

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as 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 23.0 or 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

20-P-1151

ANTHONY RICCI, executor,¹

vs.

RUSHMORE LOAN MANAGEMENT SERVICES, LLC & another.²

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The estate of Dorothy Bitsoli-Ricci (estate) filed an action seeking a declaratory judgment that the defendants, Rushmore Loan Management Services LLC (Rushmore) and Wilmington Savings Fund Society, FSB, lacked standing to foreclose on property mortgaged by Bitsoli-Ricci.³ On appeal, the plaintiff contends that the motion judge erred in allowing the defendants' motion for summary judgment because (1) an issue of fact remained as to whether Rushmore sent the required preforeclosure notices and (2) the notice of the right to cure failed to

¹ Of the estate of Dorothy Bitsoli-Ricci.

² Wilmington Savings Fund Society, FSB, doing business as Christiana Trust, as trustee for Pretium Mortgage Acquisition Trust (Wilmington Savings Fund Society, FSB).

³ By amended complaint, Anthony Ricci, the executor of the estate, was substituted as the plaintiff.

strictly comply or substantially comply with the terms of the mortgage. We affirm.

Background. The following facts are undisputed. In February 2007, Bitsoli-Ricci obtained a mortgage loan from Bank of America, N.A. (BANA), in the amount of \$100,000 on the property located on 21 Dale Road, Holbrook, Massachusetts (property). Bitsoli-Ricci defaulted on the loan in May 2010. Affidavits that verified the notices of intent to accelerate and the right to cure were filed with the summary judgment motion. Ultimately, a notice of sale was sent on September 19, 2019, with a foreclosure sale date of October 31, 2019. The estate then filed this action in the Superior Court.

Discussion. "We review a grant of summary judgment de novo to determine 'whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law.'" Pinti v. Emigrant Mtge. Co., 472 Mass. 226, 231 (2015), quoting Juliano v. Simpson, 461 Mass. 527, 529-530 (2012).

1. Notices of intent to accelerate and right to cure. To prevail at summary judgment, the defendants were required to show that there was no dispute of material fact that BANA sent notice of the right to cure the default. See G. L. c. 244, § 35A (b). Proof of receipt is not required either by the

statute or the mortgage.⁴ Id. The plaintiff asserts that the motion judge erred in concluding that there was no genuine dispute of fact as to whether BANA sent the acceleration notice and the 150-day notice of the right to cure.

The notice of intent to accelerate was dated August 26, 2014, and was followed on September 23, 2014 by the 150-day notice of the right to cure. Both were on BANA letterhead and addressed to the estate at the property. At that time, BANA was both lender and servicer. Rushmore became the servicer on May 1, 2015. Rushmore's employee, Roberto Montoya, submitted affidavits on personal knowledge representing that Rushmore had obtained the BANA records in the ordinary course of business, and as is relevant here, also stating that the notices were mailed. The plaintiff filed a counter affidavit stating that he had no recollection of receiving the notices. He argues that a finder of fact could draw the "reasonable inference that, since [p]laintiff alleges to have not received notice, one was never sent." Whelden v. U.S. Bank Nat'l Ass'n, 494 F. Supp. 3d 68, 75 (D. Mass. 2020), quoting Lamonica v. Fay Servicing, LLC, 352 F.

⁴ "Said notice shall be deemed to be delivered to the mortgagor: (i) when delivered by hand to the mortgagor; or (ii) when sent by first class mail and certified mail . . . to the mortgagor at the mortgagor's address last known to the mortgagee or anyone holding thereunder." G. L. c. 244, § 35A (b). The mortgage similarly deems notice to be given upon first class mailing.

Supp. 3d 138, 141 (D. Mass. 2018). See also Liberty Mut. Ins. Co., petitioner, 298 Mass. 75, 76 (1937).

The Montoya affidavits were sufficient to meet the defendants' initial burden of establishing that the letters were mailed.⁵ See McLaughlin v. CGU Ins. Co., 445 Mass. 815, 816 (2006); Beal Bank, SSB v. Eurich, 444 Mass. 813, 816-819 (2005). Once the defendants satisfied this initial burden on summary judgment, the plaintiff was obligated to come forward with admissible evidence that would place the fact of mailing in dispute. See generally Sea Breeze Estates, LLC v. Jarema, 94 Mass. App. Ct. 210, 215 (2018). The plaintiff's affidavit professing a lack of recollection is insufficient to create a genuine issue of material fact as to mailing. A "failure of memory . . . does not directly contradict . . . affirmative [proof]." Brandt v. Davis, 98 Mass. App. Ct. 734, 739 (2020).

⁵ Although the defendants carried their burden in the absence of contradiction, this is not to say that the affidavits were models of thoroughness. The affiant's statement of personal knowledge was bare bones. Cf. Commonwealth v. Norman, 87 Mass. App. Ct. 344, 347 (2015) (discussing methods of showing proof of mailing). Despite the fact that the statute requires a showing of mailing by first class or certified mail, the defendants submitted no receipt (even one that showed non-delivery), or a stamped certificate of mailing from the United States Postal Service in connection with its motion for summary judgment. Compare, e.g., Fifield v. Board of Zoning Appeal of Cambridge, 450 Mass. 1001, 1002 (2007); Espinal's Case, 98 Mass. App. Ct. 152, 153-154 (2020). However, in the absence of a dispute of fact as to Montoya's basis of knowledge, or the regularity of BANA's business practices, we are obligated to accept the representations made.

See Benson v. Massachusetts Gen. Hosp., 49 Mass. App. Ct. 530, 533 n.3 (2000) (lack of memory amounts to a statement made on "information and belief insufficient to defeat a well-pleaded summary judgment motion").

Ricci also maintains that the notices were improperly addressed to the "Estate of Dorothy Bitsoli-Ricci" rather than to "Anthony Ricci as executor." The notices were addressed to the "Estate of Dorothy Bistoli-Ricci" at the property, which was also the last known address of the mortgagor, thus satisfying both State law and paragraph 15 of the mortgage.⁶ See G. L. c. 244, § 35A (b). The estate was the obligor. The notices were properly addressed. In the absence of a dispute of fact, the defendants were entitled to summary judgment.

2. Strict or substantial compliance. In the trial court the plaintiff contended that the motion judge erred in determining that the notice of default and right to cure notices strictly or substantially complied with paragraph 22 of the mortgage.⁷ The Supreme Judicial Court's recent decision in Thompson v. JPMorgan Chase Bank, N.A., 486 Mass. 286, 288 (2020) forecloses this argument, which the plaintiff, commendably,

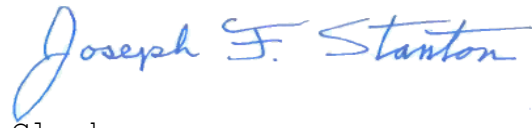
⁶ The address was also Ricci's address, as evidenced by his filings in various courts.

⁷ The notices in question were sent by BANA prior to the Pinti decision. For this reason, the Pinti strict compliance standard does not apply. See Pinti, 472 Mass. at 243.

withdrew at oral argument. A notice that states a mortgagor may tender a payment at any time prior to a foreclosure sale is "neither deceptive nor misleading." Id. The motion judge correctly forecast the law and did not err in determining that BANA's notice substantially complied with paragraph 22 of the mortgage and applicable law.

Judgment affirmed.

By the Court (Wolohojian,
Sullivan & Ditzkoff, JJ.⁸),



Clerk

Entered: October 18, 2021.

⁸ The panelists are listed in order of seniority.