Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. SJC-11490

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
BEAR STEARNS ASSET-BACKED SECURITIES TRUST 2004-AC4,
PLAINTIFF-APPELLEE,

v.

EDNA SCHUMACHER AND JOHN SCHUMACHER,
DEFENDANTS-APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE HOUSING COURT DEPARTMENT
OF THE TRIAL COURT

**BRIEF AND SUPPLEMENTAL APPENDIX FOR
THE PLAINTIFF-APPELLEE,
U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE FOR
BEAR STEARNS ASSET-BACKED SECURITIES TRUST 2004-AC4**

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Dated: June 6, 2013

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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I. Whether the Housing Court properly exercised its discretion in refusing to consider a defense that Appellant raised for the first time at trial?

II. When a foreclosure sale complies with the power of sale, does a noncompliant notice of a right to cure under M.G.L. c. 244, § 35A result in a foreclosure sale that is void in law or a foreclosure sale that is voidable in equity?

STATEMENT OF THE FACTS

I. Foreclosure Upon the Subject Property

On May 24, 2004, Defendant purchased 1204 Main Street, Clinton and Lancaster (the "Property") and granted a mortgage on the Property to Union Federal Bank of Indianapolis (the "Mortgage"). See Appendix, page 39 (hereinafter "Apx. at p._"). The Mortgage was recorded in Worcester County Registry of Deeds at Book 33728, Page 60. Id. On March 30, 2006, the Mortgage was assigned to Mortgage Electronic Registration Systems, Inc. ("MERS"). Id. The March 30, 2006 assignment to MERS was recorded in Worcester County Registry of Deeds at Book 38653, Page 262. Id. Three

years later, on March 10, 2009, MERS assigned the Mortgage to US Bank. Id.

Plaintiff defaulted on his mortgage obligations in August of 2008. Apx. at pp. 10, 39. Nearly six months *after* being assigned the Mortgage from MERS, on August 11, August 28, and September 4, 2009, US Bank caused notice of the foreclosure sale upon the Property to be published in the Clinton Item, which is a newspaper of general circulation in Clinton and Lancaster. Supplemental Appendix at pages 44-48 (hereinafter, "Sup.Apx. at p. _"). On October 23, 2009, US Bank conducted a foreclosure sale on the Property. Apx. at p. 11. As the high bidder at the foreclosure sale, US Bank took title to the Property and recorded a foreclosure deed at the Worcester County Registry of Deeds on March 8, 2010 at Book 45537, Page 278. Id.

On March 26, 2010, US Bank caused a post-foreclosure 72-hour notice to vacate to be served upon the Defendant. Id. Despite receipt of the notice to vacate, Defendant remained in the Property. Id. Accordingly, on April 12, 2010, US Bank filed this summary process action in the Worcester Housing Court. Apx. at p. 1.

II. Litigation History

A. Defendant Defeats Summary Judgment by Falsely Claiming That He Cured His Default

As stated above, US Bank filed this summary process case on April 12, 2010. On April 16, Defendant filed an Answer to the summary process complaint as well as a host of counterclaims against US Bank. Apx. at pp. 3-8. Defendant did not allege a violation of M.G.L. c. 244, § 35A in either his answer or counterclaim. Id. After responding to Defendant's discovery requests, US Bank moved for summary judgment, which was opposed by Defendant. Sup.Apx. at pp. 7-17. Schumacher's opposition to summary judgment failed to allege a violation of M.G.L. c. 244, § 35A. Instead, the crux of Defendant's opposition to summary judgment was his affidavit that he had cured the default on his mortgage prior to the foreclosure sale. Sup.Apx. at pp. 7-17. Given Defendant's affidavit, the Court found "one troubling aspect however is that the defendants have asserted by affidavit and documentary evidence, that there was some type of modification or payment delivered to plaintiff or its assignor prior to the foreclosure sale of October 23,

2009" and based upon this factual dispute alone, denied summary judgment.[1] Sup.Apx. at p. 18.

B. Defendant Avoids a Second Summary Judgment by Arguing That US Bank is not the Mortgagee

In response to Defendant's argument that he had cured his default, US Bank renewed its motion for summary judgment and demonstrated in its papers that Schumacher had indeed defaulted on his mortgage obligations. In response, Schumacher no longer argued that he had cured his default. Instead, he argued that US Bank "is clearly not the party in equity holding either the mortgage or the note… as required by US Bank as Trustee vs Ibanez et siq. [*sic*]" Sup.Apx. at pp. 19-20. Once again, Schumacher made no allegations concerning M.G.L. c. 244, § 35A.

Based upon Schumacher's argument, the Court again denied summary judgment as "questions regarding the timing of assignments and whether, or not, the plaintiff was the appropriate financial institution to conduct the foreclosure sale" remained in dispute. Sup.Apx. at pp. 21-23. Based upon concerns with its

[1] It is worth noting that Schumacher's default is now a stipulated fact in this case. As a result, Schumacher's affidavit stating that he cured his default was false and little more than an improper litigation tactic designed to defeat summary judgment.

jurisdiction to hear this dispute, the Court stayed the matter to allow Schumacher to bring his claims in a Court of appropriate jurisdiction.

C. Schumacher Files a Suit in Worcester Superior Court and Refuses to Serve it

On September 8, 2010, Schumacher filed a complaint against US Bank in Worcester Superior Court (Case No. WOCV2010-01947). Sup.Apx. at pp. 49-53. The complaint alleges that US Bank was not the mortgagee at the time of the foreclosure sale and also alleges violations of 940 CMR 800, 15 U.S.C. § 1601 (Truth in Lending Act), 15 U.S.C. § 1692 (Federal Fair Debt Collection Practices, as well as M.G.L. c. 93, § 49. Sup.Apx. at pp. 54-68. While the complaint is sixteen pages long, contains thirty-nine paragraphs of factual allegations, and lists a myriad of alleged wrongdoings by US Bank, Schumacher again does not make any allegations that M.G.L. c. 244, § 35A has been violated.

Knowing that the Housing Court eviction case was stayed, Schumacher delayed matters by refusing to serve his complaint on US Bank. Accordingly, US Bank filed a motion to dismiss based upon Schumacher's failure to prosecute. Schumacher did not oppose the

motion to dismiss. On January 13, 2011, the Worcester Superior Court dismissed Schumacher's lawsuit and noted that no opposition to the motion had been filed. Sup.Apx. at pp. 53, 69.

D. In a Span of Seven Months, Schumacher Files for Bankruptcy Protection Three Times - Each is Dismissed for Failure to Submit Required Information

Shortly after dismissal of his Worcester Superior Court case, the Housing Court set a motion hearing for January 27, 2011. See January 19, 2011 docket entry. On January 25, two days before he was due to appear in Housing Court, Schumacher filed for bankruptcy protection (Case No. 11-40262 (Chapter 13)). Sup.Apx. at pp. 70-72. Due to the automatic stay associated with the same, the Housing Court stayed the eviction case. On March 8, 2011, Schumacher's bankruptcy case was dismissed by the Bankruptcy Court for failure to file required information. Sup.Apx. at p. 73. Just nine days after having his first bankruptcy case dismissed, Schumacher filed a second bankruptcy case on March 17 (case No. 11-41014 (Chapter 13)). Sup.Apx. at pp. 74-81. This case was dismissed on July 11, 2011 for failing to submit required information to the Court. Sup.Apx. at p. 82. Lastly,

on August 17, 2011, Schumacher filed a third bankruptcy (Case No. 11-43499 (Chapter 7)). Sup.Apx. at pp. 83-88. His discharge was withheld in this matter for once again failing to submit required information. Sup.Apx. at p. 89. In none of these cases did Schumacher raise his M.G.L. c. 244, § 35A concerns. Instead, the filing of these cases demonstrates a clear intent to abuse the automatic stay provisions of bankruptcy in an effort to avoid eviction.

E. Schumacher Files Suit in Land Court

On June 15, 2011, Schumacher filed suit against US Bank in the Massachusetts Land Court (Case No. 11-MISC-449263). Sup.Apx. at pp. 90-92. The crux of the complaint was that US Bank did not have authority to conduct the foreclosure sale as it did not hold an assignment of the Mortgage at the time of the foreclosure sale. Sup.Apx. at pp. 93-104. Again, Schumacher's complaint made no allegation that the foreclosure sale was invalid due to improper notice under M.G.L. c. 244, § 35A. As the Land Court was uncomfortable ruling on the merits while Schumacher was in bankruptcy (see Sup.Apx. at p. 91, 9/14/2011

entry), Schumacher's counsel requested that the case be dismissed *without* prejudice so that he could raise his allegations again in the Housing Court. The Land Court obliged Schumacher and on December 23, 2011, the Land Court case was dismissed without prejudice. Sup.Apx. at pp. 105-107.

F. The Case Returns to Housing Court

As shown above, the Land Court matter was dismissed on December 23, 2011 and Schumacher's third bankruptcy was dismissed on March 9, 2012. According, as the Housing Court matter had been pending since April of 2010, the Housing Court set a trial date of March 29. See Docket, March 15 Docket Entry. The parties agreed to waive their right to a jury and instead agreed that the Court would decide the matter based upon material presented to it by the parties. Despite the case having been pending in the Housing Court for two years and having been litigated in the Superior Court, the Land Court and through three bankruptcy cases, the Court and US Bank learned of Schumacher's alleged violation of M.G.L. c. 244, § 35A for the first time in preparing materials to be submitted to the Court for a bench trial.

III. Disposition in the Court Below

The Worcester Housing Court's November 5, 2010 summary judgment order made clear that "the timing of the assignments and whether, or not, the plaintiff was the appropriate financial institution to conduct the foreclosure sale" were the only triable issues in this dispute. Due to Defendant's last minute presentation of this issue, both parties provided briefing on M.G.L. c. 244, § 35A to the Court. However, the Court is not required to change the law of the case and adjudicate new, untimely disputes. Instead, the Court exercised its discretion and only considered the issues that it had previously set for adjudication at trial. On those issues, it found US Bank held the mortgage by assignment *before* the notice of foreclosure sale was sent (thereby complying with Ibanez) and that US Bank was therefore the appropriate foreclosing entity. "No credible defenses were presented" on either of these contested issues and judgment was entered for US Bank.

SUMMARY OF THE ARGUMENT

US Bank filed this summary process case in April of 2010. Two years later, after the extensive litigation history described *supra*, Schumacher raised a new argument on the eve of trial. He argued that the foreclosure sale conducted by US Bank was void as the notice of right to cure he received did not fully comply with M.G.L. c. 244, § 35A. In a succinct Order, the Housing Court did not consider Schumacher's untimely § 35A argument and instead exercised its discretion to rule only on those issues properly before it. In doing so, it entered judgment for possession to US Bank. This ruling should be affirmed for several reasons.

First, Schumacher, without explanation, waited two years to raise his § 35A argument. In fact, the Housing Court previously ruled on US Bank's summary judgment motion and held that there were only two trial-worthy issues. At trial, it ruled upon only these two issues and exercised its discretion to not consider Schumacher's untimely § 35A argument. This is a proper exercise of discretion by the Housing Court. (pp. 14-19)

Even if the Housing Court were to consider Schumacher's untimely § 35A argument, the record still supports affirming the decision below. While fully admitting that he received a right to cure notice, Schumacher takes the position that *any* noncompliance with § 35A results in the foreclosure sale being void *ab initio*. Massachusetts law does not support this argument. As § 35A does not concern or regulate the power of sale, failure to comply with § 35A, while at the same time fully complying with the power of sale, does not result in the foreclosure sale being void at law. Instead, the Supreme Judicial Court has held for nearly one hundred years that this scenario results in the foreclosure sale instead being voidable in equity. In the present case, there is nothing in the record to indicate that equity requires voiding of the foreclosure sale. As a result, even though the Housing Court never considered the § 35A argument, this Court can independently affirm the Housing Court's judgment on the record before it. (pp. 20-37).

STANDARD OF REVIEW

When reviewing the findings of a bench trial, an appellate court accepts the judge's findings of fact unless they are "clearly erroneous." Kendall v. Selvaggio, 413 Mass. 619, 620, 602 N.E.2d 206 (1992); Makrigiannis v. Nintendo of Am., Inc., 442 Mass. 675, 678, 815 N.E.2d 1066, 1068 (2004); O'Connor v. Merrimack Mut. Fire Ins. Co., 73 Mass. App. Ct. 205, 210-11, 897 N.E.2d 593, 598-99 (2008). A finding of fact is clearly erroneous only when a reviewing court has a "definite and firm conviction" that the judge made a mistake. Lily Transp. Corp. v. Royal Institutional Servs., Inc., 64 Mass. App. Ct. 179, 181, 832 N.E.2d 666, 669-70 (2005). In terms of fact finding, appeals courts give deference to the trial court, as it has a "firsthand view" of the witnesses and evidence. Id. Where the findings of fact are supported by "any reasonable view of the evidence," the appellate court may not reverse. Id. In the present case, the Housing Court found that Schumacher presented "[n]o *credible* defenses." Apx. at p. 40 (emphasis added). In using the word "credible," the Housing Court indicated that it was weighing factual

evidence before it. Thus, the Housing Court's factual findings must be given proper deference.

However, no such deference must be afforded legal conclusions as legal conclusions at a bench trial are reviewed *de novo*. T.W. Nickerson, Inc. v. Fleet Natl. Bank, 456 Mass. 562, 569, 924 N.E.2d 696 (2010); Panagakos v. Collins, 80 Mass. App. Ct. 697, 701-02, 956 N.E.2d 226, 229 (2011). Conclusions are not given the heightened "clearly erroneous" standard because courts have a strong interest in ensuring that ultimate findings are consistent with current law. Kendall v. Selvaggio, 413 Mass. 619, 620-21, 602 N.E.2d 206, 208 (1992).

Lastly, for appellate review of equitable relief, an appellate court looks to whether the trial judge has committed an abuse of discretion. Com. v. Fremont Inv. & Loan, 452 Mass. 733, 741, 897 N.E.2d 548, 555 (2008); Demoulas v. Demoulas, 428 Mass. 555, 589, 703 N.E.2d 1149, 1174 (1998). An abuse of discretion occurs when a judge applies improper legal standards or does not have reasonable support for his evaluation of factual standards. Id.; Hull Mun. Lighting Plant v. Massachusetts Mun. Wholesale Elec. Co., 399 Mass. 640, 642, 506 N.E.2d 140 (1987).

ARGUMENT

I. The Housing Court Correctly Limited Trial To Only Those Issues That Remained In Dispute After Its Two Summary Judgment Rulings

This Court should affirm the decision of the Housing Court as a proper exercise of the Housing Court's discretion to not consider Schumacher's additional and untimely M.G.L. c. 244, § 35A ("§ 35A") argument. Furthermore, Schumacher's § 35A argument had been waived due to Schumacher's failure to raise it in his Answer as well as the Court's allowance of US Bank's motion to dismiss Schumacher's counterclaims. As previously stated, appellate courts review decisions for equitable relief under an abuse of discretion standard where deference is given to the trial court absent the application of improper legal standards or lack of reasonable factual support. See Fremont Inv. & Loan, 452 Mass. at 741 ("We review the grant or denial of [equitable relief] to determine whether the judge abused his discretion, that is, whether the judge applied proper legal standards and whether there was reasonable support for his evaluation of factual questions."); Demoulas, 428 Mass. at 589 ("We examine the judge's imposition of equitable remedies under an abuse of discretion

standard."). As shown *infra*, the record amply supports the Housing Court's exercise of discretion and the Housing Court's Order should be affirmed.

A. As the Housing Court's Summary Judgment Order Set the Issues for Trial, the Housing Court was not Required to Consider Schumacher's Untimely and Newly Raised Argument

In the trial order issued by the Housing Court, Justice Sullivan made no reference to the § 35A issue brought to his attention for the first time in the parties' trial briefs. Instead, he focused his attention on the issues remaining from the previously ruled upon summary judgment order - whether US Bank held the mortgage and whether US Bank was the proper party to foreclose. The trial court resolved these remaining disputes in favor of US Bank based upon all of the evidence provided at trial. Although briefed by both parties, Justice Sullivan decided not to consider the § 35A issue and his ruling ought to be given wide discretion. There was no abuse of discretion in this ruling, especially considering Schumacher's decision to raise the § 35A notice issue for the first time on the eve of trial. The record demonstrates that Schumacher did not raise the § 35A

issue in (1) his answer, (2) his counterclaims, (3) his opposition to US Bank's first summary judgment motion, (4) his opposition to US Bank's second summary judgment motion, (5) his Worcester Superior Court complaint, (6) his Land Court complaint, or (7) his three bankruptcy cases. Schumacher offers no explanation as to why his § 35A argument was not raised sooner. By the time Schumacher raised the § 35A issue for the first time, the Court had already issued a summary judgment order that, consistent with Schumacher's prior defense theory, left only the issue of assignment of the mortgage and whether US Bank was the proper foreclosing entity as the issues to be tried. See Sup.Apx. at pp. 21-23. Accordingly, the Housing Court did not abuse its discretion by considering only whether US Bank held the mortgage and whether US Bank was the proper party to foreclose - i.e., the two issues remaining from the summary judgment order. Given the long history of this case, Schumacher's failure to timely raise his § 35A issue, and Schumacher's failure to offer any explanation for his failure to raise his § 35A issue sooner, the Housing Court did not abuse its discretion in deciding not to consider his untimely argument.

B. Schumacher Waived His § 35A Argument

It is undisputed that Schumacher failed to raise his § 35A dispute until the eve of trial. This was Schumacher's third substantive change to his defense theory in the case. First, he alleged that he was not in default. When this argument was easily disproved, he argued that US Bank was not the proper foreclosing entity. Now, on the eve of trial and facing uncontroverted evidence that US Bank was the proper foreclosing entity, Schumacher changed his defense theory for a third time and argued that there was an issue of noncompliance with § 35A. However, Schumacher's strategic third change of course is problematic due to the age of the case.

If his new defense is considered an affirmative defense, then Schumacher failed to plead this affirmative defense in his answer and it was therefore waived. Pursuant to the Massachusetts Rules of Civil Procedure, "[e]very defense, *in law or fact*, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required . . . ." Mass. R. Civ. P. 12(b) (emphasis added). Relying upon Rule 12, Massachusetts courts

have consistently denied the ability of parties to raise avoidance defenses similar to Schumacher's at trial that were not included in the party's answer. See, e.g., McLean Co. v. Sidebottom, 277 Mass. 158, 159-60 (Mass. 1931) ("The defence of *ultra vires* was not open unless set up in the answer.") (internal citation omitted); Cushman v. Davis, 85 Mass. 99, 100 (3 Allen 99) (Mass. 1861) ("As the defendant did not allege in his answer that the plaintiffs had sold the claim which is the cause of action declared on . . . he has lost the benefit of such a defence."); Fogg v. Griffin, 84 Mass. 1, 8 (2 Allen 1) (Mass. 1861) ("[defense] must be alleged in the answer . . . if a defendant seeks to avail himself of it in order to defeat a recovery on a contract."); Shain Inv. Co. v. Cohen, 15 Mass. App. Ct. 4, 8-13 (Mass. App. Ct. 1982)(noting defendant may try issues because they were raised as defenses in answer). By failing to raise his § 35A issue in his answer or in any other capacity for the better part of two years, Schumacher waived his ability to raise this issue for the first time at trial. Insofar as Schumacher attempts to posit this new theory as a counterclaim rather than an affirmative defense, such a label fares no better. US

Bank moved to dismiss all of Schumacher's counterclaims. The Court allowed this motion and Schumacher has not appealed this order. Sup.Apx. at pp. 21-23.

Massachusetts rules and jurisprudence are clear that where a party fails to allege defenses in their answer or in any other formal proceedings prior to trial, the party is precluded from raising new defenses or changing the theory of their case on the eve of trial. Here, Schumacher did not raise the § 35A issue in his answer or in any of the other papers that were filed in the nearly two year litigation history of this case. He offers no explanation for this delay. Instead, he sprung the issue upon the Court for the first time at trial. Because the Court had already set what issues it was going to hear at trial, and because Schumacher's § 35A issue was not timely raised, this Court should defer to the Housing Court's exercise of discretion and affirm the Housing Court's order in all respects.

II. Schumacher Failed To Demonstrate A Superior Right To Possession

A. Post-Foreclosure Summary Process Involves Only Defenses as to Possession

In Bank of New York v. Bailey, 460 Mass. 327 (2011), the Supreme Judicial Court ("SJC") reaffirmed longstanding law that challenging a plaintiff's entitlement to *possession* is a valid defense to summary process where a property was purchased at a foreclosure sale. Id. at 333. Indeed, Bailey reaffirmed the longstanding "rule" set forth by the SJC in its Wayne Inv. Corp. v. Abbot, 350 Mass. 775 (1966) decision:

> The purpose of summary process is to enable the holder of the legal title to gain possession of premises wrongfully withheld. Right to possession must be shown and legal title may be put in issue. Sheehan Constr. Co. v. Dudley, 299 Mass. 51, 53, 12 N.E.2d 182. **Legal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; and that alone is subject to challenge.** If there are other grounds to set aside the foreclosure the defendants must seek affirmative relief in equity. New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 195, 196, 77 N.E. 376.

Id. (emphasis added); see also Bailey, 460 Mass. at 335-336 (citing same). Through application of this established rule, a defendant in summary process can challenge a plaintiff's right to possession by

asserting that the plaintiff does not have legal title to the property. In a post-foreclosure summary process case such as this, a plaintiff's "legal title" is the foreclosure deed. To properly pass legal title through a foreclosure deed, a post-foreclosure summary process plaintiff must prove "that the title was acquired strictly according **to the power of sale** provided in the mortgage; and that alone is subject to challenge." Id. (emphasis added); see also US Bank Nat'l Ass's v. Ibanez, 458 Mass. 637, 646 (2011) ("[W]e adhere to the familiar rule that 'one who sells under **a power of sale** must follow strictly its terms.")(quoting Moore v. Dick, 187 Mass. 207, 211 (1905)) (emphasis added). Indeed, it is well established law that failure to strictly comply with the power of sale voids the foreclosure sale. See Ibanez, 458 Mass. 637, 646 (2011). Accordingly, if a post-foreclosure summary process defendant demonstrates that the **power of sale** was not strictly complied with, the foreclosure deed is void and the post-foreclosure summary process plaintiff is left without legal title[2] to the property. As a result, the

[2] There is some ambiguity to the SJC's use of the term "legal title" in Bailey versus its use to the

post-foreclosure summary process plaintiff is not entitled to possession as it cannot demonstrate the required legal title to the property. Thus, the key inquiry in a post-foreclosure summary process defense is whether the defendant has set forth evidence by which the Court can void the foreclosure sale. Without such evidence, the plaintiff, through the foreclosure deed, will have legal title to the property and shall be entitled to possession.

B. Schumacher Cannot Bring a Claim at Law Seeking to Void the Foreclosure Sale as M.G.L. c. 244, § 35A Has No Bearing on Compliance With the Power of Sale

In the present matter, Schumacher seeks to defeat US Bank's legal title to the Property by urging this

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same term in Ibanez. In Ibanez (as well as in several other SJC cases), the SJC holds that "when a person borrows money to purchase a home and gives the lender a mortgage, the homeowner-mortgagor retains only equitable title in the home; the **legal title** is held by the mortgagee." Ibanez, 458 Mass. at 649 (citing cases) (emphasis added). The definitions of "legal title" in these two suits cannot be harmonized due to the fact that if a foreclosure sale is found to be void, a mortgagee still retains "legal title" to the property through the mortgage. Bailey only requires a plaintiff to demonstrate "legal title" to a property in order to obtain possession. However, a mortgagee, despite have legal title to the property, cannot prevail in a summary process case pre-foreclosure. US Bank submits that "record title" is a more appropriate term for what must be demonstrated by a plaintiff in post-foreclosure summary process.

Court to find US Bank's foreclosure sale void. Indeed, as explained *supra*, it is axiomatic that Schumacher cannot defeat US Bank's claim to legal title without a finding by this Court that US Bank's foreclosure sale is void *ab initio*. However, rather than challenge the *power of sale* and US Bank's compliance with M.G.L. c. 244, § 14[3], Schumacher instead centers the thrust of his argument on M.G.L. c. 244, § 35A.[4] To be clear, the Housing Court's order made factual findings and ruled that US Bank complied with all terms of the power of sale and with M.G.L. c. 244, § 14 as Schumacher defaulted on his mortgage and US Bank was the holder of the Mortgage by assignment when the notice of sale was delivered to Schumacher. Apx. at pp. 39-40, 59-65.[5] Thus, in order to defeat US Bank's legal title, Schumacher must argue that a failure to comply with § 35A ***voids*** the foreclosure sale. However, as shown *infra*, § 35A is a

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[3] Section 14 is entitled "Foreclosure under power of sale; procedure; notice; form."

[4] In 2008, Section 35A was entitled "Right of residential real property mortgagor to cure a default; acceleration of maturity date; notice; fees and penalties associated with default; filing of notice."

[5] To the extent Schumacher disagrees with this ruling, he has waived his right to appeal the same by not including any argument as to M.G.L. c. 244, § 14 in his Appellant's brief.

notice of the right to cure a default that is separate and apart from the contractual or statutory power of sale.[6] Accordingly, a claim under § 35A is not one that is capable in law[7] of voiding a foreclosure sale that otherwise complies with the contractual and statutory power of sale.

Recognizing that § 35A does not concern the power of sale, Schumacher instead argues that § 35A is "related to" or a "prerequisite to" the power of sale. However, this argument is at odds with the express language of the SJC in Ibanez, which holds, "[w]here a mortgage grants a mortgage holder the power of sale . . . it includes by reference the power of sale set out in G.L. c. 183, § 21, ***and further regulated by G.L. c. 244, §§ 11-17C.***" Ibanez, 458 Mass. at 646 (emphasis added)[8]; see also Sovereign Bank v. Sturgis,

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[6] Indeed, § 35A is duplicative of the notice of cure contained in the mortgage (see Sup.Apx at p. 37, section 22 of mortgage) and serves only to increase the cure period from thirty days as agreed between the parties in the mortgage, to ninety days by statute.

[7] Whether a violation of § 35A can void a foreclosure sale at equity is discussed *infra* in Section IIC.

[8] Schumacher argues that the SJC did not consider § 35A as it was not enacted at the time of the relevant foreclosures in Ibanez. However, this argument ignores the fact that the SJC issued its Ibanez decision in 2011, three years *after* § 35A was

863 F.Supp.2d 75, 102 (D.Mass. 2012) ("The Supreme Judicial Court, in defining the statutory power of sale incorporated by paragraph twenty two, did not include an obligation to comply with G.L. c. 244, § 35A."); Aurora Loan Services v. Murphy, Southeast Housing Court No. 12-SP-521 (Chaplin, F.J., July 31, 2012)("Although the defendant contends that the contents of the notice [to cure under § 35A] was inadequate[], the Court finds that these are not the types of claims that would render the foreclosure void *ab initio* . . . The Supreme Judicial Court did not include an obligation to comply with G.L. c. 244, s.35A in defining the statutory power of sale in Ibanez.").

Schumacher's brief attempts to side-step the fact that § 35A does not involve the power of sale and seeks to expand the zone of strict compliance from solely the "power of sale" to "all things related to a foreclosure sale" - no matter how tangentially related to the foreclosure sale the conduct may be. Schumacher argues that because the language of § 35A states that the foreclosing entity "shall not

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enacted. Accordingly, § 35A was in effect at the time that the SJC held that it was not a part of the power of sale.

accelerate the maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of default" the language brings § 35A within the sphere of strict compliance related to the power of sale. However, there is nothing magical about this prohibiting language that makes it any more related to the power of sale than any other general prohibitions preventing a mortgagee from acting improperly during the foreclosure process. While all parties strive to avoid any improper conduct related to foreclosure (or otherwise), it is important to distinguish between improper conduct that ***voids*** a foreclosure sale at law and improper conduct that makes a foreclosure sale ***voidable*** in equity. The line in the sand in making these distinctions is whether the conduct is part of the power of sale. The SJC has already interpreted this line narrowly, holding that only violations of M.G.L. c. 244, §§ 11-17C are related to the power of sale.

Further buttressing the SJC's narrow interpretation of what is related to a power of sale is the reality of what information can be gleaned from title to property and what information cannot. A party can go to the registry of deeds, examine a title

to property, and immediately determine whether a power of sale in a previous foreclosure has been properly exercised by simply reviewing the statutorily-mandated language of a foreclosure deed filed on the title. See Fed. Nat'l Mortg. Ass'n v. Hendricks, 463 Mass. 635 (2012) (discussing contents of foreclosure deed and affidavit). However, to the contrary, a party cannot go to the registry of deeds and examine a property's title to determine whether § 35A has been complied with in a past foreclosure, as § 35A notices are not filed at the registry of deeds. Instead, they are private letters between a mortgagor and mortgagee.

Despite this fact, Schumacher asks this Court to find that a faulty § 35A letter voids a foreclosure sale and therefore affects record title to a property. However, if the Court were to find that these letters make a foreclosure sale void (rather than voidable), the entire record title system would be put in flux. There would be no way to ascertain from documents filed at the registry of deeds as to whether a foreclosure sale was void due to an improper § 35A notice.[9] Indeed, such an interpretation of § 35A would

[9] While these notices may appear in a Servicemembers Action in the Land Court, it is clear

be particularly troubling with respect to Massachusetts' registered land system, whereby the Commonwealth guarantees and insures title as being indefeasible. See Commonwealth Elec. Co. v. McCardell, 450 Mass. 48, 50 (2007)("[t]he principal reason for establishing a land title registration system pursuant to G.L. c. 185 is to provide individuals with a means of ensuring that titles to land are indefeasible and certain."). The notice provisions of § 35A are designed to increase the time to cure a default for a mortgagor. They have nothing to do with the power of sale or title to a property. This reality is demonstrated by the fact that it is impossible to visit a registry of deeds and determine whether a proper § 35A notice has been sent.

Only defects in the execution of the power of sale result in a foreclosure sale that is void *ab initio*. Here, no such defects are present. To the contrary, it is undisputed that the power of sale was executed properly. Nonetheless, Schumacher argues that § 35A is related to or a prerequisite of the

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that these proceedings are not part of the foreclosure process. See Deutsche Bank Nat. Trust Co. v. Butler, 83 Mass. App. Ct. 1114 (2013). Furthermore, members of the general public search the registry of deeds for title issues, not legal filings in the Land Court.

power of sale. However, the SJC in Ibanez rejected this argument by omission as it did not include § 35A as one of the statutes that regulates the power of sale. Accordingly, a claimed violation of § 35A creates no grounds at law to void the foreclosure sale, and therefore legal title remains with US Bank. This result conforms with the reality that § 35A does not affect record title, as one cannot examine a property's title to determine whether a § 35A notice is proper.

C. A Claim Alleging a Violation of M.G.L. c. 244, § 35A is a Claim in Equity, Therefore Making the Foreclosure Sale Voidable Rather Than Void

US Bank does not argue that a violation of § 35A is without a remedy. Instead, US Bank argues that a noncompliant § 35A notice does not render a foreclosure sale void *ab initio*. Of course, this position then begs the question as to what a proper remedy for a noncompliant § 35A notice may be. Despite being over one hundred years old, the SJC's case of Moore v. Dick, 187 Mass. 207, 211 (1905) is particularly instructive in answering this query. In Moore, the SJC spoke to what a remedy may be if, as here, there was compliance with the power of sale, yet

other potential grounds existed to void the foreclosure sale. The Moore Court held:

> This is not a case where there has been a literal compliance with the power [of sale], so that the legal title to the land passed to the purchaser, but for some reason-as, for instance, a failure to act with due fidelity to the trust imposed by the power-there are equitable reasons why the sale should be set aside. In such a case the sale, being in law valid, is voidable only in equity, and the owner of the right to redeem must apply for relief in equity within a reasonable time.

Sixty years later, in the 1966 Wayne case, the SJC echoed Moore's holding that there are instances whereby there is compliance with the power of sale, but that other equitable reasons may exist to set aside a foreclosure sale. As cited above, Wayne held:

> Legal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; and that alone is subject to challenge. **If there are other grounds to set aside the foreclosure the defendants must seek affirmative relief in equity.**

Wayne, 350 Mass. at 775 (emphasis added). The language in Moore and Wayne that a party must "apply for equitable relief" or "seek affirmative relief" does not mean that a defendant in summary process needs to start a new lawsuit. Indeed, after these cases were decided, in 1974, law and equity were

merged in the Commonwealth. See Mass. R. Civ. P. 2, effective July 1, 1974 (establishing one form of civil action); Lawless-Mawhinney Motors, Inc. v. Mawhinney, 21 Mass. App. Ct. 738, 741 (1986) ("the defenses which a tenant may set up in a summary process proceeding… could include equitable defenses."). Accordingly, a defendant in a post-foreclosure summary process case can "apply for equitable relief" or "seek affirmative relief" in the summary process case as either an affirmative defense or a counterclaim.

The SJC's decision to have disputes not affecting the power of sale as equitable defenses making the foreclosure voidable, rather than legal defenses making the foreclosure void, is well reasoned. When a party's foreclosure sale does not strictly comply with the power of sale, especially the mandates of M.G.L. c. 244, § 14, it is logical to void the foreclosure sale as the improper exercise of the power of sale is the genesis of the foreclosure sale. However, the same logic does not apply in a scenario like the present one, whereby the foreclosure sale was conducted in strict accordance with the power of sale, but the mortgagee receives a noncompliant notice of the right to cure. Not all noncompliant § 35A notices

result in the same degree of harm to the mortgagors who receive them or effect whether a foreclosure sale should go forward. Thus, a blanket "one size fits all" remedy that voids all foreclosure sales, no matter how trivial the noncompliance, lacks the rationale for voiding the foreclosure in Ibanez, fails to take into account the Housing Court's ability to fashion remedies appropriate to the harm sustained, and unnecessarily delays the foreclosure process[10] by

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[10] As noted by Judge Young of the Massachusetts Federal District Court, delay in foreclosure harms not only the borrower and lender, but the economy as a whole. In Dixon v. Wells Fargo Bank, N.A., 798 F.Supp.2d 336, 361 (D.Mass. 2011), he ruled:

> The Dixons' allegations are easy to make, yet until their veracity is put to the test, foreclosure is inappropriate. But just as the homeowner ought not suffer a wrongful foreclosure, so too the bank has an equal and proper interest in realizing on its mortgage security by putting the home on the market at a foreclosure sale, selling it to a viable buyer, and *lending* the funds derived to other potential home buyers. This case is but a microcosm of much larger economic issues; to a significant extent, our national economy may depend upon promptly sorting out the issues raised here. Clogging the operation of the mortgage foreclosure system with court delay simply will not work. Either individual rights will be submerged, and people will lose their homes unlawfully, or home mortgage liquidity will atrophy, the larger economy will suffer, and potential home buyers will be denied homeownership, although financially able to support mortgage payments.

voiding foreclosure sales that even the borrower/ mortgagor may want to take place.

Instead, separating the wheat from the chaff in these disputes should be done on a case-by-case basis by the Housing Court. For instance, where a § 35A notice is sent to "Jon Smith" rather than to "John Smith" yet the borrower admits receipt and there is no harm or reliance, it is certainly better practice to allow the Housing Court to determine the appropriate equitable relief under these circumstances, rather than require the Housing Court to void the foreclosure sale. By contrast, if the noncompliance on the § 35A notice is that the cure amount was written as $100,000.00 when it should have been $1,000.00, this may invite relief whereby voiding the foreclosure sale is equitable. The Housing Court is fully equipped to balance the noncompliance with the reliance or harm caused by the same and can offer a wide array of remedies given that the equitable powers of the Housing Court are co-extensive with those of the Superior Court. See G.L. c. 185C, § 3.

The holdings of the SJC in Moore and Wayne both contemplate issues outside of title, yet involving foreclosure, as being handled in equity rather than at

law. Accordingly, a claim of noncompliance with § 35A results in the foreclosure sale being ***voidable*** rather than void. Rather than holding that any violation of § 35A voids a foreclosure sale, it should be left to the justices of the Housing Court to make this equitable determination on a case-by-case basis. The Housing Court has the ability to balance the specific facts of every alleged noncompliance and the harm or reliance that may result from the same under its broad equity powers. After this specific factual analysis is conducted, the Housing Court can determine whether the remedy of voiding the foreclosure sale is equitable.

D. Application to the Present Appeal

As argued *supra*, it is undisputed that US Bank foreclosed in accordance with the power of sale and in accordance with M.G.L. c. 244, §§ 11-17C - the statutes that the SJC defined as regulating the power of sale. As a result, legal title transferred to US Bank via the foreclosure deed, and a claim that US Bank failed to send an unrelated § 35A notice cannot void the foreclosure sale at law. However, the § 35A notice (that Schumacher admits to receiving) did not

fully comply with the statute. It listed the loan originator as "N/A" and listed the mortgagee as "U.S. Bank National Association, Trustee Bear Stearns Asset Backed Securities I trust 2004-AC4 Asset-Backed Certificates, Series 2004-AC4" instead of the correct "U.S. Bank National Association, as Trustee for Bear Stearns Asset-Backed Securities Trust 2004-AC4" entity. Accordingly, the foreclosure sale is voidable should the Housing Court determine that such a remedy is equitable given the circumstances of the present case. Based upon the evidence presented to the Housing Court, there is nothing in equity that would require the Court to void the foreclosure sale. Indeed, the Housing Court found that "[n]o credible defenses were presented" by Schumacher. Apx. at p. 40.

As an initial matter, the Housing Court's decision whether to issue equitable relief is reviewed under an abuse of discretion standard. See Fremont Inv. & Loan, 452 Mass. at 741. There was no abuse of discretion in this case. Importantly, there was no evidence that Schumacher had the ability (or desire) to cure the default, but was nonetheless sent astray by misinformation in the § 35A notice as to who originated his loan or the identity of the current

mortgagee. In fact, given the unique history of this case, it is clear that Schumacher knew exactly who the original lender and mortgagee were as his complaints filed in Worcester Superior Court and the Land Court recite in detail the loan origination process and name US Bank as a defendant. Sup.Apx. at pp. 57, 94. Instead of evidence demonstrating confusion ***as to how to cure his default***, the Housing Court was presented with evidence painting a picture of a fully informed borrower seeking to stave off eviction through delay. There was a stipulated fact presented that Schumacher had not made a full mortgage payment since 2008. See Apx. at p. 10, ¶6. Despite this now stipulated fact, Schumacher argued in opposition to the first summary judgment that he was not in default. Sup.Apx. at pp. 7-17. The evidence shows that he then filed a case in Worcester Superior Court (detailing the loan origination process and naming US Bank as a defendant) and delayed matters by refusing to serve the summons and complaint. See Sup.Apx. at pp. 49-53. He then filed three bankruptcy cases in a seven month span, obtained the automatic stays associated with the same, and each was eventually dismissed for failure to comply with Court orders. Sup.Apx. at pp. 73, 82, 89.

These are not the actions of an individual confused as to who his mortgagee was or who originated his loan looking for a way to cure his admitted default. These are calculated maneuvers designed to delay eviction.

Accordingly, there was no evidence presented to the Housing Court that Schumacher suffered any harm or detrimental reliance from the noncompliant § 35A notice, much less any evidence which in equity would require the voiding of the foreclosure sale. As there was no reason in equity to set aside the foreclosure sale, legal title remains with US Bank and judgment of possession in its favor should be affirmed.

CONCLUSION

For the reasons set forth herein, this Court should affirm U.S. Bank's judgment for possession. The Housing Court properly exercised its discretion and did not consider Schumacher's untimely M.G.L. c. 244, § 35A argument. Moreover, even if it had, a noncompliant notice under M.G.L. c. 244, § 35A does not void a foreclosure sale. Instead, it invites a scenario whereby the Housing Court may exercise its equitable powers to void the foreclosure sale, if the evidence presented warrants such relief. The Housing

Court here found no such relief to be required.

Therefore, this Court should affirm the Housing Court's judgment for possession.

Respectfully submitted,

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Dated: June 6, 2013