Loan

Fitzhugh alleges that she did not receive a copy of any of the closing documents at the closing of the transaction on January 14, 2005. Complaint at ¶ 35; see also id. at ¶ 46 (alleging that she did not receive a copy of the notice of her right to cancel until "well after 3 days from

the consummation of the mortgage loan transaction"). When she did receive the package of closing documents, she noticed that it contained a copy of a promissory note for $77,550 with an allonge attached. Id. at ¶ 37. She also received a notice of her three-day right to cancel at that time. Id. at ¶ 38. On or about February 16, 2005, about thirty days after the closing, Fitzhugh was contacted by Master Financial, Inc., stating that servicing of the loans had been transferred to them and requesting that payment be made to them. Id. at ¶ 39. On April 3, 2005, Fitzhugh mailed a Truth in Lending Act notice of rescission to Master Financial. Id. at ¶ 41.

C. Fitzhugh's Bankruptcy Proceedings And Attempted Foreclosures

On November 9, 2005, Fitzhugh filed for bankruptcy in order to stop a foreclosure of the Property. Complaint at ¶ 50. Fitzhugh and her husband have filed for bankruptcy ten times. Docket No. 23 at 4; see also Complaint at ¶¶ 50, 57, 64, 69, 79. No bankruptcy discharge has been granted. Docket No. 23 at 4. Wells Fargo and its predecessors have submitted as proof of claim in those proceedings a copy of a promissory note for $77,550 with an attached allonge transforming it into a $310,200 note. Complaint at ¶¶ 7, 51, 56, 65, 70. On November 25, 2011, Deutsche Bank National Trust Company filed a copy of a $310,200 Note as an exhibit in bankruptcy court. Complaint at ¶ 82; Ex. H to Seeley Decl. According to Fitzhugh, Wells Fargo now relies on the $310,2000 Note. Complaint at ¶ 8.

Fitzhugh has not paid her mortgage in sixteen years. Docket No. 23 at 4. Multiple foreclosure sales have been scheduled, but all have been cancelled due to bankruptcy filings. Id.

On February 16, 2021, Wells Fargo recorded an Affidavit Pursuant to M.G.L. c. 244 Sections 35B and 35C with the Registry in Book 39535, Page 97, attesting to Wells Fargo's ownership of the Note and Mortgage and stating that the requirements of M.G.L. c. 244, § 35B were complied with. Complaint at ¶ 27; Ex. G to Seeley Decl.

On February 8, 2022, Fitzhugh filed the instant action in state court in order to stop the foreclosure of the Property. Docket No. 11 at 48-358. The case was removed to this Court on February 10, 2022. The Complaint contains four claims against Wells Fargo: (i) for a judgment declaring that Wells Fargo failed to comply with M.G.L. c. 244, § 14 (Count I); (ii) for violations of M.G.L. c. 244, § 35B; (iii) to quiet title to the Property (Count III); and (iv) to rescind the Loan pursuant to 15 U.S.C. § 1635 and M.G.L. c. 140D (Count IV).

II. ANALYSIS

A. Standard Of Review

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "To survive a motion for judgment on the pleadings—just as to survive a motion to dismiss—the allegations of the complaint must be plausible on their face." Kando v. Rhode Island State Board of Elections, 880 F.3d 53, 63 (1st Cir. 2018) (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft, 556 U.S. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id.

In assessing the sufficiency of the complaint, "an inquiring court must first separate wheat from chaff; that is, the court must separate the complaint's factual allegations (which must be accepted as true) from its conclusory legal allegations (which need not be credited)." Guadalupe-Baez v. Pesquera, 819 F.3d 509, 514 (1st Cir. 2016) (citing Morales-Cruz v. Univ. of P.R., 676 F.3d 220, 224 (1st Cir. 2012)). The Court must then determine "whether the well-pleaded facts, taken in their entirety, permit 'the reasonable inference that the defendant is liable

for the misconduct alleged.'" Id. (citations omitted).

B. Fitzhugh Lacks Standing To Challenge Wells Fargo's Authority To Foreclose

1. Assignment Of The Mortgage

In Count I of the Complaint, Fitzhugh alleges that Wells Fargo violated M.G.L. c. 244, § 14 and cannot proceed to foreclosure because Wells Fargo does not possess a valid assignment of the Mortgage or the underlying indebtedness evidenced by the Note. See Complaint at ¶¶ 89-119. Wells Fargo argues that Count I fails because Fitzhugh lacks standing to challenge Wells Fargo's authority to foreclose under M.G.L. c. 244, § 14. I agree.

"[A] foreclosing mortgagee must demonstrate an unbroken chain of assignments in order to foreclose a mortgage, and . . . that it holds the note (or acts as authorized agent for the note holder) at the time it commences foreclosure, [but] nothing in Massachusetts law requires a foreclosing mortgagee to demonstrate that prior holders of the record legal interest in the mortgage also held the note at the time each assigned its interest in the mortgage to the next holder in the chain." Giannasca v. Deutsche Bank Nat'l Trust Co., 95 Mass. App. Ct. 775, 777-778 (2019) (internal citations omitted).

For a mortgagor to have standing to challenge an assignment purporting to give a foreclosing mortgagee legal title and the authority to conduct a foreclosure, a mortgagor must claim the assignment was void and not merely voidable. Id. (citing Sullivan v. Kondaur Capital Corp., 85 Mass. App. Ct. 202, 210 (2014)); see also Culhane v. Aurora Loan Servs. of Nebraska, 708 F.3d 282, 291 (1st Cir. 2013) (mortgagor has standing to challenge a mortgage assignment as invalid, ineffective, or void but not to challenge shortcomings in an assignment that render it merely voidable at the election of one party but otherwise effective to pass legal title). In determining whether a mortgagor has standing, a mortgagor's conclusory allegations that an

assignment was void do not carry the day. Rather, a court reviews the text of the assignments themselves in light of Massachusetts law to determine whether the amended complaint sets forth allegations that the assignments are void or voidable. See Wilson v. HSBC Mortg. Servs., Inc., 744 F.3d 1, 10 (1st Cir. 2014).

Chapter 183, Section 54B of the Massachusetts General Laws sets forth the requirements for a valid mortgage assignment:

> Notwithstanding any law to the contrary . . . [an] assignment of mortgage . . . executed before a notary public . . . by a person purporting to hold the position of president, vice president, . . . or other officer . . . of the entity holding such mortgage, or otherwise purporting to be an authorized signatory for such entity . . . shall be binding upon such entity . . .

M.G.L. c. 183, § 54B. Here, the chain of assignments from the original mortgagee to Wells Fargo complied with these requirements: an authorized representative of each of the entities holding the Mortgage at the time executed the assignment before a notary public. See Exs. B – F to Seeley Decl. "With the assignment[s] here comporting with the requirements of the governing statute, [they were] 'otherwise effective to pass legal title' and cannot be shown to be void." Bank of New York v. Wain, 85 Mass. App. Ct. 498, 503 (2014); see also Butler v. Deutsche Bank Trust Co. Americas, 748 F.3d 28, 34 (1st Cir. 2014) (affirming dismissal of complaint where assignments of mortgage complied with requirements of M.G.L. c. 183, § 54B on their face).

Nevertheless, Fitzhugh attacks the chain of assignments of the Mortgage pointing to the 2008 assignment from Geneva to IMPAC Funding Corporation. See Docket No. 29 at 6-8. Fitzhugh argues that the later assignments were void because they rely on the void 2008 assignment. See id. The purported 2008 assignment, however, did not undo the other assignments. At that point, Geneva had nothing to give IMPAC because it had already conveyed

its interest in the Mortgage to IMPAC on January 19, 2005, see Complaint at ¶ 13 and Ex. B to Seeley Decl., which had in turn conveyed its interest to Wells Fargo, as trustee for IMH Asset Corp. Complaint at ¶ 14 and Ex. C to Seeley Decl. Cf. Wells Fargo Bank, N.A. v. Anderson, 89 Mass. App. Ct. 369, 372-373 (2016) (calling a confirmatory assignment "superfluous and harmless"); Wilson, 744 F.3d at 14 (finding later assignment "superfluous and of no legal effect or significance" in light of earlier valid assignment). Accordingly, Fitzhugh lacks standing to challenge the chain of assignments.

2. Possession Of The Note

Fitzhugh also argues that Wells Fargo has not proven that it ever had physical possession of the Note and, therefore, has no authority to foreclose. Docket No. 29 at 13-17. However, physical possession of the note is not required to foreclose. See Searle v. Nationstar Mortg., LLC, No. 1:21-cv-11962-IT, 2022 U.S. Dist. LEXIS 136830, at *14 (D. Mass. Aug. 2, 2022) (citing Eaton v. Fannie Mae, 462 Mass. 569, 584 (2012)). Moreover, Wells Fargo is not required to affirmatively prove that it holds the Mortgage and the Note. Rather, at this stage, it is Fitzhugh who must provide sufficient facts to plausibly allege that Wells Fargo does not own the Mortgage and the Note. Id. (citing Rice v. Wells Fargo Bank, N.A., 2 F.Supp.3d 25, 35 (D. Mass. 2014)). She has not done so. In fact, Wells Fargo has provided an affidavit pursuant to M.G.L. c. 244, §§ 35B and 35C which states, among other things, that, as of February 4, 2021, Wells Fargo is the holder of the Note. Ex. G to Seeley Decl. at p. 3-4. Such an affidavit is considered proof that the entity seeking to foreclose has authority to do so and its sufficiency cannot be challenged by unsupported conclusory allegations. Jones v. Bank of New York as Trustee for the Certificate Holders CWABS, Inc. Asset-Backed Certificates Series 2004-7, 542

F.Supp.3d 44, 54-55 (D. Mass. 2021) (citing Eaton, 462 Mass. at 589 n.28).[3]

Fitzhugh makes much of the fact that Wells Fargo's predecessors introduced in bankruptcy proceedings a different note for $77,550, which Fitzhugh argues contradicts Wells Fargo's assertion that it currently holds the $310,200 Note. See Docket No. 29 at 15-16. Fitzhugh, however, has not shown how the proofs of claim filed in her now dismissed bankruptcies have any bearing on the issue whether Wells Fargo currently holds the Note and has the authority to foreclose. Fitzhugh has not questioned the authenticity or validity of the $310,200 Note, which was in fact filed by Deutsche Bank on November 25, 2011 in connection with one of Fitzhugh's bankruptcy cases. See Ex. H to Seeley Decl.

Accordingly, I find that Fitzhugh lacks standing to challenge Wells Fargo's authority to foreclose and, therefore, that Count I should be dismissed.

C. Fitzhugh Has Failed To State A Claim Under M.G.L. c. 244, § 35B

In Count II of the Complaint, Fitzhugh alleges that Wells Fargo violated M.G.L. c. 244, § 35B ("Section 35B") by issuing the Notice of Sale prior to conducting certain examinations of the Loan required under Section 35B with regards to her ability to pay and finances. Complaint at ¶ 123. According to Fitzhugh, Wells Fargo failed to determine "Plaintiff's current ability to make an affordable monthly payment," "whether a modified mortgage loan achieves the borrower's affordable monthly payment," and failed to "conduct a compliant analysis comparing

[3] Fitzhugh argues that Wells Fargo's affidavit is insufficient to demonstrate possession of the Note because the purpose of an affidavit pursuant to M.G.L. c. 244, §§ 35B & 35C is to protect a third-party purchaser, not the foreclosing party. Docket No. 29 at 16-17. Fitzhugh's argument is contrary to the weight of authority on this issue, where courts have held that such an affidavit established at the pleading stage that the foreclosing mortgagee held the note and had the authority to foreclose. See, e.g., id.; Searle, 2022 U.S. Dist. LEXIS 136830, at *15; O'Brien v. Wilmington Trust Nat'l Ass'n, 506 F.Supp.3d 82, 95 (D. Mass. 2020); Lamson v. Chase Home Fin., LLC, 87 Mass App. Ct. 1102 (2015). Fitzhugh has not cited to any caselaw supporting her argument.

the net present value of the Plaintiff's modified mortgage loan and the Defendant's anticipated net recovery that would result from a foreclosure sale." Id. at ¶¶ 125-127. She also alleges that Wells Fargo failed to determine "whether the net present value of the modified mortgage loan exceeds the anticipated net recovery at foreclosure, or agreed to modify the loan in a manner that provides for the affordable monthly payment." Id. at ¶ 128. Fitzhugh, however, fails to allege any facts supporting this claim.

Fitzhugh alleges only that Wells Fargo's statements in its 35B/35C Affidavit "are without support." Id. at ¶ 130. This statement fails to overcome the presumption that the 35B/35C Affidavit is valid. This Court also notes that Fitzhugh has not addressed Wells Fargo's arguments in support of dismissal of Count II, namely that, as required by Section 35B, she requested a loan modification. Docket No. 27 at 14. Accordingly, I recommend that Judge Saris dismiss Count II of the Complaint.

D. Fitzhugh Lacks Standing To Proceed With A Quiet Title Claim

In Count III, Fitzhugh seeks to quiet title to the Property pursuant to M.G.L. c. 240, §§ 6-10. A plaintiff seeking to quiet title in Massachusetts must show both a right to possession and legal title to the property. Flores v. OneWest Bank, F.S.B., 172 F.Supp.3d 391, 396 (D. Mass. 2016) (citations omitted). In a title theory state like Massachusetts, a "'mortgage splits the title [to a property] in two parts: the legal title, which becomes the mortgagee's' and secures the underlying debt, 'and the equitable title, which the mortgagor retains.'" Lemelson v. U.S. Bank Nat'l Ass'n, 721 F.3d 18, 23 (1st Cir. 2013) (citations omitted). The "mortgagor can redeem or reacquire title by paying the debt which the mortgage secures." Id. Therefore, "a quiet title action is not an avenue open to a mortgagor whose debt is in arrears because, until the mortgage is discharged, the title necessarily remains under a cloud." Oum v. Wells Fargo, N.A., 842

F.Supp.2d 407, 412 (D. Mass. 2012), abrogated on different grounds, Culhane v. Aurora Loan Servs. of Nebraska, 708 F.3d 282, 290 (1st Cir. 2013).

Fitzhugh attempts to meet the "legal title" requirement by stating that she is in legal possession of the Property, challenging the assignments of the Mortgage, and claiming that they failed to "transfer . . . any legally valid interest in Plaintiff's title to the named Defendant." Complaint at ¶ 136. As discussed above, however, the assignments are presumptively valid and Fitzhugh has not plausibly alleged that they are void. The recorded Mortgage and assignments show that the Mortgage remains an encumbrance on the Property. Therefore, Fitzhugh and Wells Fargo hold complementary claims of title until such time as Wells Fargo conducts a foreclosure sale. See Abate v. Fremont Inv. & Loan, 470 Mass. 821, 834 (2015) ("[W]here a mortgagor challenges the right of the mortgagee to foreclose, the 'adverse claim' element of a try title action is sufficiently alleged only if the foreclosure has already occurred."); "The law fashions a relationship that is in equipoise, which stands until either the mortgagor satisfies the debt or the mortgagee forecloses." Id. Accordingly, Fitzhugh has not plausibly alleged that she holds legal title to the Property and has failed to state a valid quiet title claim.

E. Rescission

Finally, in Count IV of the Complaint, Fitzhugh seeks a declaration that the Loan was rescinded pursuant to the Truth in Lending Act ("TILA"), 15 U.S.C. § 1635, and the Massachusetts Consumer Credit Cost Disclosure Act ("MCCCDA"), M.G.L. c. 140D. Complaint at ¶¶ 139-148. Under the TILA, borrowers have three business days after the loan is consummated to exercise their right of rescission and cancel the transaction. See 15 U.S.C. § 1635(a). If the creditor fails to provide all material disclosures and/or proper notice of the right to rescind, however, a borrower's right of rescission is extended to three years from the date of

consummation. See 15 U.S.C. § 1635(f).[4]

Fitzhugh argues that because she did not receive the required disclosures at the consummation of her purported mortgage transaction, she had the right under the TILA to rescind the loan within three years. See Complaint at ¶¶ 46-49; Docket No. 29 at 17-18. However, as Defendant maintains, this argument misunderstands the TILA.

Under the TILA, "the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter." 15 U.S.C. § 1635(a) (emphasis added). The three-year time limit for rescission is only relevant if the required disclosures, including disclosure of the right of rescission, are never delivered. See 15 U.S.C. § 1635(f); see also Jesinoski v. Countrywide Home Loans, Inc., 574 U.S. 259, 261-262 (2015) (noting that borrowers have "an unconditional right to rescind for three days, after which they may rescind only if the lender failed to satisfy the Act's disclosure requirements," but that "[e]ven if a lender *never* makes the required disclosures, the 'right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever comes first.'") (emphasis in original); see also Jesinoski v. Countrywide Home Loans, Inc., 196 F.Supp.3d 956, 959 (D. Minn. 2016) ("The three-day rescission period begins upon the consummation of the transaction or the delivery of the required rescission notices and

[4] "Except for a modest variance in regard to the limitation period . . . the MCCCDA mirrors its federal counterpart. This is not an accident; the Massachusetts legislature closely modeled the state law after the TILA." McKenna v. First Horizon Home Loan Corp., 475 F.3d 418, 422 (1st Cir. 2007) (citing Lynch v. Signal Fin. Co., 367 Mass. 503 (1975)). "It is, therefore, common ground that the MCCCDA should be construed in accordance with the TILA." Id. (citations omitted).

disclosures, whichever occurs later.")

Here, Fitzhugh does not allege that she did not receive the required disclosures. Rather, the only plausible reading of the complaint is that Fitzhugh in fact received the "notice of her three-day right to cancel the transaction" with her package of closing documents sometime prior to February 16, 2005. See Complaint at ¶¶ 35-39. As such, the notice of rescission was untimely. Indeed, her argument regarding the timeliness of the notice appears to be based solely on her mistaken interpretation of the TILA allowing her three years to send the notice of rescission. See Complaint at ¶¶ 44-45, 48-49.[5] Accordingly, I find that Fitzhugh has failed to state a claim for rescission.

III. RECOMMENDATION

For the foregoing reasons, this Court recommends that Judge Saris grant Wells Fargo's motion for judgment on the pleadings.

IV. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of service of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72. The parties are further advised that the United States Court

[5] This Court notes that, in any event, her rescission claim is barred by the applicable statute of limitations. The statute of limitations for a claim of rescission under the TILA is one year, which begins to run from twenty days after a plaintiff gives notice of rescission. Ward v. Security Atlantic Mortg. Electronic Registration Systems, Inc., 858 F.Supp.2d 561, 570 (E.D.N.C. 2012). As such, the statute of limitations would have started running on April 23, 2005 and would have expired on April 23, 2006. Fitzhugh did not file this action until almost 16 years later, on February 8, 2022.

of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hospital, 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir.1993).

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge

United States Court of Appeals
For the First Circuit

No. 23-1107

JACQUELYN V. FITZHUGH,

Plaintiff - Appellant,

v.

WELLS FARGO BANK, N.A., as Indenture Trustee for the Impac CMB Trust Series 2005-3,

Defendant - Appellee.

Before

Barron, Chief Judge,
Kayatta, Gelpí, Montecalvo,
Rikelman, and Aframe, Circuit Judges.

ORDER OF COURT

Entered: November 3, 2025

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and rehearing en banc be denied.

Plaintiff-appellant's rehearing petition also includes a request that this court certify a question of law to the Massachusetts Supreme Judicial Court. Upon consideration, that request is denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Glenn Francis Russell Jr., Jacquelyn V. Fitzhugh, Marissa I. Delinks, Hale Yazicioglu Lake, Donald W. Seeley Jr.

APPENDIX C

No. 23-1107

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JACQUELYN FITZHUGH,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant-Appellee.

On Appeal from the Order Allowing Defendant-Appellee's Motion for Judgement on the Pleadings by the United States District Court for the District of Massachusetts.

AMENDED PETITION OF PLAINTIFF-APPELLANT JACQUELYN R. FITZHUGH FOR REHEARING OR REHEARING EN BANC

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Dated: September 24, 2025

Appendix D

TABLE OF CONTENTS

PAGE

INTRODUCTION 5

I. THE PANEL ERRED IN DENYING ORAL ARGUMENT.....7

II. THE PANEL ERRED BY NOT CERTIFYING A QUESTION OF STATE LAW TO THE MASSACHUSETTS SUPREME JUDICIAL COURT 8

TABLE OF AUTHORITIES

Page(s)

CASES

Bevilacqua v. Rodriguez,
460 Mass. 762, 771 (SJC 2011).....

U.S. Bank, Nat'l Ass'n v. Ibanez,
458 Mass. 637 (SJC 2011).....

Sullivan v. Kondaur Capital,
85 Mass.App.Ct. 202, 205-206.....

U.S. Bank Natl. Assn.v. Ibanez,
458 Mass. 63, 647-648 (2011).....

Ashcroft v. Iqbal,
556 U.S. 662 (2008).....

Eaton v. Fed. Nat'l Mortg. Ass'n,
462 Mass. 569.....

Wells Fargo Bank, N.A. v. Coffin,
27 LCR 221, 18 MISC 000166 (2018).....

Scanlan v. Deutsche Bank, N.T. Co.,
19H82SP01496.....6

STATUTES

Mass. Gen. Laws ch. 244, §14.....7, 8

Rule 1:03 of the Massachusetts SJC.....9

Mass. Gen. Laws ch. 24 §35C(b).....8, 10

Local Rule 34.....7

STATEMENT OF PETITIONER UNDER RULE 40(b)(1)

Petition for Panel Rehearing.

Based on my judgment, I believe that if oral argument had been allowed, as requested by Appellant's counsel in the opening brief, the panel would not have affirmed the judgement of the District Court, at least not on all Counts. I also believe that the panel failed to certify a gravamen question of state law to the Massachusetts Supreme Judicial Court which would be determinative of the causes pending in this action. The question of state law as to whether or not the "The presumptivly valid, publicly-filed section 35C affidavit and assignments of mortgage established defendant held both the Note and Mortgage," should been certified to the Massachusetts Supreme Judicial Court, as it appeared there was no controlling precedent in the SJC, as stated by Appellant's counsel.

Furthermore, this court's finding that Appellant's more than 30 pages of painstaking legal and factual argument, contained in three different documents in the record on appeal, amounts to nothing more than conclusory allegations, is incomprehensible. The panel misapprehended Appellant's legal reasoning in the Appellant brief, and also in other documents in the record on appeal.

Petition for Rehearing En Banc.

The questions raised by this petition are also matters of exceptional importance:

1. If the G.L. c. 244, §35C affidavit conclusively establishes a foreclosing entity's compliance with statute as far as being in possession of a borrower's Note, in a contested foreclosure action, without providing a borrower any ability to assail, challenge, or cross examine the purported affiant, does this violate procedural due process rights of the borrower?

2. If a federal claim is raised in Appellant's opening brief in the jurisdictional statement, but not addressed and therefore waived, is that federal claim preserved for a Writ of Certiorari?

INTRODUCTION

The panel's decision in this case defies and effectively changes Massachusetts statutory law. Why? The panel affirms a district court Magistrate Judge's misinterpretation of the plain language of G. L. c. 244, ss 35C. On page 38 of the Apellant opening brief, the following statement of the Magistrate Judge is opposed by the Appellant:

"Fitzhugh argues that Wells Fargo's affidavit is insufficient to demonstrate possession of the Note because the purpose of an affidavit pursuant to M.G.L. c. 244, §§ 35B & 35C is to protect a third-party purchaser, not the

*foreclosing party. Docket No. 29 at 16-17. Fitzhugh's argument is contrary to the weight of authority on this issue, where courts have held that such an affidavit established at the pleading stage that the foreclosing mortgagee held the note and had the authority to foreclose. See, e.g., id.; Searle, 2022 U.S. Dist. LEXIS 136830, at *15; O'Brien v. Wilmington Trust Nat'l Ass'n, 506 F.Supp.3d 82, 95 (D. Mass. 2020); Lamson v. Chase Home Fin., LLC, 87 Mass App. Ct. 1102 (2015). Fitzhugh has not cited to any caselaw supporting her argument." (A-747)*

(In dispute of the Magistrate Judge's statement, supra, Appellant states below:)

"See also Scanlan v. Deutsche Bank, N.T. Co., 19H82SP01496, in which a Judge of the Massachusetts Metro South Housing Court found that such affidavit would not meet muster under a summary judgment standard, [see Plaintiff's Memorandum In Support of her Preliminary Injunction (A-15-16), and case attached at (A-33 to A-36), which were submitted to the USDC trial Court Judge."

"Further, at no point did either the Magistrate Judge or the USDC trial Court Judge ever undertake statutory construction as to the meaning of the legislative intent of G.L. c. 244, §35C(b). This was so, despite the Plaintiff specifically articulating in detail, the clear language of the statute, and its obvious application to only "arm's length third party purchasers" at a statutory auction sale. Instead, the Magistrate Judge and USDC trial Court Judge eschewed any such review, and merely relied upon parallel non-precedential federal trial court rulings and Massachusetts Appeals Court R. 1:28 non precedential holdings involving decisions examining other borrowers pleadings under a 12(b)(6) analysis that were nowhere alleged by Plaintiff. Further, in none of the cited cases by the Magistrate Judge was the issue of the statute only applying to arm's length third party purchasers ever raised."

Despite the issues raised in the foregoing, the panel finds no apparent error with the Magistrate Judge's interpretation of the law. This raises the question of what is the standard for "apparent error."

ARGUMENT

I. THE PANEL ERRED IN DENYING ORAL ARGUMENT

At page 7 of the Appellant's brief, counsel for the Appellant Attorney Russell requested oral argument, stating that oral argument was critical:

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

The Plaintiff's complaint was originally Removed to the U.S. District Court, District of Massachusetts on February 10, 2019. Plaintiff's complaint involves the Defendants use of the Massachusetts state legislatively enacted extra judicial statutory foreclosure remedy under G.L. c. 244, §14, and related statutes and regulations thereto.

The trial court judge erred in the interpretation, and application of statute and regulation based upon an improper reading of inapposite existing case law, some of which was issued by this Court.

***Oral argument is critical** in order for Plaintiff to explicate precisely how the trial court judge misinterpreted existing case law that was inapposite as to Plaintiff's specific fact pattern and plausible allegation, as well as to highlight exactly how the trial court judge abused his discretion in dismissing Plaintiff's complaint under FRCP, R.12(c).*

Rule 34, of the Local Rules of this court, provide that:

Oral Argument

(a) In General.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Appellant's request for oral argument should have been allowed, and should still be allowed, because the panel:

(A) did not find that the appeal was frivolous;
(B) did not hold that the dispositive issue or issues have been authoritatively decided;
(C) did hold that the facts and legal arguments were inadequately presented in the Appellant brief.**

**Second, Fitzhugh's claim that the district court erred in considering the documents that defendant submitted with its motion for judgment on the pleadings is waived for lack of developed argumentation. See Quintana-Dieppa v. Dept. of Army, 130 F.4th 1, 12 n.12 (1st Cir. 2025) ("It is not enough merely to mention an argument in the most skeletal way, leaving it to the court to do [a party's] work, create the ossature for the argument, and put flesh on its bones." (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (See *Judgement,* entered August 11, 2015.)

II. THE PANEL ERRED BY NOT CERTIFYING AN IMPORTANT QUESTION OF STATE LAW TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

At page 40, of the Appellant's brief, attorney Russell stated:

3. *Due To The Apparent Long Held Confusion, Under Conflicting Trial Court Findings Regarding A Contested Foreclosure, The G.L. c. 244, §35C Statutory Affidavit "Conclusively Establishes" Possession of a Borrower's Note for A Foreclosing Entity For Purposes of G.L. c. 244, §14, Defendant Will Seek Certification of A Question of State Law on This Issue As It Has Never Reached The SJC*

The obvious typographical error in the statement above should not have deterred the panel in seeking an authoritative answer for this question of state law. Attorney Russell clearly meant to write, "Plaintiff will seek certification of a question of State Law on this issue as it has never reached the SJC." Despite an obvious conflation of the word "Defendant" with the word "Plaintiff," the panel should have certified the question of whether a 35C Statutory Affidavit "conclusively establishes possession of a borrower's note for a foreclosing entity for purposes of G.L. c. 244, ss 14, in a contested foreclosure, because of:

Rule 1:03 of the Massachusetts Rules and Order of the Supreme Judicial Court

1:03 Uniform Certification of Questions of Law.

Section 1. Authority to Answer Certain Questions of Law.

This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking.

This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order.

A certification order shall set forth
(1) the question of law to be answered; and
(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

In light of the foregoing, Appellant Jacquelyn V. Fitzhugh, incorporates the following motion into her petition for rehearing:

Motion of Jacquelyn V. Fitzhugh to Certify A Question of State Law

Pursuant to Rule 1:03 of the Massachusetts Rules and Order of the Supreme Judicial Court, Section 2, Jacquelyn V. Fitzhugh, Appellant and a party to the cause, hereby moves this honorable court to certify the following question of law to the Supreme Judicial Court of Massachusetts:

> Does the recording of a G.L. c. 244, §35C affidavit conclusively establish a foreclosing entity's compliance with statute as far as being in possession of a borrower's Note, in a contested foreclosure action, without providing a borrower any ability to assail, challenge, or cross examine the purported affiant, and does this violate procedural due process rights of the borrower?

Wherefore, Appellant prays this honorable court to:

(1) Allow her motion to certify this important question of state law to the SJC.

(2) Allow her petition for rehearing.

United States Court of Appeals
For the First Circuit

No. 23-1107

JACQUELYN V. FITZHUGH,

Plaintiff - Appellant,

v.

WELLS FARGO BANK, N.A., as Indenture Trustee for the Impac CMB Trust Series 2005-3,

Defendant - Appellee.

Before

Barron, Chief Judge,
Kayatta, Gelpí, Montecalvo,
Rikelman, and Aframe, Circuit Judges.

ORDER OF COURT

Entered: November 3, 2025

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and rehearing en banc be denied.

Plaintiff-appellant's rehearing petition also includes a request that this court certify a question of law to the Massachusetts Supreme Judicial Court. Upon consideration, that request is denied.

By the Court:

Anastasia Dubrovsky, Clerk

cc:
Glenn Francis Russell Jr., Jacquelyn V. Fitzhugh, Marissa I. Delinks, Hale Yazicioglu Lake, Donald W. Seeley Jr.

APPENDIX C

No. 23-1107

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JACQUELYN FITZHUGH,

Plaintiff-Appellant,

v.

WELLS FARGO BANK, N.A.,

Defendant-Appellee.

On Appeal from the Order Allowing Defendant-Appellee's Motion for Judgement on the Pleadings by the United States District Court for the District of Massachusetts.

AMENDED PETITION OF PLAINTIFF-APPELLANT JACQUELYN R. FITZHUGH FOR REHEARING OR REHEARING EN BANC

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Dated: September 24, 2025

Appendix D

TABLE OF CONTENTS

PAGE

INTRODUCTION 5

I. THE PANEL ERRED IN DENYING ORAL ARGUMENT.....7

II. THE PANEL ERRED BY NOT CERTIFYING A QUESTION OF STATE LAW TO THE MASSACHUSETTS SUPREME JUDICIAL COURT 8

TABLE OF AUTHORITIES

Page(s)

CASES

Bevilacqua v. Rodriguez,
460 Mass. 762, 771 (SJC 2011).....

U.S. Bank, Nat'l Ass'n v. Ibanez,
458 Mass. 637 (SJC 2011).....

Sullivan v. Kondaur Capital,
85 Mass.App.Ct. 202, 205-206.....

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462 Mass. 569.....

Wells Fargo Bank, N.A. v. Coffin,
27 LCR 221, 18 MISC 000166 (2018).....

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19H82SP01496.....6

STATUTES

Mass. Gen. Laws ch. 244, §14.....7, 8

Rule 1:03 of the Massachusetts SJC.....9

Mass. Gen. Laws ch. 24 §35C(b).....8, 10

Local Rule 34.....7

STATEMENT OF PETITIONER UNDER RULE 40(b)(1)

Petition for Panel Rehearing.

Based on my judgment, I believe that if oral argument had been allowed, as requested by Appellant's counsel in the opening brief, the panel would not have affirmed the judgement of the District Court, at least not on all Counts. I also believe that the panel failed to certify a gravamen question of state law to the Massachusetts Supreme Judicial Court which would be determinative of the causes pending in this action. The question of state law as to whether or not the "The presumptivly valid, publicly-filed section 35C affidavit and assignments of mortgage established defendant held both the Note and Mortgage," should been certified to the Massachusetts Supreme Judicial Court, as it appeared there was no controlling precedent in the SJC, as stated by Appellant's counsel.

Furthermore, this court's finding that Appellant's more than 30 pages of painstaking legal and factual argument, contained in three different documents in the record on appeal, amounts to nothing more than conclusory allegations, is incomprehensible. The panel misapprehended Appellant's legal reasoning in the Appellant brief, and also in other documents in the record on appeal.

Petition for Rehearing En Banc.

The questions raised by this petition are also matters of exceptional importance:

1. If the G.L. c. 244, §35C affidavit conclusively establishes a foreclosing entity's compliance with statute as far as being in possession of a borrower's Note, in a contested foreclosure action, without providing a borrower any ability to assail, challenge, or cross examine the purported affiant, does this violate procedural due process rights of the borrower?

2. If a federal claim is raised in Appellant's opening brief in the jurisdictional statement, but not addressed and therefore waived, is that federal claim preserved for a Writ of Certiorari?

INTRODUCTION

The panel's decision in this case defies and effectively changes Massachusetts statutory law. Why? The panel affirms a district court Magistrate Judge's misinterpretation of the plain language of G. L. c. 244, ss 35C. On page 38 of the Apellant opening brief, the following statement of the Magistrate Judge is opposed by the Appellant:

"Fitzhugh argues that Wells Fargo's affidavit is insufficient to demonstrate possession of the Note because the purpose of an affidavit pursuant to M.G.L. c. 244, §§ 35B & 35C is to protect a third-party purchaser, not the

*foreclosing party. Docket No. 29 at 16-17. Fitzhugh's argument is contrary to the weight of authority on this issue, where courts have held that such an affidavit established at the pleading stage that the foreclosing mortgagee held the note and had the authority to foreclose. See, e.g., id.; Searle, 2022 U.S. Dist. LEXIS 136830, at *15; O'Brien v. Wilmington Trust Nat'l Ass'n, 506 F.Supp.3d 82, 95 (D. Mass. 2020); Lamson v. Chase Home Fin., LLC, 87 Mass App. Ct. 1102 (2015). Fitzhugh has not cited to any caselaw supporting her argument." (A-747)*

(In dispute of the Magistrate Judge's statement, supra, Appellant states below:)

"See also Scanlan v. Deutsche Bank, N.T. Co., 19H82SP01496, in which a Judge of the Massachusetts Metro South Housing Court found that such affidavit would not meet muster under a summary judgment standard, [see Plaintiff's Memorandum In Support of her Preliminary Injunction (A-15-16), and case attached at (A-33 to A-36), which were submitted to the USDC trial Court Judge."

"Further, at no point did either the Magistrate Judge or the USDC trial Court Judge ever undertake statutory construction as to the meaning of the legislative intent of G.L. c. 244, §35C(b). This was so, despite the Plaintiff specifically articulating in detail, the clear language of the statute, and its obvious application to only "arm's length third party purchasers" at a statutory auction sale. Instead, the Magistrate Judge and USDC trial Court Judge eschewed any such review, and merely relied upon parallel non-precedential federal trial court rulings and Massachusetts Appeals Court R. 1:28 non precedential holdings involving decisions examining other borrowers pleadings under a 12(b)(6) analysis that were nowhere alleged by Plaintiff. Further, in none of the cited cases by the Magistrate Judge was the issue of the statute only applying to arm's length third party purchasers ever raised."

Despite the issues raised in the foregoing, the panel finds no apparent error with the Magistrate Judge's interpretation of the law. This raises the question of what is the standard for "apparent error."

ARGUMENT

I. THE PANEL ERRED IN DENYING ORAL ARGUMENT

At page 7 of the Appellant's brief, counsel for the Appellant Attorney Russell requested oral argument, stating that oral argument was critical:

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

The Plaintiff's complaint was originally Removed to the U.S. District Court, District of Massachusetts on February 10, 2019. Plaintiff's complaint involves the Defendants use of the Massachusetts state legislatively enacted extra judicial statutory foreclosure remedy under G.L. c. 244, §14, and related statutes and regulations thereto.

The trial court judge erred in the interpretation, and application of statute and regulation based upon an improper reading of inapposite existing case law, some of which was issued by this Court.

***Oral argument is critical** in order for Plaintiff to explicate precisely how the trial court judge misinterpreted existing case law that was inapposite as to Plaintiff's specific fact pattern and plausible allegation, as well as to highlight exactly how the trial court judge abused his discretion in dismissing Plaintiff's complaint under FRCP, R.12(c).*

Rule 34, of the Local Rules of this court, provide that:

Oral Argument

(a) In General.

(1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary for any of the following reasons:

(A) the appeal is frivolous;

(B) the dispositive issue or issues have been authoritatively decided; or

(C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.

Appellant's request for oral argument should have been allowed, and should still be allowed, because the panel:

(A) did not find that the appeal was frivolous;
(B) did not hold that the dispositive issue or issues have been authoritatively decided;
(C) did hold that the facts and legal arguments were inadequately presented in the Appellant brief.**

**Second, Fitzhugh's claim that the district court erred in considering the documents that defendant submitted with its motion for judgment on the pleadings is waived for lack of developed argumentation. See Quintana-Dieppa v. Dept. of Army, 130 F.4th 1, 12 n.12 (1st Cir. 2025) ("It is not enough merely to mention an argument in the most skeletal way, leaving it to the court to do [a party's] work, create the ossature for the argument, and put flesh on its bones." (quoting United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (See *Judgement,* entered August 11, 2015.)

II. THE PANEL ERRED BY NOT CERTIFYING AN IMPORTANT QUESTION OF STATE LAW TO THE MASSACHUSETTS SUPREME JUDICIAL COURT

At page 40, of the Appellant's brief, attorney Russell stated:

3. Due To The Apparent Long Held Confusion, Under Conflicting Trial Court Findings Regarding A Contested Foreclosure, The G.L. c. 244, §35C Statutory Affidavit "Conclusively Establishes" Possession of a Borrower's Note for A Foreclosing Entity For Purposes of G.L. c. 244, §14, Defendant Will Seek Certification of A Question of State Law on This Issue As It Has Never Reached The SJC

The obvious typographical error in the statement above should not have deterred the panel in seeking an authoritative answer for this question of state law. Attorney Russell clearly meant to write, "Plaintiff will seek certification of a question of State Law on this issue as it has never reached the SJC." Despite an obvious conflation of the word "Defendant" with the word "Plaintiff," the panel should have certified the question of whether a 35C Statutory Affidavit "conclusively establishes possession of a borrower's note for a foreclosing entity for purposes of G.L. c. 244, ss 14, in a contested foreclosure, because of:

Rule 1:03 of the Massachusetts Rules and Order of the Supreme Judicial Court

1:03 Uniform Certification of Questions of Law.

Section 1. Authority to Answer Certain Questions of Law.

This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking.

This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order.

A certification order shall set forth
(1) the question of law to be answered; and
(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order.

The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

In light of the foregoing, Appellant Jacquelyn V. Fitzhugh, incorporates the following motion into her petition for rehearing:

Motion of Jacquelyn V. Fitzhugh to Certify A Question of State Law

Pursuant to Rule 1:03 of the Massachusetts Rules and Order of the Supreme Judicial Court, Section 2, Jacquelyn V. Fitzhugh, Appellant and a party to the cause, hereby moves this honorable court to certify the following question of law to the Supreme Judicial Court of Massachusetts:

> Does the recording of a G.L. c. 244, §35C affidavit conclusively establish a foreclosing entity's compliance with statute as far as being in possession of a borrower's Note, in a contested foreclosure action, without providing a borrower any ability to assail, challenge, or cross examine the purported affiant, and does this violate procedural due process rights of the borrower?

Wherefore, Appellant prays this honorable court to:

(1) Allow her motion to certify this important question of state law to the SJC.

(2) Allow her petition for rehearing.