

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

21-P-829

MTGLQ INVESTORS, L.P.

vs.

DONNA G. VICKERY & others.¹

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In this postforeclosure summary process action, the plaintiff, MTGLQ Investors, L.P., appeals from an amended judgment issued by a judge of the Housing Court dismissing the plaintiff's claim for possession of property located at 644 Wareham Street in Middleborough.² The plaintiff asserts that the judge erred in concluding that it failed to establish its prima facie case for possession and in denying its motion to continue the trial for consideration of its motion for summary judgment.³

¹ Steven Olson, Sr.; Steven Olson, Jr.; and any unknown named occupants. The first two defendants failed to appear at trial, were defaulted, and are not parties to this appeal. The complaint was dismissed as to "any unknown named occupants," and the plaintiff does not challenge that ruling.

² The complaint also sought damages for use and occupancy.

³ In its brief, the plaintiff asserts that the judge abused her discretion by denying its motion to continue the trial scheduled for May 10, 2021, for consideration of its motion for summary judgment. Assuming that this issue was properly before us, the

We vacate so much of the amended judgment as dismissed the plaintiff's claim for possession, and judgment for possession shall enter for the plaintiff. In all other respects, we affirm the amended judgment.

Background. On January 11, 2020, the plaintiff served the defendant, Donna Vickery, with a seventy-two hour "Notice to Quit and Vacate Premises." After the defendant refused to vacate, the plaintiff initiated this action by serving a summary process summons and complaint.⁴ The plaintiff's March 13, 2020 "entry package" contained the summons and complaint, notice to quit, and certified copies of the consecutively recorded foreclosure deed, affidavit of sale, and notice of foreclosure sale. The defendant answered the complaint in November 2020 and asserted as a defense that the plaintiff unfairly refused to modify the terms of her loan. After mediation with a Housing Court specialist failed, trial was scheduled for May 10, 2021.

judge did not abuse her discretion. See Commonwealth v. Ray, 467 Mass. 115, 128 (2014), citing Commonwealth v. Gilcrest, 364 Mass. 272, 276 (1973). The plaintiff's claim of prejudice is undercut by its failure to renew its motion for a continuance when the judge implicitly denied it by commencing the trial without endorsing the motion. See Commonwealth v. Marrero, 436 Mass. 488, 497 (2002); note 5, infra.

⁴ The defendant signed a note in 2007 secured by a mortgage on the property that she owned as a tenant by the entirety with her husband. Both spouses were named as borrowers on the mortgage, and both signed it. Thereafter, the couple divorced. In October 2014, the defendant stopped making payments on the note. Three years later the plaintiff, who had been assigned the note and mortgage, initiated a foreclosure.

On April 7, 2021, the plaintiff filed and served on the defendant a motion for summary judgment supported, inter alia, by an exhibit containing certified copies of the foreclosure deed, affidavit of sale, and notice of foreclosure sale. A virtual motion hearing date was set for May 4, 2021. On that date, however, the judge refused to consider the motion for summary judgment because the trial was scheduled for the following Monday. The judge told the plaintiff that if it could "work this issue out with the clerk" before trial on May 10, 2021, she would be willing to hear the motion for summary judgment on that date. The judge marked the plaintiff's exhibits for identification and stated, "[Y]ou can move them into exhibits at trial when it becomes (inaudible -- technical difficulties)." On May 5, 2021, the plaintiff filed an "emergency motion to continue" the trial and convert the trial date to a hearing on its motion for summary judgment.

At trial on May 10, 2021,⁵ the judge said to the plaintiff, "[Y]ou submitted several documents with your motion for summary judgment, and . . . some are in the form of admissible evidence, and as I represented to you, I would admit those documents into evidence." The judge then entered ten exhibits in evidence, sua sponte, without objection from the defendant. One of those

⁵ While the judge did not endorse the plaintiff's May 5, 2021, emergency motion to continue the trial, she implicitly denied the motion by commencing the trial on May 10, 2021.

exhibits, marked at trial as "Exhibit 10," contained certified copies of the foreclosure deed, affidavit of sale, and notice of foreclosure sale. The defendant did not offer any countervailing documentary evidence at trial.⁶ She briefly testified, but the judge did not credit critical portions of her testimony.

In a written decision, the judge dismissed all claims of both parties. She found that the plaintiff did not demonstrate that the foreclosure was valid and did not make a prima facie case for possession because there was insufficient evidence of compliance with G. L. c. 244, §§ 17B and 35A. The judge also found that the defendant "failed to produce any credible evidence that the [p]laintiff did not work with her to modify her mortgage." Both parties appealed from the judgment, but the judge, sua sponte, revised her findings on June 3, 2021, to add that there was insufficient evidence that the defendant's former husband had notice of the foreclosure proceedings. The judge ordered entry of an amended judgment from which only the plaintiff appealed.⁷

⁶ The defendant appeared pro se at the trial, but is represented by counsel on appeal.

⁷ The judge dismissed the defendant's appeal because she did not file a notice of appeal following the amended judgment.

Discussion. 1. Prima facie case.⁸ The dispositive issue in this case is whether a certified copy of a recorded affidavit of sale in the statutory form⁹ was properly admitted in evidence at the virtual trial.¹⁰ We conclude that it was.

The plaintiff maintains that it established its prima facie case for possession of the property by introducing in evidence attested copies of the recorded foreclosure deed and the affidavit of sale under Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 642 (2012) (Hendricks). The defendant contends that the affidavit of sale was not properly admitted at trial because it was submitted as an attachment to the foreclosure deed rather than as a separate and distinct exhibit. The defendant also noted that the affidavit of sale was not mentioned at trial or in the judge's decision. To be sure, the plaintiff could have eliminated doubt arising from the absence of findings regarding the affidavit of sale by seeking posttrial clarification or reconsideration by the judge. That notwithstanding, the defendant's contention is unpersuasive. As the defendant acknowledged at oral argument, there is no

⁸ "Challenging a plaintiff's entitlement to possession has long been considered a valid defense to a summary process action." Bank of N.Y. v. Bailey, 460 Mass. 327, 333 (2011).

⁹ See G. L. c. 244, § 15; G. L. c. 183 Appendix Form 12.

¹⁰ At oral argument, the defendant did not dispute that exhibit ten was sufficient under Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 642 (2012), to establish the plaintiff's prima facie case if the affidavit of sale was properly admitted.

requirement under Hendricks nor any other case that the documents be separately admitted in evidence as separate and distinct exhibits.

Exhibit 10 contained the same certified copies of the foreclosure deed, affidavit of sale, and notice of foreclosure sale that were served on the defendant, in the same form and sequence, in 2020 and 2021. The plaintiff did not have an opportunity to "insert" additional documents because the judge admitted the exhibit, sua sponte, at a trial held via "videoconference" due to the COVID-19 pandemic. This procedure was not impermissible. See, e.g., Commonwealth v. Corbett, 98 Mass. App. Ct. 34, 38 (2020). Further, the defendant neither alleged nor adduced evidence to support an inference that the documents she received with the summons and complaint (and again with the motion for summary judgment) were any different from Exhibit 10. Having carefully reviewed the record, we conclude that the affidavit of sale was properly admitted "as a packet together with the foreclosure deed." Deutsche Bank Nat'l Trust Co. v. Gabriel, 81 Mass. App. Ct. 564, 570 (2012) (Gabriel). The unrebutted affidavit of sale in the statutory form, recorded and filed with the foreclosure deed, was "sufficient to show compliance with the power of sale for the purpose of establishing the right of possession." Bank of N.Y. Mellon v. Morin, 96 Mass. App. Ct. 503, 513 (2019) (Morin), quoting

Henricks, 463 Mass. at 635-636. See G. L. c. 183, § 8; Gabriel, 81 Mass. App. Ct. at 570.

None of the judge's findings and conclusions detract from this reality.¹¹ Even if the defendant's former husband was a necessary party to the foreclosure proceedings, he was not necessary to the action for possession, because he was not in possession of the property.¹² Even assuming arguendo the dubious propositions that (1) sending notices to the defendant at the property by certified and first class mail was insufficient to establish they were "delivered" within the meaning of G. L. c. 244, §§ 17B and 35A (b), and that (2) notice under § 17B was a prerequisite to maintaining an action for possession rather than for deficiency after foreclosure,¹³ see Framingham Sav. Bank v. Turk, 40 Mass. App. Ct. 384, 387 (1996), failure of notice under §§ 17B and 35A would not defeat the plaintiff's claim for possession unless the defendant could also show that the violations "rendered the foreclosure so fundamentally unfair that" equity requires it be set aside. Morin, 96 Mass. App. Ct.

¹¹ We accept the judge's findings of fact unless they are clearly erroneous and review de novo her conclusions of law. See United States Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 427 (2014).

¹² Even assuming, arguendo, that the defendant's former husband was in possession of the property, Exhibit 10 would also constitute prima facie evidence as to him, as it certified the plaintiff's compliance with G. L. c. 244, § 14.

¹³ General Laws c. 244, § 17B, by its terms, applies to "action for a deficiency," which, as the parties acknowledge, is not at issue in the present case.

at 512, quoting United States Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 433 (2014). No such showing was or could be made here. The judge found that the plaintiff worked with the defendant for years to avoid foreclosure and fairly denied her requests for a loan modification. Thus, "that which ought to be done" was done. Bakwin v. Mardirosian, 467 Mass. 631, 637 (2014) (defining equity).

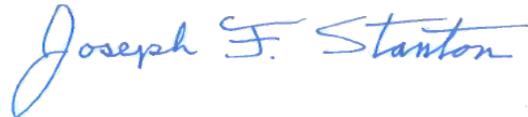
2. Notice to quit. For the first time on appeal, the defendant challenges the sufficiency of the evidence that she received notice to quit. The defendant was served with a notice to quit in January 2020, a summary process summons and complaint containing a copy of the notice to quit in March 2020, and a motion for summary judgment as to possession in April 2021. Long before then, she received notices of the scheduled foreclosure auction and several postponements. On this record, the defendant had ample "notice of the bank's intention to secure possession of the property," which was all that was required. Morin, 96 Mass. App. Ct. at 514.

Conclusion. The plaintiff having made an unrebutted prima facie case, we vacate so much of the amended judgment that dismissed the claim for possession of the property, and judgment shall enter for the plaintiff on that claim. See Framingham Sav. Bank, 40 Mass. App. Ct. at 387 ("we may make such order as

that court ought to have made"). In all other respects, the amended judgment is affirmed.

So ordered.

By the Court (Neyman,
Ditkoff & Hershfang, JJ.¹⁴),



Clerk

Entered: November 23, 2022.

¹⁴ The panelists are listed in order of seniority.