

Commonwealth of Massachusetts

BRISTOL, SS:
PLYMOUTH, SS

HOUSING COURT DEPARTMENT
SOUTHEASTERN DIVISION
Docket No. 12-SP-00521

Aurora Loan Services, LLC
Plaintiff

vs.

Walter Murphy a/k/a Walter W. Murphy
and all occupants
Defendants

JUDGMENT

This action came on for trial/hearing before the Court, **Chaplin, J.** presiding, and the issues having been duly tried/heard and findings having been duly rendered, it is **ORDERED** and **ADJUDGED** under **Rule 10** of the **Uniform Rules of Summary Process** that:

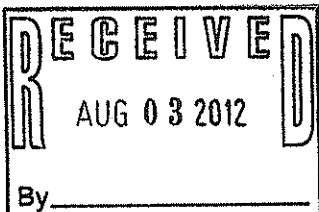
Judgment for the Plaintiff for possession, plus costs.

Accordingly, judgment enters at **10:00 a.m.** this **1st** day of **August 2012**.

Pursuant to Massachusetts General Laws Chapter 239, Section 5, an aggrieved party must file a notice of appeal with the Court within ten (10) days after the entry of the judgment.



MARK R. JEFFRIES
CLERK MAGISTRATE



COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

BRISTOL, SS
PLYMOUTH, SS

HOUSING COURT DEPARTMENT
SOUTHEASTERN DIVISION
Docket No. 12-SP-00521

Aurora Loan Services, LLC *
PLAINTIFF *

v. *

Walter Murphy a/k/a Walter W. Murphy *
and all occupants *
DEFENDANTS *

**FINDINGS OF FACT, RULING OF LAW,
AND ORDER FOR JUDGMENT**

This is a summary process action in which the plaintiff seeks to recover possession of the premises from the defendant. The defendant filed a written answer.

On May 14, 2012, at the continuation of the trial of this action, the defendant, Walter Murphy a/k/a Walter W. Murphy¹, filed **Defendant’s Motion for Involuntary Dismissal Pursuant to Mass. R. Civ. P. 41 (b)(2)**. After hearing on this Motion, the Court rules as follows:

M.R.Civ.P. 41(b)(2) provides, in pertinent part: “...After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief.

¹The Court finds that there was no evidence that anyone other than the named defendant occupies the premises. Accordingly, the remainder of this decision will be limited to the named defendant.

The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff the court shall make findings as provided in Rule 52(a).”

On March 26, 2012, when this action was called for trial, the plaintiff introduced its *prima facie* case, and the defendant, who was self-represented, began to testify. During the course of his testimony, he requested that the trial be continued on the grounds that he had recently consulted Greater Boston Legal Services and needed additional time in which to have his attorney appear for trial. The Court granted the defendant’s oral Motion and continued the trial to May 14, 2012.

On May 14, 2012, counsel for the defendant filed this Motion, and stipulated that, if the Court denied the Motion, the defendant would not testify further and the case was ripe for a decision on the merits.

Since the defendant had already begun to testify on March 26, 2012, the **Defendant’s Motion for Involuntary Dismissal Pursuant to Mass. R. Civ. P. 41 (b)(2)** is **DENIED** as untimely. The Court will proceed to decide this case on the merits.

Based upon all the credible testimony and evidence presented at trial, and the reasonable inferences drawn therefrom, the Court finds as follows:

The defendant, Walter Murphy a/k/a Walter W. Murphy, has resided at 275 Holmes Street, Halifax, MA (“the premises”) at all times relevant to this action. The plaintiff, Aurora Loan Services, LLC, recorded a Foreclosure Deed in the Plymouth County Registry of Deeds on December 12, 2011 at Book 40708, Page 24, and is the record owner of the premises. The plaintiff contends that it has a superior right of possession of the premises.

The Court finds that, on March 13, 2007, the defendant granted a mortgage on the

premises to the Mortgage Electronic Registration Systems, Inc. (“MERS”) as nominee for GreenPoint Mortgage Funding, Inc. The Court finds that, on April 13, 2011, MERS as nominee for GreenPoint Mortgage Funding, Inc. assigned the defendant’s mortgage to the plaintiff, and said assignment of mortgage was recorded in the Plymouth County Registry of Deeds on April 21, 2011 at Book 39861, Page 115. The Court finds that the plaintiff foreclosed on the mortgage and was the high bidder at the foreclosure auction held on October 6, 2011. The plaintiff does not contend that the defendant owes it any unpaid use and occupancy.

The Court finds that, on December 21, 2011, the plaintiff served the defendant with a 72 Hour Notice To Quit and Vacate Premises.

The defendant contends that the plaintiff has failed to prove that it has a superior right to possession of the premises, on the grounds that the foreclosure from which the plaintiff purports to derive its standing in this action “was not conducted strictly according to the statute.” **Bank of New York v. Bailey**, 460 Mass. 327, 333 (2011). The defendant contends that where, as here, the mortgage grants the mortgagee the power of sale, it includes by reference the power of sale set forth in G.L. c. 183, §21. See **U.S. Bank, N.A. v. Ibanez**, 458 Mass. 637, 646 (2011).

G.L. c. 183, §21 provides, in pertinent part: “But upon any default in the performance or observance of the foregoing or other condition, the mortgagee or his executors, administrators, successors or assigns may sell the mortgaged premises...by public auction on or near the premises then subject to the mortgage...first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale, and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity.”

The defendant contends that the plaintiff failed to comply with the right to cure

provisions of G.L. c. 244, §35A, a statute relating to the foreclosure of mortgages, in that the plaintiff was not the assignee of the mortgage on November 10, 2010, the date of the written notice of the right to cure.

G.L. c. 244, §35A(g) provides, in pertinent part: “The mortgagee, or anyone holding thereunder, shall not accelerate maturity of the unpaid balance of such mortgage obligation or otherwise enforce the mortgage because of a default consisting of the mortgagor’s failure to make any such payment in subsection (b) by any method authorized by this chapter or any other law until at least 150 days after the date a written notice is given by the mortgagee to the mortgagor;...”

The Court finds that G.L. c. 244, §35A does not define the term “mortgagee,” but finds that the regulations promulgated by the Commonwealth of Massachusetts Division of Banks pursuant to the statute defines “mortgagee” as follows: “[A]n entity to whom property is mortgaged, the mortgage creditor or lender including, but not limited to, mortgage servicers, lenders in a mortgage agreement and any agent, servant or employee of the mortgagee or any successor in interest or assignee of the mortgagee’s rights, interests or obligations under the mortgage agreement.” **209 CMR 56.02**. The Court finds that the plaintiff was the mortgage servicer on November 10, 2010 and, accordingly, was a “mortgagee” within the meaning of 209 CMR 56.02. The Court finds that the plaintiff had the authority to send the defendant the notice of right to cure on November 10, 2010.

The defendant also contends that the contents of the notice of the right to cure did not comply with the provisions of G.L. c. 244, §35A and did not comply with the terms of paragraph 22 of the defendant’s mortgage.

The Court finds that there is no dispute as to whether the defendant received a notice of the right to cure in November 2010. Although the defendant contends that the contents of the

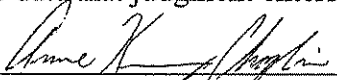
notice was inadequate and did not comply with the terms of paragraph 22 of the defendant's mortgage, the Court finds that these are not the types of claims that would render the foreclosure void *ab initio*. Moreover, "[w]here a mortgage grants a mortgage holder the power of sale...it includes by reference the power of sale set out in G.L. c. 183, §21, and further regulated by G.L. c. 244, §§11-17C." Ibanez, supra at 646. The Supreme Judicial Court did not include an obligation to comply with G.L. c. 244, §35A in defining the statutory power of sale in Ibanez. See Sovereign Bank v. Sturgis, No. 11-10601-DPW (U.S.D.C., D.Mass., March 22, 2012). Accordingly, the Court finds that these claims are beyond the scope of review in a summary process action.

The Court finds that the plaintiff has established its case for possession of the premises, plus costs.

ORDER FOR JUDGMENT

Based upon all the credible testimony and evidence presented at trial in light of the governing law, it is **ORDERED** that:

1. Judgment enter for the plaintiff for possession of the premises, plus costs.
2. Execution issue ten (10) days after the date that judgment enters.



ANNE KENNEY CHAPLIN
FIRST JUSTICE

Date: July 31 , 2012

cc: **Matthew R. Braucher, Esq.**
Eloise Lawrence, Esq.