COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss.

DISTRICT COURT DEPARTMENT
EDGARTOWN DIVISION
Docket No. 1135SU0130

DEUTSCHE BANK NATIONAL TRUST CO.,)
As Trustee,)
Plaintiff,)
v.)
)
PETER SEARLE and JAROSLAVA SEARLE,)
Defendants.)

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S "MOTION FOR SUMMARY JUDGMENT" AND DEFENDANTS' "COUNTER-MOTION FOR SUMMARY JUDGMENT DISMISSING THIS ACTION AGAINST THE DEFENDANTS"

The plaintiff, Deutsche Bank National Trust Co., as Trustee [*sic*] ("Deutsche Bank"), [1] moves this Court for summary judgment pursuant to Mass.R.Civ.P. 56 (b) on the ground that it is entitled to judgment as a matter of law against the defendants, Peter Searle and Jaroslava Searle (together, "Searle"), since it is a successor-in-interest to Searles's original mortgagee and has served Searle, whom Deutsche Bank considers a tenant at sufferance, with notice for immediate possession of the subject property, at 40 Puritan Drive, Oak Bluffs ("Puritan Drive"). Searle counters , arguing that Deutsche Bank has failed to establish its right to foreclose on Puritan Drive and demanding a dismissal of this action. Following a hearing on 3 February 2012, the Court allows the motion of Deutsche Bank for summary judgment, and denies Searle's counter-motion for summary judgment.

Motions for summary judgment are permissible in summary-process actions. *See Metropolitan Credit Union v. Matthes*, 46 Mass.App.Ct. 326, 330 (1999); *see also Bank of New York v. Bailey*, 460 Mass. 327, 334 (2011). In order to award summary judgment to Deutsche Bank, this Court must, viewing the facts in the light most favorable to Searle,

[1] The caption of the complaint does not state what Deutsche Bank is trustee for. The foreclosure deed indicates that Deutsche Bank is trustee for "WAMU Mortgage Pass-Through Certificates, Series 2005-AR13 Trust."

determine that "there is no genuine issue as to any material fact and that [Deutsche Bank] is entitled to judgment as a matter of law." *Ryan v. Hughes-Ortiz*, 81 Mass.App.Ct. 90, 92 (2012) quoting Mass.R.Civ.P. 56(c), and citing, inter alia, *Humphrey v. Byron*, 447 Mass. 322, 325 (2006). The same standard obviously holds for Searle's motion against Deutsche Bank. Specifically, as to Deutsche Bank's motion, because it asserts that it purchased Puritan Drive at a foreclosure sale, it must demonstrate its right of possession of that property. *E.g.*, *Bank of New York*, *supra*, at 333, citing *Sheehan Constr. Co. v. Dudley*, 299 Mass. 51, 53 (1937). And, "[t]he 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. . . 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.*" *Id.* (emphasis added) (further citation omitted); *see also, e.g., Novastar Mortgage, Inc. v. Saffran*, 2010 Mass.App.Div. 117, 118. *See also, e.g., Golfco Acquisitions, Inc. v. Golftown, Inc.*, 2004 Mass.App.Div. 141.

Deutsche Bank offers the following facts as undisputed.

In 2005, Searle granted a mortgage on Puritan Drive to Washington Mutual Bank, N.A. In 2009, J.P. Morgan Chase Bank, N.A., successor in interest to the Federal Deposit Insurance Corporation ("FDIC"), as receiver for Washington Mutual Bank, assigned the Searle mortgage to Deutsche Bank. On 8 June 2010, Deutsche Bank foreclosed on the Searle mortgage by granting Puritan Drive to itself. (That foreclosure deed was actually signed and notarized on 9 September 2010). On 17 and 18 August 2011, Deutsche Bank caused a notice to quit to be served upon Searle, followed by the service of a summons on 29 August 2011.

Deutsche Bank submits that it has complied with all the requirements of establishing that it was the holder of the mortgage at the time the notice of sale under G.L. c. 244, §14 was published in the newspaper, and that the record establishes that it was the owner of Puritan Drive by dint of its purchase of it at the foreclosure sale. Deutsche Bank is, it urges, entitled to possession of Puritan Drive and thus to a judgment in this action. Searle, on the other hand, disputes that because of several gaps in the documentary record--missing assignments, trustee certificates and certain "pass-through" certificates--Deutsche Bank has established its right to possession as a matter of law, and thus Deutsche Bank is not entitled to summary judgment.

Relying on *U.S. Bank, N.A. v. Ibanez*, 458 Mass. 637 (2011), Deutsche Bank submits that it must establish that it was the holder of the mortgage when notice of sale under G.L. c. 244, §14 was published in the newspaper. The documentation provided with Deutsche Bank's motion demonstrated that the assignment of mortgage of 15 April 2009 was signed by a vice president of JP Morgan, and that the first notice of sale was published more than a year later, on 14 May 2010.

In order to demonstrate that it is the owner of Puritan Drive, Deutsche Bank established that it had acquired title to it strictly according to power of sale in the mortgage. Pursuant

to G.L. c. 244, §15, "[i]f the affidavit [attached to the foreclosure deed] shows that the requirements of the power of sale and [the provisions of G.L. c. 244, §14] have in all respects been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed." *See also Bank of New York v. Bailey*, 460 Mass. 327, 334 (2011); *Novastar Mortgage, supra.* Deutsche Bank has provided the affidavit attached to the recorded foreclosure deed to establish that it complied with G.L. c. 244, §14 and duly exercised the power of sale. Specifically, the affidavit showed that Deutsche Bank published notice of the sale in *The Vineyard Gazette* on 14, 21 and 28 May 2010, and sent the required notices registered mail, return receipt requested, all in accordance with the statutorily-prescribed procedure.

Searle's opposition to Deutsche Bank's motion centers on what Searle argues are gaps in Deutsche Bank's documentary evidentiary chain. Specifically, Searle argues that the evidence Deutsche Bank has submitted does not demonstrate that JP Morgan was the lawful successor in interest to the FDIC or that the FDIC is the lawful receiver on record for Washington Mutual Bank. Additionally, Searle notes that the exhibits do not show that Deutsche Bank is the lawful trustee for "WAMU Pass-Through Certificates Series 2005-AR13 Trust." Finally, Searle suggests that Deutsche Bank has not supported by affidavit any of the facts on which it relies in its motion.

In order to defeat Deutsche Bank's motion, Searle would have to demonstrate by specific facts that there is a genuine issue for trial. Mass.R.Civ.P. 56(e); *see, e.g., Fair Trade Fish Co. v. Morad*, 2012 WL 685501 (Appeals Court, Mar. 5, 2012) (Rule 1:28), *quoting Polaroid Corp. v. Rollins Envtl. Servs. (NJ), Inc.*, 416 Mass. 684, 696 (1993) ("An affidavit must set forth specific facts showing that there is a genuine issue for trial; bare assertions and conclusions regarding a [party's] understandings, beliefs, and assumptions are not enough to withstand a well-pleaded motion for summary judgment"). Searle here has, however understandably, proffered argument about the perceived deficiencies with Deutsche Bank's presentation of its motion without actually combating that motion with properly-authenticated countervailing materials. Searle, in short, offers no evidence of "specific facts" in opposition to Deutsche Bank's materials sufficient to overcome the facts evidenced in those materials. Taken as argument regarding the quality of Deutsche Bank's evidence, Searle's points fall short of effectively compromising Deutsche Bank's position. The Court is satisfied that the materials presented in support of Deutsche Bank's motion sufficiently establish that JP Morgan was the holder of Searle's mortgage when that mortgage was assigned to Deutsche Bank. As to Searles's second point, the Court notes above that the exhibits sufficiently show what Deutsche Bank was trustee of. And finally, Deutsche Bank's exhibits are, the Court finds, sufficiently authenticated by affidavit to constitute proper evidence supporting Deutsche Bank's motion.

A former mortgagor, such as Searle, is a tenant at sufferance following foreclosure of his mortgage. *Cunningham v. Davis*, 175 Mass. 213, 222 (1900); *see Singh v. 207-211 Main Street, LLC*, 78 Mass.App.Ct. 901 (2010) (rescript). "A tenant at sufferance has no estate or title, but only a naked possession." *Russell v. Ribeiro*, 2006 Mass.App.Div. 111, 111. No particular form of notice to quit is required to be provided a tenant at sufferance, and notice calling for immediate possession of the premises suffices, so long as the tenant at

sufferance is provided a reasonable opportunity to pack his belongings. *Lash v. Ames*, 171 Mass. 487 (1898); *Hooton v. Holt*, 139 Mass. 54 (1885); *see also Rubin v. Prescott*, 362 Mass. 281, 284 (1972); *Reid v. Bacas*, 317 Mass. 240, 240-241 (1944).

ORDER

The motion of the plaintiff, Deutsche Bank National Trust Co., as Trustee, for summary judgment is **ALLOWED**. The counter-motion for summary judgment of the defendants, Peter Searle and Jaroslava Searle, is **DENIED.**

So ordered.

Dated: 7 MARCH 2012

H. Gregory Williams
First Justice