

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
SUMMARY PROCESS
NO. **12H84SP000459**

BANK UNITED,
Plaintiff

v

CATHERINE RAONA SMALL-QUARATIELLO
and JAMES E. SMALL
Defendants

ORDER

This matter was before the court on November 15, 2012 with respect to the Plaintiff's Motion for Summary Judgment. For the reasons set forth herein, the Plaintiff's motion is **ALLOWED.**

The Plaintiff seeks to recover possession of the single family home at 41 Winthrop Street in the Roxbury neighborhood of Boston (the "Premises") after foreclosure. Catherine Raona Small-Quaratiello filed an answer alleging retaliation, breach of warranty of habitability, interference with quiet enjoyment, violation of a *bona fide* tenancy and lack of just cause, failure to comply with G.L. c. 186A, failure to comply with the federal Protecting Tenants at Foreclosure Act and lack of a superior right to possession. The Defendant James E. Small filed an answer alleging violation of G.L. c. 93A relative to the mortgage which the Spellers granted to the Plaintiff.

Case History

The case was commenced in the Roxbury Division of the Boston Municipal Court on January 17, 2012.

James E. Small filed an Answer¹ and a Notice of Transfer on January 23, 2012. The answer and discovery filed by Catherine Raona Small-Quaratiello² were filed on January 26, 2012, along with a Notice of Transfer to this court. The case was transferred to this court on February 7, 2012. The Plaintiff filed a Motion for Summary Judgment, on October 19, 2012, it was scheduled for a hearing on November 1, 2012. The parties agreed to continue the hearing to November 15, 2012.

Standard for Summary Judgment

Summary judgment is granted where there are no issues of material fact and when the moving party is entitled to judgment as a matter of law. Mass.R.Civ.P. 56(c), *Cassesso v Commissioner of Corrections*, 390 Mass. 419, 422 (1983), *Community National Bank v Dawes*, 369 Mass. 550, 553 (1976). The moving party bears the burden of demonstrating affirmatively the absence of a triable issue and its entitlement to judgment as a matter of law. *Pederson v Time, Inc.*, 404 Mass. 14, 16 - 17 (1989). In viewing the record before it, the court reviews "the evidence in the light most favorable to the non-moving party. *Donaldson v Farrakhan*, 436 Mass. 94, 96 (2002).

In weighing the merits of a summary judgment motion, the court must address two questions: whether the factual disputes are genuine, and whether a fact genuinely in dispute is material.

¹The answer filed by Mr. Small was filed for himself and five other persons, none of whom are parties to this matter. He did not seek to join them as parties and as a result, their claims were dismissed. Those parties, Ida Small Speller, Depriest Speller, John D. Small, Freeda Small Rawson and Lisa Small Lawyer, together with the Defendants herein, are plaintiffs in the matter of *Speller, et. al. v MERS*, a matter now pending in the Suffolk Superior Court (SUCV2009-00451).

²With the exception of the limited appearances of the Harvard Legal Aid Bureau, Ms. Small Quaratiello is self-represented. James, E. Small, although an attorney licensed to practice law in the Commonwealth of Massachusetts, has not entered an appearance on behalf of Ms. Small Quaratiello.

Town of Norwood v Adams-Russell Co., Inc., 401 Mass. 677, 683 (1988) citing *Anderson v Liberty Lobby, Inc.*, 477 U.S. 242, 247 - 248 (1986). The substantive law will identify which facts are material and such facts are those which might affect the outcome of the suit under the governing law and preclude the entry of summary judgment. *Anderson v Liberty Lobby, Inc.*, 477 U.S. at 248, citing *Carey v New England Organ Bank*, 446 Mass. 270, 278 (2006), *Molly A. v Commissioner of the Department of Mental Retardation*, 69 Mass.App.Ct. 267, 268 n. 5 (2007). In order to determine if a dispute about a material fact is genuine, the court must decide whether “the evidence is such that a reasonable [fact finder] could return a verdict for the non-moving party.” *Anderson v Liberty Lobby, Inc.*, 477 U.S. at 248.

The party opposing summary judgment “cannot rest on his or her pleadings and mere assertions of disputed facts to defeat the motion for summary judgment.” *LaLonde v Eissner*, 405 Mass. 207, 209 (1976). To defeat summary judgment the non-moving party must “go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *Kourouvacilis v General Motors Corp.*, 410 Mass. 706, 714 (1991). “Conclusory statements, general denials and factual allegations not based on personal knowledge [are] insufficient.” *Cullen Enterprises, Inc. v Massachusetts Property Insurance Underwriting Association*, 399 Mass. 886, 890 (1987) quoting *Madsen v Erwin*, 395 Mass. 715, 721 (1985).

When the court considers the materials accompanying a motion for summary judgment, the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. *Attorney General v Bailey*, 386 Mass. 367, 371 (1982). The court does not “pass upon the credibility of witnesses or the weight

of the evidence or make its own decision of facts.” *Attorney General v Bailey*, 386 Mass. at 370. However, the court may only consider evidence which meets the requirements of Mass.R.Civ.P. 56(e). That evidence must come from “pleadings, depositions, answers to interrogatories, and responses to requests for admissions under Rule 36, together with . . . affidavits, if any.” Mass. R.Civ.P. 56(c).

Material Facts about which there is no Genuine Dispute

At some point prior to June 4, 2007, Depriest and Ida Speller acquired the Premises. On June 4, 2007, the Spellers granted a mortgage to MERS to secure a loan from the Plaintiff. The mortgage was recorded on June 4, 2007 in the Suffolk Registry of Deeds at Book 41915, Page 132. (Exhibit “A” to the Plaintiff’s Motion for Summary Judgment and Catherine Small-Quaratiello’s Opposition to Plaintiff’s Motion for Summary Judgment, Exhibit “B” to Mr. Small’s Opposition to Motion for Summary Judgment). On June 5, 2007, the Spellers recorded a deed dated December 30, 2002, transferring their interest in the Premises to the Defendants and four other persons not parties hereto. (Exhibit “F” to the Plaintiff’s Motion for Summary Judgment and Catherine Small-Quaratiello’s Opposition to Plaintiff’s Motion for Summary Judgment, Exhibit “A” to Mr. Small’s Opposition to Motion for Summary Judgment). As a matter of law, the Defendants took title subject to the mortgage signed on June 4, 2007. The dispute relative to the corrected mortgage is not genuine or material to the matter before the court. The correction to properly reflect the loan amount on June 13, 2012 did not affect validity of the mortgage or the fact that the Defendant’s title was subject thereto.

There is no dispute that sometime after June 2007, the Spellers became delinquent in the mortgage payments. The mortgage was assigned to the Plaintiff on March 26 2009. (Exhibit “B”

to the Plaintiff's Motion for Summary Judgment). Subsequent to the assignment of the mortgage to the Plaintiff, the Premises were sold at auction on October 23, 2009. (See Affidavit of Sale appended to Plaintiff's Motion for Summary Judgment as Exhibit "C").

Discussion

Because the two defendants have answered separately, asserted different claims and have responded to the instant motion with separate and different oppositions, the court will address the arguments of each defendant separately.

James E. Small

The Answer filed by Mr. Small denies that the Plaintiff is entitled to possession of the property and asserts defenses of failure to state a claim upon which relief can be granted, the existence of a prior pending action, unclean hands, estoppel and the statute of frauds. He also asserts counterclaims alleging unfair and deceptive actions with respect to the negotiations between the Plaintiff and the Spellers relative to the mortgage and that such actions were in violation of G.L. c. 93A. Mr. Small was not a party to the mortgage and has no standing to raise these issue. (Exhibit "A" to the Plaintiff's Motion for Summary Judgment, Exhibit "B" to Mr. Small's Opposition to Motion for Summary Judgment). To the extent that any of these claims survived the Plaintiff's Motion to Strike Counterclaims, same are **DISMISSED**.

Mr. Small's counterclaims having been dismissed, the only issue before the court relative to him is the Plaintiff's case in chief.

To prevail on a summary process action, a plaintiff must prove a right to possession of the subject property which is superior to that of the defendant and that the defendant's right to continued occupancy was properly terminated.

If a plaintiff can show that the foreclosure was properly conducted, it can establish its *prima facie* case. An affidavit that meets the requirements of G. L. c. 244, sec. 15 is evidence that the power of sale was duly executed and constitutes *prima facie* evidence of the plaintiff's case in chief. See *Federal National Mortgage Association v Hendricks*, 363 Mass. 635, 641 - 642 (2012). The Affidavit of Sale filed by the Plaintiff relative to the foreclosure in this matter complies with the requirements of G. L. c. 244, sec. 15, which requires the

person selling, or the attorney duly authorized by a writing [to] , after the sale, cause a copy of the notice and his affidavit, fully and particularly stating his acts, or the acts of his principal. . . , to be recorded in the registry of deeds for the county or district where the land lies, with a note or reference thereto on the margin of the record of the mortgage deed, if it is recorded in the same registry.

Once a plaintiff makes a *prima facie* case, the burden shifts to the opposing party to demonstrate, through the use of affidavits or by the depositions, answers to interrogatories, and admissions on file or some other evidence which would be admissible at trial, specific facts showing that there is a genuine issue for trial. If a defendant fails to show the existence of a genuine issue of material fact in response to a motion for summary judgment by contesting factually a *prima facie* case of compliance with G. L. c. 244, sec. 14,³ such failure generally should result in judgment for the

³G.L. c. 244, sec. 14 provides in relevant part

The mortgagee . . . may, upon breach of condition and without action, do all the acts authorized or required by the power; but no sale under such power shall be effectual to foreclose a mortgage, unless, previous to such sale, notice thereof has been published once in each of three successive weeks, the first publication to be not less than twenty-one days before the day of sale, in a newspaper, if any, published in the town where the land lies or in a newspaper with general circulation in the town where the land lies and notice thereof has been sent by registered mail to the owner or owners of record of the equity of redemption as of thirty days prior to the date of sale, said notice to be mailed at least fourteen days prior to the date of sale to said owner or owners to the address set forth in section sixty-one of chapter one hundred and eighty-five, if the land is then registered or, in the case of unregistered land, to the last address of the owner or owners of the equity of redemption appearing on the records of the holder of the mortgage, if any, or if none, to the address of the owner or owners as given on his deed or on the petition for probate by which he acquired title, if any, or if in either case no

plaintiff. *Federal National Mortgage Association v Hendricks*, 363 Mass. at 642 (citations omitted).

Mr. Small offers no admissible evidence to dispute the Plaintiff's *prima facie* case, only argument, and the court finds that the Plaintiff has established a right to possession of the subject property which is superior to that of Mr. Small.

In addition to establishing a right to possession, a plaintiff must show that the defendant's right to occupy the subject property was properly terminated. The Plaintiff submits a copy of a notice to quit and vacate the Premises dated December 12, 2011 and delivered to James Small by constable on December 14, 2012. (Exhibit "D" appended to Plaintiff's Motion for Summary Judgment). The constable's return of service state that a copy of the notice was delivered to Mr. Small's last and usual place of abode, the Premises, and mailed first class mail. (Exhibit "D" appended to Plaintiff's Motion for Summary Judgment). Mr. Small submits no information to dispute the return of service and does not challenge the sufficiency of the notice.

address appears, then to the address to which the tax collector last sent the tax bill for the mortgaged premises to be sold, or if no tax bill has been sent for the last preceding three years, then to the address of any of the parcels of property in the name of said owner of record which are to be sold under the power of sale and unless a copy of said notice of sale has been sent by registered mail to all persons of record as of thirty days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed, said notice to be mailed at least fourteen days prior to the date of sale to each such person at the address of such person set forth in any document evidencing the interest or to the last address of such person known to the mortgagee. Any person of record as of thirty days prior to the date of sale holding an interest in the property junior to the mortgage being foreclosed may waive at any time, whether prior or subsequent to the date of sale, the right to receive notice by mail to such person under this section and such waiver shall be deemed to constitute compliance with such notice requirement for all purposes. If no newspaper is published in such town, or if there is no newspaper with general circulation in the town where the land lies, notice may be published in a newspaper published in the county where the land lies, and this provision shall be implied in every power of sale mortgage in which it is not expressly set forth. A newspaper which by its title page purports to be printed or published in such town, city or county, and having a circulation therein, shall be sufficient for the purpose.

Based on the foregoing, there is no question of material fact to be resolved by a fact finder relative to James E. Small.

Catherine Raona Small-Quaratiello

The defenses and counterclaims asserted by Ms. Small-Quaratiello are based on her contention that she is a *bona fide* tenant entitled to the protections of G.L. c. 186A and the federal Protecting Tenants at Foreclosure Act. She continues to assert this position in her opposition to the Plaintiff's Motion for Summary Judgment. If Ms. Small-Quaratiello can establish that she is a *bona-fide* tenant, she is entitled to assert defenses under G.L. c. 239, sec. 8A. To prevail on her claim, Ms. Small-Quaratiello must show, **with admissible evidence**, that her tenancy is the result of an arm's length transaction.

To support her position, Ms. Small-Quaratiello relies on her affidavit (Exhibit "C" to Defendant Catherine Small-Quaratiello's Opposition to Plaintiff's Motion for Summary Judgment), copies of money orders (Exhibit "G" to Defendant Catherine Small-Quaratiello's Opposition to Plaintiff's Motion for Summary Judgment), copies of the front of checks drawn on an account with Citizen's Bank in 2006 and 2007 (Exhibit "H" to Defendant Catherine Small-Quaratiello's Opposition to Plaintiff's Motion for Summary Judgment) and a copy of a document entitled "Boston Public Schools Residency Affidavit -- Landlord/Shared Tenancies," dated January 23, 2006 and purportedly signed by one "Ida P. Speller." (Exhibit "I" to Defendant Catherine Small-Quaratiello's Opposition to Plaintiff's Motion for Summary Judgment). The only document which the court can consider in opposition to the Plaintiff's Motion for Summary Judgment is Ms. Small-Quaratiello's affidavit. The other documents, the copies of money orders, the front of checks drawn on an account with Citizen's Bank in 2006 and 2007 and the copy of a document

entitled "Boston Public Schools Residency Affidavit -- Landlord/Shared Tenancies," are not in the form of admissible evidence and cannot be considered to create a question of fact for the fact finder. *Godbout v Cousens*, 396 Mass. 254, 261 (1985).

Ms. Small-Quaratiello's affidavit states that in 2002 she and her sister, Ida Speller, agreed that Ms. Small-Quaratiello would rent a room and share the bathroom and kitchen with other tenants. The rent was \$400.00 a month and the rent was increased to \$500.00 in 2004 and to \$1,000.00 in 2007. The agreement to pay rent does not establish an arms length transaction establishing a tenancy. Ms. Small-Quaratiello has failed to meet her burden of proof that she is a *bona-fide* tenant at the Premises and her claims of breach of warranty of habitability and interference with quiet enjoyment are **DISMISSED**.⁴

Ms. Small-Quaratiello's claim of tenancy having been resolved, the issues before the court are whether this Plaintiff can establish a right to possession of the subject property which is superior to that of the Ms. Small-Quaratiello and that Ms. Small-Quaratiello's right to continued occupancy was properly terminated.

The Plaintiff has established its case in chief by the filing of the affidavit of sale. (See *Federal National Mortgage Association v Hendricks*, 363 Mass. 635, 641 - 642 (2012)). The burden is now on Ms. Small-Quaratiello to show, with admissible evidence, the existence of a material question of fact. The affidavit of Mr. Oh does not create a question by simply stating he did not find the notice of acceleration and right to cure. Mere speculation does not create a question of fact.

⁴Ms. Small-Quartiello also failed to present any evidence that her claims of retaliation and / or violation of G.L. c. 93A could defeat the Plaintiff's Motion for Summary Judgment and those claims are also **DISMISSED**.

Ms. Small-Quaratiello admits that she received the notice terminating her right to occupy the Premises (See affidavit attached as Exhibit "C" to Defendant Catherine Small-Quaratiello's Opposition to Plaintiff's Motion for Summary Judgment) and does not argue that it is not sufficient to terminate her right to continued occupancy thereof.

For these reasons, the Plaintiff's Motion for Summary Judgment is **ALLOWED**.

SO ORDERED.



MARYLOU MUIRHEAD
ASSOCIATE JUSTICE

January 3, 2013

cc: Matthew Braucher, Esquire
James E. Small, Jr., Esquire
Catherine Roana Small-Quaratiello