

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1722

CHRISTIANA TRUST<sup>1</sup>

vs.

CRYSTAL A. HIMES & another.<sup>2</sup>

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendants, Crystal A. Himes and James A. Lozano, appeal from a Housing Court order denying their request for sanctions pursuant to Mass. R. Civ. P. 11, as amended, 456 Mass. 1401 (2010) (rule 11), against plaintiff Christiana Trust. We affirm.

Background. We summarize the relevant facts and procedural background. The plaintiff mortgagor filed a postforeclosure summary process action in the Housing Court seeking to evict the defendant mortgagees when they refused to vacate a condominium unit at 39 Knowlton Circle in Upton (property). Ultimately, judgment entered in favor of the plaintiff for possession of the property and money damages. Counsel for the defendants later learned that the plaintiff had transferred title to the property

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<sup>1</sup> As trustee for PennyMac Loan.

<sup>2</sup> James A. Lozano

to a third party before the summary process action was filed. Consequently, the defendants filed a motion for relief from judgment and to dismiss the action arguing that the plaintiff could not bring a summary process action for possession of property that it did not own. The defendants also requested sanctions against the plaintiff alleging "[the plaintiff] and its lawyers committed fraud upon [the Housing Court], violated Mass. R. Civ. P. 11 and Rules of Prof. Conduct, Rule 3.3."

Counsel for the plaintiff responded that he was not aware that the property had been transferred and that the summary process action was filed by predecessor counsel. When plaintiff counsel's own investigation confirmed that the property had been deeded to a third party prior to the commencement of the summary process proceeding, he filed a motion to dismiss the postforeclosure summary process action. He opposed the request for sanctions, however, arguing "that this was an inadvertent mistake of which no one was aware until after entry of judgment."

After a hearing, the judge dismissed the summary process complaint, but denied the request for sanctions, reasoning that "this case was brought as a result of an inadvertent mistake on the part of [p]laintiff and its counsel" and "the [d]efendants presented no credible proof of bad faith, fraud or wilful

misconduct on the part of the [p]laintiff." This appeal followed.

Discussion. Rule 11 "authorizes a judge to impose attorney's fees and costs where an attorney has failed to show a subjective good faith belief that the pleading was supported in both fact and law." Van Christo Advertising, Inc. v. M/A-COM/LCS, 426 Mass. 410, 416 (1998). The rule "requires a finding that an attorney engaged in a 'wilful violation' before sanctions may be imposed." Psy-Ed Corp. v. Klein, 62 Mass. App. Ct. 110, 113 (2004). We review the denial of a request for rule 11 sanctions for abuse of discretion. Van Christo, supra at 417.

Here, the evidence showed that plaintiff's counsel first learned of the property transfer at the postjudgment appeal bond hearing when defendants' counsel brought it to his attention. Counsel for the defendants does not dispute that he first raised the issue with plaintiff's counsel at that hearing on August 10, 2018. It is also undisputed that plaintiff's counsel, after learning of the transfer, took no action to enforce the judgment and ultimately filed a motion to dismiss the summary process action. This evidence supported the motion judge's conclusion that the mistake was inadvertent. By contrast, the defendants presented no evidence in support of their claim that the "[p]laintiff, its legal counsels, and affiants deceived

defendants and committed fraud upon this [c]ourt." Accordingly, we discern no abuse of discretion in the denial of the request for sanctions.<sup>3</sup>

The defendants' argument that the motion for rule 11 sanctions should have been allowed because the plaintiff had constructive notice of the transfer is unavailing. We have carefully reviewed the defendant's motion for sanctions in the underlying summary process action. The motion asserted only that plaintiff's counsel knowingly "deceived defendants and committed fraud upon th[e] [c]ourt." The argument that the plaintiff should have known of the transfer and therefore was on constructive notice is raised for the first time on appeal.

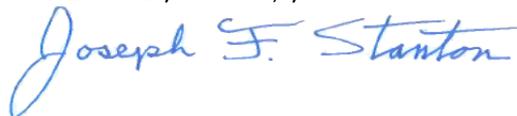
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<sup>3</sup> The defendants also claimed that the plaintiff violated G. L. c. 231, § 6F, by filing a frivolous action not advanced in good faith. To the extent that the defendants seek appellate review of the denial of sanctions based on that claim, it is not properly before this court. See G. L. c. 231, § 6G (appeal "shall be to the single justice of the appeals court").

That argument is therefore waived and we decline to address it.  
See McLaughlin v. American States Ins. Co., 90 Mass. App. Ct.  
22, 33 n.17 (2016).<sup>4</sup>

So much of the order dated  
October 31, 2018, as denies  
the defendants' request for  
sanctions is affirmed.

By the Court (Green, Blake &  
Kinder, JJ.<sup>5</sup>),



Clerk

Entered: January 13, 2020.

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<sup>4</sup> The defendants' argument that plaintiff's counsel should have been sanctioned based on the actions of predecessor counsel is equally unavailing. There was no evidence before the judge that predecessor counsel knowingly deceived the court.

<sup>5</sup> The panelists are listed in order of seniority.