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Volume 2

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(*and certain older decisions*)

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ABOUT
This is an unofficial reporter for decisions issued by the Western Division Housing Court. The editors collect the decisions on an ongoing basis for publication in sequentially numbered volumes. Presently, this unofficial reporter is known as the "Western Division Housing Court Reporter." Inasmuch as the reader's audience is familiar with this unofficial reporter, the reader is invited to cite from these decisions by using the abbreviated reporter name "W.Div.H.Ct."

WHO WE ARE
This is a collaborative effort by and among several individuals representative of the Court, the local landlord bar, and the local tenant bar:

Hon. Dina Fein, First Justice, *Western Division Housing Court*
Hon. Robert Fields, Associate Justice, *Western Division Housing Court*
Hon. Michael Doherty, Clerk Magistrate, *Western Division Housing Court*
Aaron Dulles, Esq., *Community Legal Aid*
Peter Vickery, Esq., *Bobrowski & Vickery, LLC*

Messrs. Dulles and Vickery serve as co-editors for coordination and execution of this project.

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The exclusion criteria and the review criteria will undoubtedly grow, change, and evolve over time. The prefatory text of each volume will reflect the most recent version of the criteria.

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PUBLICATION

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Comments, questions, and concerns may be raised to any person involved in this project. Out of respect for the Court's time, please direct such communications at the first instance to Aaron Dulles (adulles@cla-ma.org) and/or Peter Vickery (peter@petervickery.com).

INDEX

SECONDARY INDEX — BY JUDGE

Hon. Dina Fein, First Justice

Hon. Robert Fields, Associate Justice

Hon. Jeffrey Winik, Associate Justice

COMMONWEALTH OF MASSACHUSETTS

FRANKLIN, SS:

HOUSING COURT DEPARTMENT
WESTERN DIVISION
SUMMARY PROCESS
NO. **17H79SP002360**

SELENE FINANCE LP,

Plaintiff

VS

RUTH A. JOHNSON, ARTHUR S. JOHNSON, TERRY JO JOHNSON YVONNE E. JOHNSON,[1]

Defendants

Memorandum of Decision on the Cross-Motions for Summary Judgment

Introduction

This is a summary process action in which plaintiff Selene Finance LP (hereinafter "Selene Finance") is seeking to recover possession of the residential premises from the defendants after the plaintiff acquired title to the property upon foreclosure.[2] Defendant Ruth Johnson (hereinafter "Johnson") filed an answer which included a defense that Selene Finance did not have a superior right to possession of the property prior to or at the time in initiated this eviction action or anytime thereafter.

The parties filed cross-motions for summary judgment together with memoranda, supporting affidavits and documents. This matter is before the court on these cross-motions for summary judgment. Selene Finance argues that it foreclosed on the subject property in compliance with the underlying mortgage and holds legal title to the property. It claims it has terminated Johnson's right to possession and is entitled to judgment on its claim for possession as a matter of law. Johnson argues that she has the superior right to possession based upon her contention that the foreclosure sale was

[1] Arthur S. Johnson is deceased. By court order entered on June 23, 2017 Terry Jo Johnson and Yvonne E. Johnson were dismissed as defendants because they did not occupy the premises at the time plaintiff commenced this summary process action.

[2] The plaintiff commenced this case in the Orange District Court in May 2017. The plaintiff file a notice of transfer to the Western Division Housing Court Department under the provisions of G.L. c. 185C, § 20.

void ab initio because Selene Finance did not have the authority to exercise the power of sale contained in Johnson's mortgage. Specifically, Johnson argues that prior to accelerating the debt after she fell behind in her mortgage loan payment obligations in August 2014, neither the then mortgagee, Bank of America, N.A. (hereinafter "BoA"), nor its then loan servicer (Selene Finance) offered Johnson a "face-to-face" meeting as required by 24 C.F.R. § 203.604 (b). Selene Finance argues that it became the mortgagee effective August 1, 2014 (prior to the date on which Johnson first fell in arrears of her mortgage loan obligations) and was not obligated to comply with the "face-to-face" meeting provisions of the federal regulation because it did not have an office within 200 miles of the mortgaged property.

For the reasons below, Johnson's cross-motion for summary judgment is **ALLOWED** and Selene's motion for summary judgment is **DENIED**.

Undisputed Facts

The following facts necessary to resolve the legal issues raised in the cross-motions for summary judgment are based on facts set forth in the record that I conclude are not in dispute.

Arthur S. Johnson and Ruth A. Johnson, husband and wife, owned and occupied the residential dwelling at 91 Mountain Road, Erving , Massachusetts (the "property").

On March 18, 2008 the Johnsons obtained an FHA-insured loan from Taylor Bean & Whitaker Mortgage Co ("Taylor Bean") in the amount of $223,300.00. The Johnsons granted a mortgage on the property to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for Taylor Bean to secure the promissory note.[3] The Johnson loan was transferred to Government National Mortgage Association (hereinafter "Ginnie Mae") and bundled with other loans in a securitized instrument. From March 1, 2009 through July 31, 2014 Bank of America, NA ("BAMA") serviced the Johnson loan/mortgage for Ginnie Mae.

On February 27, 2012 MERS assigned the Johnson mortgage BoA.[4] BoA continued to service the mortgage loan until August 1, 2014.

On October 28, 2013 BoA entered into a mortgage loan modification agreement with the Johnsons.[5] The Johnsons were current with their mortgage loan payment obligations under the terms of the modification agreement through July 2014.

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[3] The mortgage was recorded at the Franklin County Registry of Deeds on March 31, 2008 in Book 5479, Page 127.

[4] The mortgage assignment was recorded at the Franklin County Registry of Deeds on March 5, 2012 in Book 6149, Page 210.

[5] The loan modification agreement was recorded at the Franklin County Registry of Deeds on January 17, 2014 in Book 6488, Page 303.

On February 13, 2014 Ginnie Mae entered into a contract with Selene Finance. Under the terms of the contract Ginnie Mae appointed Selene Finance as its attorney-in-fact (a power of attorney) to take actions required to transfer certain Ginnie Mae owned pooled mortgage loans, the related mortgages held by MERS, BoA and others and the loan servicing contracts (including the Johnsons' loan and mortgage) purportedly to Selene Finance.

On July 11, 2014 BoA notified the Johnsons that effective August 1, 2014 "the servicing of your home loan will transfer to Selene Finance LP." Selene Finance became the loan servicer for the Johnson loan as of August 1, 2014. However, even though Selene Finance may have had the authority as attorney-in-fact for Ginnie Mae to direct BoA to assign the Johnson mortgage to Selene Finance, the documents in the summary judgment record establish that BoA remained the mortgagee after August 1, 2014.

Arthur S. Johnson died unexpectedly in July 2014. Ruth A. Johnson was unable to make her mortgage loan payments in August 2014 or thereafter.

On November 4, 2014 BoA executed a written Assignment of Mortgage that assigned the Johnson mortgage to Selene Finance.[6] Notwithstanding Selene Finance's contention that it was the mortgagee effective August 1, 2014, there are no documents or other competent evidence in the summary judgment record sufficient to establish as fact or raise a disputed issue of fact as to whether BoA assigned the Johnson mortgage to Selene Finance at any time prior to November 4, 2014.

Accordingly, between February 27, 2012 and November 4, 2014 BoA was the mortgagee holding the Johnson mortgage. As of August 1, 2014 Selene Finance was the loan servicer for the Johnson mortgage loan. Selene Finance did not become the mortgagee until November 4, 2014.

Selene Finance has never maintained or operated offices within 200 miles of the mortgaged property at 91 Mountain Road, Erving, Massachusetts. However, given BoA's extensive and continuous presence in Massachusetts, it cannot be seriously disputed that between February 27, 2012 and November 4, 2014 BoA operated offices and branch offices (including mortgage loan origination offices) within 200 miles of the mortgaged property at 91 Mountain Road, Erving, Massachusetts.[7]

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[6] The loan modification agreement was recorded at the Franklin County Registry of Deeds on November 12, 2014 in Book 6610, Page 105.

[7] Selene Finance does not dispute the factual statement set forth in Ruth Johnson's July 25, 2018 affidavit, ¶5, that BoA "has branches all over Massachusetts (within 200 miles of my house)."

With respect to Johnson's mortgage loan BoA was the mortgagee from February 27, 2012 to November 4, 2014, and the loan servicer from March 1, 2009 through July 31, 2014.

Neither BoA nor Selene Finance ever notified Johnson after August 1, 2014 and before three full monthly installments due on the mortgage were unpaid (or any time thereafter) that she could request a "face-to-face" meeting with BoA or Selene Finance to discuss her mortgage loan arrearage.

On January 23, 2015 Selene Finance, acting as mortgagee, sent Johnson a 150 Day Right to Cure Your Default notice together with a form Right to Request a Modified Mortgage Loan notice. Over the course of the next two years Johnson requested loan mitigation assistance (in the form of loan modifications) from Selene Finance. There is no evidence in the summary judgment record that during this two-year period Selene Finance ever attempted to arrange a meeting with Johnson or ever attempted to contact Johnson to discuss mortgage loan modification options. Instead, Johnson's loan modification requests were rejected by Selene Finance in form letters dated May 13, 2015, August 15, 2015, March 29, 2016, July 1, 2016 and January 20, 2017.[8] At no time after it became the mortgagee (November 4, 2014) did Selene Finance offer or grant Johnson a forbearance agreement or loan modification.

In February 2017 Selene Finance foreclosed on the Johnson property. As is set forth in the Affidavit of Sale dated February 23, 2017, 1) a foreclosure sale of the Johnson property by public auction was scheduled for January 24, 2017; 2) Selene Finance, through counsel, caused to be published in the Athol Daily News the foreclosure sale notice once a week over a consecutive three-week period (January 3, 10 and 17, 2017); 3) Selene Finance, through counsel, mailed the required foreclosure sale notices to Johnson by certified mail, return receipt requested, and by first class mail in accordance with G.L. c. 244, § 14; 4) on January 24, 2017, at the time (1:00 p.m.) and place (the Johnson property) of the scheduled foreclosure auction sale, a licensed auctioneer by public proclamation postponed the scheduled foreclosure auction sale to February 7, 2017 at the same time and place of the originally scheduled sale; 5) on February 7, 2017, at time and place of the rescheduled sale, a licensed auctioneer conducted a public foreclosure auction sale at the Johnson property on behalf of Selene Finance; and 7) Selene Finance submitted the highest bid and purchased the Johnson property for $159,900.00.

On February 14, 2017, Selene Finance, for consideration paid of $159.900.00, executed and delivered to itself a foreclosure deed to the property.

[8] See September 20, 2018 Affidavit of Jennifer Muller, Litigation Specialist, Exh. 5. Selene Finance rejected Johnson's loan modification requests for a number of reasons, claiming in its form letters that either Johnson did not provide necessary documentation, did not comply timely with the loan modification documentation requirements or did not pursue other options for loss mitigation offered by Selene Finance.

On March 20, 2017 Selene Finance served Johnson with a 72-hour notice to vacate. On May 4, 2017 Selene Finance served Johnson with a summary process summons and complaint.

Johnson has continued to occupy the property as her residence since the date of the foreclosure sale.[9]

Discussion

The standard of review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible documents, based upon the pleading depositions, answers to interrogatories, admissions documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999). Once the moving party meets its initial burden of proof, the burden shifts to the non-moving party "to show with admissible evidence the existence of a dispute as to material facts." *Godbout v. Cousens*, 396 Mass. 254, 261 (1985). The non-moving party cannot meet this burden solely with "vague and general allegations of expected proof." *Community National Bank*, 369 Mass. at 554; *Ng Brothers Construction, Inc. v Cranney*, 436 Mass. 638, 648 (2002) ("[a]n adverse party may not manufacture disputes by conclusory factual assertions; such attempts to establish issues of fact are not sufficient to defeat summary judgment").

To prevail in a summary process action involving foreclosed property (where the validity of the foreclosure is challenged) the plaintiff claiming to be the post-foreclosure owner of the property must prove that it has a superior right of possession to that property over the claimed ownership right asserted by the defendant who was the pre-foreclosure owner/occupant. To prove this element of its claim for possession the post-foreclosure plaintiff must show "that the title was acquired strictly according to the power of sale provided in the mortgage." *Wayne Inv. Corp. v. Abbott*, 350 Mass. 775, 775 (1966). See *Pinti v. Emigrant Mortg. Co., Inc.,* 472 Mass. 226 (2012); *Bank of New York v. Bailey, 460 Mass. 327* (2011).

[9] The undisputed evidence in the summary judgment record is sufficient to establish that if the February 7, 2017 foreclosure was valid, Selene Finance would have a superior right to possession over the right asserted by Johnson, and would be entitled to a judgment on its claim for possession.

The Johnson mortgage was insured by the United States Department of Housing and Urban Development ("HUD") through a program managed by the Federal Housing Administration ("FHA"). The "Acceleration of Debt" clause contained in Johnson's mortgage (Mortg. ¶ 9(a)) provides that "the [l]ender may, *except as limited by regulations issued by the Secretary in case of payment defaults*, require immediate payment in full of all sums secured by this Security Instrument" (emphasis added). The acceleration clause, ¶ 9(d), further states that "[t]his Security instrument does not authorize acceleration *or foreclosure* if not permitted by regulations of the Secretary" (emphasis added).

Under the statutory power of sale, G.L. c. 183, § 21, upon default by the mortgagor "*in the performance or observation of the foregoing or other conditions*" the mortgagee may sell the mortgaged premises by public auction after "*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 . . ." (emphasis added).

The HUD regulations referenced in ¶ 9(d) of the mortgage are those governing a mortgagee's servicing responsibilities with respect to HUD-insured mortgages are codified in Title 24, Part 203 (Single Family Mortgage Insurance), Subpart C (Servicing Responsibilities) of the Code of Federal Regulations, 24 C.F.R. § 203.500-681. Section 203.500 states *"[i]t is the intent of the Department [HUD] that no mortgagee shall commence foreclosure or acquire title to a house until the requirements of this subpart [C] have been followed*" (emphasis added).

One of the Subpart C requirements that a mortgagee of a HUD-insured mortgage must comply with before initiating a foreclosure is the "face-to-face" meeting requirement set forth in 24 C.F.R. § 203.604 (b), which provides in relevant part:

> (b) *The mortgagee must have a face-to face interview with the mortgagor, or make reasonable effort to arrange such meeting*, before three full monthly installments due on the mortgage are unpaid. *If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor,* or make a reasonable attempt to arrange such meeting within 30 days after such default and *at least 30 days before foreclosure is commenced* . . . (emphasis added)

There are five exemptions to this meeting requirement. 24 C.F.R. § 203.604 (c) provides:

> (c) *A face-to-face meeting is not required if*:
>
> (1) The mortgagor does not reside in the mortgaged house,
>
> (2) *The mortgaged house is not within 200 miles of the mortgagee, its servicer, or a branch office of either*,
>
> (3) The mortgagor has clearly indicated that he will not cooperate in the interview . . .

(4) A repayment plan . . . is entered into to bring the mortgagor's account current and thus making the meeting unnecessary . . . or

(5) A reasonable effort to arrange a meeting is unsuccessful.

(Emphasis added).[10]

I rule as a matter of law that the "face-to-face" meeting provision of Subpart C of the HUD regulations was explicitly incorporated into Johnson's mortgage and is a material provision of the mortgage. Specifically, before it could accelerate the debt, commence foreclosure or acquire title to the property pursuant to a foreclosure sale Selene Finance would have to comply with (or show that the "mortgagee" had complied with) the HUD mandated "face-to-face" meeting requirement set forth in 24 C.F.R. § 203.604 (b) *or* be prepared to show that it (and all entities that come within the definition of "mortgagee") were exempt from that requirement under the provisions of 24 C.F.R. § 203.604 (c). *Wells Fargo Bank, N.A. v. Cook*, 87 Mass. App. Ct. 382 (2015); *Jose v. Wells Fargo Bank, N.A.*, 89 Mass. App. Ct. 772 (2016).

It is undisputed that neither BoA nor Selene Finance made any effort to offer Johnson a face-to-face meeting before three full monthly installments due on her mortgage are unpaid (August to October 2014) as required by 24 C.F.R. § 203.604 (b) and Johnson's mortgage.

Selene Finance presents two arguments in opposition to Johnson's summary judgment motion pertaining to the face-to-face meeting requirement. First, Selene Finance argues that it was exempt from the face-to-face meeting requirement of 24 C.F.R. § 203.604 (b) arguing that it was the mortgagee and loan servicer as of August 1, 2014 and that it did not maintain an office or branch office within 200 miles of Johnson's mortgaged house at the time Johnson missed her first three mortgage payment in August, September and October 2014. Second, citing to *Wells Fargo Bank, N.A. v. Cook*, supra., footnote 10, Selene Finance argues that even if it was subject to the HUD regulations and failed to offer Johnson a face-to-face meeting, the foreclosure was nonetheless valid because it gave Johnson an opportunity to access loss mitigation services that she should have been offered through a face-to-face meeting. I shall address each in turn.

Obligation to Comply with 24 C.F.R. § 203.604 (b). After executing a modification agreement in 2013 Johnson remained in compliance with her mortgage loan obligations through July 2014. After the death of her husband in July 2014 Johnson fell into arrears on her mortgage loan

[10] Exemptions 1, 3, 4 and 5 are not at issue in this action.

obligation when she missed the payment that was due August 1, 2014 (and those that came due in the months thereafter).

Selene Finance contends that as of August 1, 2014 it was the mortgagee and loan servicer for Johnson's mortgage. Because Selene Finance did not maintain an office within 200 miles of Johnson's mortgaged house it argues that it was exempt from the provisions of 24 C.F.R. § 203.604 (b).

With respect to its claim that it was the mortgagee as of August 1, 2014 Selene Finance presents an unusual argument in its summary judgment memorandum. Without reference to statutes or case law Selene Finance reasons that it became the mortgagee holding Johnson's mortgage effective August 1, 2014 based upon the following syllogism: (1) In February 2014 Ginnie Mae as the owner of the bundled mortgage loans (including the Johnson loan) appointed Selene Finance as its attorney-in-fact to act to transfer (presumably to Selene Finance) the bundled mortgage loans (held by Ginnie Mae) and associated mortgages (held by MERS, BoA and others) at an indeterminate date in the future; and (2) acting upon Selene Finance's request made pursuant to its power of attorney from Ginnie Mae, BoA transferred its mortgage loan servicing responsibilities to Selene Finance effective August 1, 2014; therefore (3) taken together, the grant of the power of attorney and Selene Finance's exercise of that power to effect the transfer of the loan servicing contract from BoA to Selene Finance effective August 1, 2014 necessarily carried with it (even in the absence of a written assignment) the assignment of the Johnson mortgage from BoA to Selene Finance effective August 1, 2014.

I am aware of no statutory or case law authority for this unique theory. The written assignment of the Johnson mortgage to Selene Finance was executed by BoA on November 4, 2014 (apparently at Selene Finance's direction acting as attorney-in-fact for the note holder, Ginnie Mae). A power or option granted by the current note holder authorizing its attorney-in-fact to direct a mortgagee to assign a mortgage to the attorney-in-fact, until exercised, does not constitute an actual assignment of that mortgage. See *HSBC Bank USA,N.A. v Matt*, 464 Mass. 193, 202 (2013) ("Those who, like HSBC, are said to have an option to become the holder of a mortgage do not have the present authority to foreclosure. See *Eaton v. Fed. Nat. Mortg Ass'n*"). It is the executed written assignment that manifests the actual assignment of the mortgage as of the date the assignment is executed. See, *U.S Bank Nat'l Ass'n v. Ibanez,* 458 Mass. 637, 654 (2011) ("Because an assignment of a mortgage is a transfer of legal title, it becomes effective . . . only on the transfer; it cannot be effective before the transfer"). There is no evidence in the summary judgment record sufficient to establish (or raise a disputed issue of material fact) that BoA assigned Johnson's mortgage to Selene Finance on August 1, 2014 (when the

loan servicing contract was transferred to Selene Finance) or prior to November 4 2014 (when the written assignment of mortgage was executed by BoA).

I find and rule that between August 1 and November 4, 2014 BoA remained the mortgagee holding Johnson's mortgage. Selene Finance was the loan servicer during that period. Selene Finance did not become the mortgagee holding Johnson's mortgage until November 4, 2014, the date on which BoA executed the mortgage assignment to Selene Finance.

BoA (the mortgagee between August 1 and November 4, 2014) maintained offices within 200 miles of Johnson's mortgaged house. It is of no consequence that during that same period Selene Finance (as the loan servicer) did not maintain an office within 200 miles of Johnson's mortgaged house. The HUD face-to-face meeting exemption applies only if neither mortgagee nor its loan servicer maintain an office or branch office within 200 miles of the mortgaged house. See *Jose v. Wells Fargo Bank, N.A.*, supra.

After reviewing the evidence set forth in the summary judgment record and considering the arguments of the respective parties, I conclude as a matter of law based on the holding in *Wells Fargo Bank, N.A. v. Cook*, supra., that under the terms of Johnson's mortgage either BoA (as mortgagee) or Selene Finance (as loan servicer) was required to comply with the face-to-face meeting requirements required by 24 C.F.R. § 203.604 (b) prior to accelerating the debt after Johnson fell behind in her mortgage loan payment obligations in August 2014. It is undisputed that neither BoA (as mortgagee) nor Selene Finance (as loan servicer) complied with the face-to-face meeting requirements required by 24 C.F.R. § 203.604 (b) prior to accelerating the debt after Johnson fell behind in her mortgage loan payment obligations in August 2014.

Without more the failure of the mortgagee or loan servicer to comply with the face-to-face meeting requirements set forth in 24 C.F.R. § 203.604 (b) would render the February 7, 2017 foreclosure of the property void ab initio and that judgment should enter in favor of Johnson on Selene Finance's claim for possession.

Whether Selene Finance Followed a Permissible Alternative Path to Comply with Loss Mitigation Provisions of 24 C.F.R. § 203.604 (b). Selene Finance has set forth evidence in the summary judgment record that measured from the date it sent Johnson a 150 Day Right to Cure notice on or about January 23, 2015 (together with the notice informing Johnson that she could seek a loan modification) Johnson submitted "no fewer than four requests for loan modifications (beginning on or about March 2015)." Selene Finance contends that it evaluated each application and rejected them for

various reasons (including one that was rejected because Johnson failed to return a loan modification package in a timely fashion and one that was rejected because it was submitted 37 days before the scheduled foreclosure).[11]

Selene Finance argues that the Appeals Court in *Wells Fargo Bank, N.A. v. Cook*, supra., footnote 10, set forth an alternative path to validate a foreclosure where the mortgagee did not comply with the face-to-face meeting requirements of 24 C.F.R. § 203.604 (b).

Wells Fargo Bank, N.A. v. Cook, supra., footnote 10, states with respect to the mortgagee's failure to comply with the face-to-face meeting requirement of 24 C.F.R. § 203.604 (b) within three months of a default:

> We also decline to adopt the suggestion raised in the briefing in this case that the regulatory deadline if missed prevents a lender thereafter from ever conducting a lawful foreclosure sale. We recognize that the regulations impose an obligation for a timely face-to-face meeting shortly following the initial default in part to assure that it will occur before the amount of the arrearage (including penalties and interest) grows so large that it might impede as a practical matter any realistic prospect of loan restructuring. *That being said, the regulations obviously do not state or require that the deadline specified in the regulations, once missed, could never again be met thereby forever precluding the lender from accelerating the loan or exercising its right of foreclosure. Even the [borrower/defendant] recognize that a lender who misses the three-payment window in which to conduct the face-to-face meeting still "has a viable path to foreclosure . . .[by] giving the borrower an opportunity to access loss mitigation services that she should have been offered through a face to face meeting."* (emphasis added).

Recognizing this as dicta, I nonetheless conclude that

Pointing to *Wells Fargo Bank, N.A. v Cook*, footnote 10, Selene Finance argues that the Johnson foreclosure was valid simply because, even though it did not comply with the face-to-face meeting requirements, after sending the default notice it gave Johnson written notices that she could request a loan modification and that Johnson had the opportunity seek assistance through those loan modification programs (unsuccessfully as it turns out).

I believe that to interpret footnote 10 in the manner suggested by Selene Finance would render meaningless the face-to-face meeting provisions of 24 C.F.R. § 203.604 (b). The alternative narrow "viable path" set forth in in *Wells Fargo Bank, N.A. v Cook* would be transformed into a gaping chasm.

[11] See footnote 8, supra.

I interpret the dicta set forth in *Wells Fargo Bank, N.A. v Cook*, footnote 10, to mean that where a mortgagee failed to offer the mortgagor a timely face-to-face meeting before three full monthly installments due on the mortgage were unpaid, there remains a narrow "viable path to foreclosure." To travel successfully down this narrow path the mortgagee has the burden to present evidence sufficient to establish that it (1) offered the mortgagor a face-to-face meeting albeit outside the three-month window, (2) gave the borrower a fair and adequate opportunity to access loss mitigation services that she should have been offered through a timely face-to-face meeting, and (3) the mortgagor was not unfairly prejudiced by the late access to these loss mitigation services.

There is no evidence in the summary judgment record to establish that Selene Finance ever offered Johnson the opportunity to schedule a face-to-face meeting outside of the three-month window to discuss her loss mitigation or loan modification options based upon the specific circumstances of Johnson's case. There is no evidence in the summary judgment record that subsequent to August 1, 2014 Selene Finance ever offered Johnson a forbearance agreement that might have led to a permanent mortgage loan modification. See, eg. *Jose v. Wells Fargo*, supra.

I conclude that there does not exist evidence in the summary judgment record sufficient to establish that Selene Finance followed the narrow "viable path to foreclosure" identified in *Wells Fargo Bank, N.A. v Cook*, , footnote 10. Further, the evidence in the summary judgment record is insufficient to raise a disputed issue of material fact on this issue.

Conclusion

Accordingly, based upon the undisputed facts set forth in the summary judgment record Johnson's Cross Motion for Summary Judgment is **ALLOWED** and Selene Finance's Motion for Summary Judgment is **DENIED**.

I rule as a matter of law that:

1. In accordance with ¶ 9(a) of Johnson's mortgage prior to accelerating Johnson's mortgage loan debt and foreclosing on the property BoA and/or Selene Finance was obligated to offer Johnson a face-to-face meeting pursuant to 24 C.F.R. § 203.604 (b) within three months of August 1, 2014 (the date on which Johnson missed her mortgage loan payment), and failed to comply with this requirement;
2. Selene Finance has not established that it followed the narrow "viable path to foreclosure" set forth in *Wells Fargo Bank, N.A. v Cook*, footnote 10;

3. The February 7, 2017 foreclosure sale of Johnson's property to Selene Finance is void ab initio based upon the failure of BoA and Selene Finance to comply strictly with ¶ 9(a) of Johnson's mortgage and 24 C.F.R. § 203.604 (b).
4. With respect to Selene Finance's claim for possession, Johnson is entitled to judgment in her favor because she has established that she has a superior right to possession of the property over the right asserted by Selene Finance.

It is **ORDERED** that judgment entered for Johnson dismissing Selene Finance's claim for possession

SO ORDERED.

JEFFREY M. WINIK
Associate Justice

October 29, 2019

Cc: Jonathan S. Rankin, Esq.
Uri Strauss, Esq.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-CV-1061

MCR PROPERTY MANAGEMENT, INC
Plaintiff,
v.
VICTOR ESPINOSA et al.
Defendants.

ORDER

After a hearing on November 21, 2019, for which the plaintiff appeared via counsel and only the defendant Leilani Martinez appeared self-represented, the following order is to enter:

1. The defendant Victor Espinosa shall not occupy the subject property at 68 Eastern Drive, Chicopee, MA until further leave of court.
2. The plaintiff/landlord is authorized to change the locks of the subject property after November 25, 2019 at 5:00pm.
3. Nothing in this order shall effect the defendant Victor Espinosa's right to occupy the subject property upon filing a request before the court.
4. A further hearing on this matter has been scheduled for Friday, December 13, 2019 at 12:00pm.

So entered this 26th day of November, 2019.

Dina E. Fein
First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-CV-1028

SADIE VARGAS,

Plaintiff,

v.

MOUMOUNI AMIDOU and the SPRINGFIELD WATER AND SEWER COMMISSION,

Defendants.

ORDER

After hearing on November 7, 2019 at which the plaintiff tenant and the defendant property owner each appeared *pro se* and at which the defendant Water and Sewer Commission appeared through counsel, the following agreed upon order shall enter:

1. The water shall be shut off at the subject premises by the Water and Sewer Commission (Commission) and kept off until the Commission agrees to restore same or until the court orders its restoration.
2. The tenant has reported that she is in a shelter and is not currently seeking alternate housing from property owner.
3. The property owner shall keep the property vacant until approval Commission for reoccupancy.
4. That said, Mr. Vargas shall keep her belongings at the premises until she secure

permanent alternate housing. During that time, the property owner shall not enter Ms. Vagas' apartment without her prior approval. The property owner shall ensure that Ms. Vargas' personal belongings remain safe and secure.

So entered this 26th of November 2019.

Robert Fields, Associate Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

BERKSHIRE, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 17-SP-4687

Robert Malloy,
Plaintiff

v.

Louise Braica, et al.,
Defendant

ORDER FOR AMENDED MONEY JUDGMENT

1. On October 15, 2019, the Appeals Court (Docket Number 2018-P-1237) issued a decision on the defendants' appeal of this court's judgment in the above-captioned matter.

2. On November 14, 2019, this court received a Notice of Rescript from the Appeals Court ordering the Housing Court to vacate so much of the judgment as awarded the landlord monetary damages, plus court costs and interest. As set forth below, the Housing Court judgment for money damages entered on December 22, 2017 is hereby modified.

3. At trial, the undersigned found that the monthly rent was $650 and multiplied that rate by the twenty-seven months that had elapsed between the start of the lease and the November 2017 trial. This produced a total rent charged of $17, 550, from which the court deducted $9,676 (the sum paid by the tenants through the month of trial), leaving a total of $7,874 in unpaid rent. The court reduced that amount by 15% due to substandard conditions at the premises since the inception of the tenancy, leaving a total owing of $5,241.50, which was the damages amount ultimately entered by way of judgment in

favor of the plaintiff.

4. As determined by the Appeals Court, the testimony at trial established that the monthly rent was reduced to $625 after sixteen months of the tenancy, giving rise to an error in the amount of damages awarded. Upon recalculating, the court rules as follows: the total rent charged through the month of trial was $17,275. This amount was reduced by 15% (2,591.25) due to substandard conditions. Subtracting the amount of rent paid through the month of trial ($9,676) yields damages (unpaid rent) of $5,007.75.

5. This court heard two post judgment motions by the tenants, seeking reduction in use and occupancy payments pending appeal based on continued substandard conditions at the premises. As to both motions, the court reduced the agreed upon rent of $625 by 15%, and ruled that the tenants were required to pay $531 "until further order of this Court."

6. On December 20, 2019, this court denied the plaintiff's request to increase the monthly use and occupancy payments back to $625, and relieved the tenants of their obligation to make any use and occupancy payments to the plaintiff, as he had transferred the property to a new owner and no longer had standing to pursue the rent or possession claims.

7. **Order Amending Judgment:** In light of the Appeals Court decision and in conformity with the Housing Court's post judgment rulings, the judgment dated December 22, 2017 is hereby amended. Judgment shall enter in favor of the plaintiff for $5,007.75, plus

interest as of the date of trial, and court costs. The issue of possession is moot.

So entered this 29th day of November, 2019.

Dina E. Fein
First Justice

COMMONWEALTH OF MASSACHUSETTS

WESTERN DIVISION, SS.

HOUSING COURT
DEPARTMENT OF
THE TRIAL COURT
CIVIL ACTION
No. 12-CV- 573

CITY OF SPRINGFIELD
CODE ENFORCEMENT DEPARTMENT
HOUSING DIVISION,

Plaintiff

v.

489 WORTHINGTON STREET REALTY TRUST (owner) and
NO LIMIT INVESTMENT, INC. (trustee),

Defendants

Re: Premises 489-493 Worthington Street, Springfield, Massachusetts

ORDER
(Hampden County Registry of Deeds Book/Page #:20274/564)

After a hearing on October 21, 2019 for which a representative of the Plaintiff and Defendants NO LIMIT INVESTMENT, INC. and 489 WORTHINGTON STREET REALTY TRUST appeared via counsel, the following order is to enter:

1. The Defendants NO LIMIT INVESTMENT, INC. and 489 WORTHINGTON STREET REALTY TRUST assent to being found in contempt of Paragraphs 2 and 7 of the May 9, 2019 Order of this Court, and are hereby in contempt of said paragraphs of the Order.

2. The Defendants NO LIMIT INVESTMENT, INC. and 489 WORTHINGTON STREET REALTY TRUST shall escrow the funds stemming from the refinancing of other properties as contemplated at the time of this hearing in the IOLTA account of their Attorney, Thomas Wilson, Esq., and released only after motion and leave by this Court for the purposes of paying taxes, fines, and fees, as well as for work at the property.

3. The Defendants NO LIMIT INVESTMENT, INC. and 489 WORTHINGTON STREET REALTY TRUST are permitted to use the escrowed funds as per Paragraph 3 of this Order to pay all taxes, fines, and fees that are or shall be owed to the City of Springfield as of November 4, 2019.

4. The Defendants NO LIMIT INVESTMENT, INC. and 489 WORTHINGTON STREET REALTY TRUST shall pay all reasonable attorney's fees in this matter to the City of Springfield.

5. **The Plaintiff CITY OF SPRINGFIELD has leave to amend their complaint for contempt after the November 15, 2019 completion date, and may serve said amended complaint upon Attorney Wilson, in hand.**

6. **The Plaintiff CITY OF SPRINGFIELD shall accept permit applications for this property and begin processing said applications, forthwith.**

7. **The Plaintiff CITY OF SPRINGFIELD shall issue permits for this property, forthwith, upon full payment for the taxes, fees, and fines owed as of November 4, 2019.**

8. **The Plaintiff CITY OF SPRINGFIELD shall inform the Defendants NO LIMIT INVESTMENT, INC. and 489 WORTHINGTON STREET REALTY TRUST of any errors or defects in the Defendant's applications for permits, and provide the Defendants seven days to remedy any said errors or defects in their application.**

So entered this 2nd **day of** December **, 2019.**

Dina E. Fein, First Justice
Western Division Housing Court

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-4399

ANHAR BAKTH,

Plaintiff,

v.

ANGEL AYALA and CAROLYN SANTIAGO,

Defendants.

ORDER OF DISMISSAL

This matter came before the court on November 7, 2019 on the defendant tenants' motion to dismiss the summary process action. After hearing, and for the reasons stated below, the motion is allowed and the case is dismissed without prejudice.

1. Background: The parties stipulate to the relevant facts upon which this motion is based. On June 14, 21019 the defendants were served with a rental period *no fault* Notice to Terminate Tenancy from Nidal and Jason Abeid, the former owners of the property. On June 26, 2019 the Abeids sold the property to the plaintiff, Anhar Bakth, without any assignment of rights. On August 6, 2019, the defendants paid the plaintiff $800 rent or use and occupancy. The plaintiff commenced this instant summary process matter in October, 2019, relying on the Abeids' June, 2019 termination notice.

2. Discussion: In this instant matter, the former owners did not grant an assignment of their rights with respect to the termination of this tenancy to the new owner plaintiff. In addition, the underlying termination notice did not terminate the tenancy until August 1, 2019 by its own terms and the sale of the premises occurred prior to that date. The result is that the tenancy was not terminated prior to the purchase of the property by the plaintiff and the plaintiff did not terminate the tenancy, on his own accord, prior to commencing this summary process action[1]. See, *MB Management Co. v. Berry*, Boston Housing Court No. 06-SP-295 (March 7, 2007, Winik, F.J) which also highlights that "it is an established common law practices that a succeeding landlord cannot take advantage of a breach which occurred before he acquired title,' citing *Mulcahy & Dean, Inc. v. Hanley,* 323 Mass. 232 (1955).

3. Conclusion and Order: Based on the foregoing, the summary process matter is dismissed.

So entered this 3rd of December, 2019.

Robert Fields, Associate Justice

cc: Gordon Shaw, Esq. (LAR counsel for the tenants)
Amber Benzinger, (SJC Rule 3.03 Student Attorney)

[1]See, by contrast: *Martin v. Knight,* Boston Housing Court No. 97-SP-4147 (August 14, 1997, Winik, J.) and *Poutahidis v. Clingan,* 2001 Mass. App. Divi. 217 (District Ct. 2001) in which the tenancy was terminated prior to the sale of the premises.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-SP-1378

DENNIS LECLERC, et al,

Plaintiffs

v.

JOHANNA RIVERA,

Defendant

RULING ON DEFENDANT'S MOTION TO DISMISS

The above-captioned matter is before the court on the tenant's motion to dismiss or for summary judgment. For the reasons set forth herein, the motion is allowed.

1. This case involves a tenancy at will. On or around March 8, 2019, the landlord served and the tenant received a "fourteen (14) day notice to quit for nonpayment of rent." The notice included two consecutive paragraphs, the first of which was entitled "RESERVATION OF LANDLORDS' RIGHTS," and the second of which was entitled "CURE RIGHTS FOR TENANCIES AT WILL." Asterisks and the word "NOTE" precede and follow the language of both paragraphs. In support of her motion, the tenant argues that the language of these two paragraphs, quoted in the margin,[1] was inconsistent and had a

[1] ***NOTE- *RESERVATION OF LANDLORDS' RIGHTS*: Any monies tendered by you and accepted by the Landlords or the Landlords' agent after receipt of this notice will be accepted for ***the use and occupancy only*** of the aforesaid premises and not as rent; and without in any way waiving any rights under this Notice to Quit, the Landlord reserves the right to accept such monies without establishing any new tenancy. You will in any event be responsible for the use and occupancy charges for the time you occupy the premises***...

***NOTE – *CURE RIGHTS FOR TENANCIES AT WILL*: If you have not received a Notice to Quit for Nonpayment of Rent within the last twelve months, you have a right to prevent termination of your tenancy by paying or tendering to your Landlords, the Law Office of Lance S. Chavin, or the person to whom you customarily pay your rent, the full amount of rent due within ten (10) days after your receipt of this Notice to Quit. ***

tendency to mislead, rendering the notice defective and requiring dismissal of the case.[2]

2. The requirements of a notice to quit are set by statute, in this case G.L. c. 186, § 12, which provides in relevant part as follows:

> In case of neglect or refusal to pay the rent due from a tenant at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the tenancy; provided, that the tenancy of a tenant who has not received a similar notice from the landlord within the twelve months next preceding the receipt of such notice shall not be determined if the tenant, within ten days after the receipt thereof, pays or tenders to the landlord, the landlord's attorney, or the person to whom the tenant customarily pays rent, the full amount of any rent due. Every notice to determine an estate at will for nonpayment of rent shall contain the following notification to the tenant: "If you have not received a notice to quit for nonpayment of rent within the last twelve months, you have a right to prevent termination of your tenancy by paying or tendering to your landlord, your landlord's attorney or the person to whom you customarily pay your rent the full amount of rent due within ten days after your receipt of this notice."

3. Delivery of a legally sufficient notice to quit "is a condition precedent to a summary process action and part of the landlord's prima facie case." *Cambridge St. Realty LLC v. Stewart*, 481 Mass. 121, 122 (2018). The requirements of notices to quit vary, depending on the basis for terminating the tenancy, and whether the tenancy is at will or under a lease. See *Adjartey v. Central Division of Housing Court Department*, 481 Mass. 830, 850-852 (2019).

4. In considering whether incorrect or incomplete language in a notice to quit for nonpayment of rent rendered the notice defective and insufficient to terminate the tenancy, some trial courts have focused on the question of whether the tenant was misled by the language. See, e.g. *Casserly v. Hadley et. al.*, Boston Housing Court, 03-SP-01625 (Pierce, J. Sept. 8, 2003)("some showing that the tenant was actually misled to his detriment by the inaccurate language would be required"); *The Village at Marshfield v. Delconte*, Southeastern Division Housing Court, 09-SP-505 (Chaplin, F.J., July 23, 2009)

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[2] The notice includes a third paragraph, also preceded by asterisk and the word NOTE, entitled CURE RIGHTS FOR RESIDENTIAL TENANTS UNDER LEASE.

(notice to quit was valid although it did not accurately set forth tenant's cure rights, as it did not mislead tenant).

5. Other courts have focused on whether the language had a "tendency to mislead," irrespective of its actual impact on the tenant in question. See, e.g. *Walnut Apartment Associates v. Perez*, Western Division Housing Court, 14-SP-4924 (Fields, J., February 25, 2015)("[t]he standard applied when analyzing the equivocal nature of a termination notice is not whether in fact the tenant was misled by the notice but whether the notice is sufficiently clear, accurate and not subject to being reasonably misunderstood. Furthermore, they should not have a 'tendency to deceive' and no reliance upon, or even knowledge of, the deceptive language or effect must be shown"); *Sargeant West, II LP, v. Keebaugh*, Western Division Housing Court, 11-SP-2012 (Fein, J., July 11, 2012)(a notice to quit which stated that "any" payments were accepted for use and occupancy only and that the tenant could stop the eviction process "under some circumstances" by paying the full amount of rent owed, "overstates the landlord's reservation of rights, understates the tenant's statutory right to cure, is internally inconsistent, and in its totality has the capacity and the tendency to mislead the tenant"); *Springfield II Investors v. Marchena*, Hampden Division, Housing Court Department, 89-SP-1342-S (Abrashkin, J., February 1990)(notice to quit had "the tendency and capacity to mislead the tenant as to her cure rights" where tenancy at issue was under a subsidized lease, as to which the governing statute "places no limit on the number of time tender of cure may be legally valid" but the notice to quit included the cure rights for a tenancy at will, which are available only if the tenant has not receive a notice to quit in the previous twelve months).

6. Recent appellate case law provides guidance with respect to the pending motion. In *Cambridge*, the Supreme Judicial Court ruled that "substantial compliance with statutory or contractual notice to quit requirements is necessary to effect lease termination, but minor errors or omissions will not render the notice to quit defective such that a summary process action cannot be maintained." *Cambridge St.*

Realty, LLC v. Stewart, 481 Mass. at 131 (notice to quit failed to use specific language provided for in the lease, but nonetheless was found to have "complied with the statutory requirement that it be specific.") In the appendix to *Adjartey v. Central Division of Housing Court Department*, 481 Mass. 830, 851 (2019), the SJC also indicated as follows in a footnote with respect to cure rights for a tenant under a lease:

> The potential for confusion is increased by the fact that some sample notice to quit forms, available online, include language that could cause a reasonable tenant to believe that there is no right to avoid eviction by repaying the full amount of rent due. The sample form available at https://www.mass.gov/files/documents/2016/08/wg/notice-quit-14.pdf [https://perma.cc/X7PE-AH9S], for instance, states that "[a]ll monies paid to the landlord after your receipt of this notice will be accepted as use and occupancy and not as rent, without waiving any right to possession of the premises, and without any intention of reinstating your tenancy or establishing a new tenancy." Although the form goes on to discuss a tenant's cure rights, this language is likely to create misunderstandings.

Id. at Note Appx-3 (2019). [3]

7. The question in this case is whether the notice to quit, by stating that "any" monies tendered by the tenants were accepted for use and occupancy only, and that the landlord "reserves the right to accept such monies without establishing any new tenancy," without expressly limiting that reservation

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[3] In addition to the language identified by the SJC as likely to create misunderstandings, the notice posted on mass.gov, set forth below, regrettably misstates the cure rights of a tenant under lease; it sets out the cure rights under G.L. c. 186, §12 for tenants at will.

> Reservation of Landlord's Rights
>
> All monies paid to the landlord after your receipt of this notice will be accepted as use and occupancy and not as rent, without waiving any right to possession of the premises, and without any intention of reinstating your tenancy or establishing a new tenancy.
>
> Cure Rights of Residential Tenant at Will
>
> If you are a tenant at will, and if you have not received a Notice To Quit for Nonpayment of Rent within the last twelve months, you have a right to prevent termination of your tenancy by paying or tendering to your landlord, or your landlord's attorney, or to the person to whom you customarily pay your rent, the full amount of rent due within ten days after your receipt of this notice.
>
> Cure Rights of Residential Tenant under Lease
>
> If you are a tenant under an unexpired written lease, and you have not received a Notice to Quit for Nonpayment of Rent within the last twelve months, you have a right to prevent termination of your tenancy by paying or tendering to your landlord, or landlord's attorney, or the person to whom you customarily pay your rent, the full amount of rent due within ten days after your receipt of this notice,
> CHAPTER 494, ACT OF 1977.

of rights to situations in which the tenants did not fully cure as was their stated right, achieved "substantial compliance" with statutory notice to quit requirements, or rather misstated the law and thereby had a legally unacceptable "tendency to mislead."

8. Unlike cure rights, "reservation of rights" language in a notice to quit is neither required nor authorized by statute. Nor does the case law suggest that a landlord's reservation of rights must be expressly stated in a notice to quit, as "the question of waiver depends on the circumstances of the given case..." *Slater v. Krinsky*, 11 Mass. App. Ct. 941, 942 (1981). "A landlord's acceptance of rent for a time subsequent to the expiration of the notice to terminate, may constitute a waiver of the notice. But a waiver will not be found if the landlord 'accepts such rent expressly reserving his rights for the money is his due, and he has a right to receive it without barring his right to terminate the tenancy at will, which is the direct object of the suit.' " *Id.*, quoting Hall, Massachusetts Law of Landlord Hit and Tenant, Section 176 (4th ed. 1949)(internal citations omitted). While this does not signify that reservation of rights language in a notice to quit is impermissible, it must be included, if at all, in such a way as not to undermine the language that is statutorily required, namely language informing the tenant of her right to cure; the permissible language must yield to that which is statutorily required.

9. In this case the reservation of rights language was not expressed in such a way as to harmonize with the cure language, and in fact conflicted with that language. Both in terms of sequence (the reservation of rights language came before the cure language), and in substance (the reservation of rights language stated that "all" monies would be accepted without reinstating the tenancy), the language significantly risked misleading the tenant that payment in any amount would not operate to reinstate the tenancy. While the notice, in using asterisks and indicating "NOTE," appears to have attempted to qualify the reservation of rights language, it failed to explain in any way that the cure rights, if exercised properly, would effectively obviate the reservation of rights.

10. I am well aware that landlords, and in particular self-represented landlords, are too often tripped up by the technical requirements of notices to quit, regrettably delaying adjudication of the underlying dispute. The form notices to quit available in the public domain often do not help, as evidenced by the notice referenced in the *Adjartey* decision. In the absence of notices established by the Legislature or promulgated by the Judiciary for their intended purpose, however, the courts are left to first principles in determining whether a given notice to quit is sufficient or defective. Notice of cure rights being statutorily required, a notice to quit must first and foremost communicate those rights clearly, and this notice did not meet that standard. The motion to dismiss is therefore allowed.

11. **Order:**

A. The plaintiff's complaint is dismissed.

B. The defendant's request for costs is denied.

C. The Clerk's office is requested to schedule a case management conference and ADR screening with the undersigned, at which time the parties are ordered to appear with counsel.

So entered this 3rd day of December, 2019.

Dina E. Fein
First Justice

Cc: Clerk's Office

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden, ss: Western Division
Housing Court Department

No. 18-SP-2661

Westfield Housing Authourity,
Plaintiff

V.

ORDER

Lorraine Wright,

Defendants

After hearing on December 3, 2019, at which both parties appeared, the following order is to enter:

1. The motion for entry of judgment is allowed. The execution (eviction order) shall issue after the 10 day appeal period. There shall be a stay on the use of the execution until January 1, 2019.

2. Ms. Wright is referred to the Tenancy Preservation Program and T.P.P is requested to meet with Ms. Wright and discuss any smoking sensation programs that might be available to her. Ms. Wright is ordered to cooperate with T.P.P. Ms. Wright may bring a request for a further stay if T.P.P. determines that there is a program that can reasonably be expected to support her in stopping smoking.

3. For so long as Ms. Wright occupies the premises, she may not smoke except in the designated smoking area.

So entered this 4th day of December, 2019

Dina E. Fein, First Justice

cc: Tenancy Preservation Program

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

Housing Court Department
Western Division
No. 19-SP-1954

PYNCHON I, LP,

Plaintiff,

v.

VILMARYS OCASIO,

ORDER

After hearing on December 3, 2019, on the plaintiff's (landlord's) motion for entry of judgment and issuance of the execution (eviction order) for which both parties were present, the following order shall enter:

1. A judgment shall enter in favor of the plaintiff (landlord) for possession $2,392.21 for use and occupancy through December 3, 2019.
2. The execution (eviction order) shall issue, upon application copied to the tenant, at the expiration of the statutory appeal period.
3. This matter is scheduled for further review on December 17, 2019 at 2:00 p.m. This review is scheduled because the tenant believes that she should have a rent calculation which may significantly reduce the amount of outstanding rent, use, and occupancy. The parties shall cooperate with one another to effectuate any needed recalculation and shall bring witnesses from the landlord's management office to the next review.

So entered this 5th of December 2019.

Robert Fields, Associate Justice AM.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

Housing Court Department
Western Division
No. 19-SP-3034

WHALING PROPERTIES LLC,
Plaintiff,

v.

STACY STROM,
Defendant.

ORDER

After hearing on December 3, 2019, on the defendant's emergency motion to stop a physical eviction for which the plaintiff appeared telephonically and the defendant and a representative from the Tenancy Preservation Program appeared, the following order shall enter:

1. The defendant's emergency motion to stop a physical eviction is hereby allowed conditioned upon the defendant paying the plaintiff $280 by 11:30 a.m. on December 4, 2019.
2. The defendant shall take all steps necessary to secure funds through her 401K or other resources to pay the lot fees and arrears.
3. The defendant is referred to the Tenancy Preservation Program and shall cooperate with all of their recommendations.
4. This matter is scheduled for further review on December 17, 2019 at 9:00 a.m.

So entered this 5th of December 2019.

Robert Fields, Associate Justice AM.
cc: Tenancy Preservation Program

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-SP-4097

Joseph Francis,
Plaintiff
v.
Dan Martin et al,
Defendant

ORDER

After a bench trial on December 4, 2019 at which both parties were present, the following order is to enter:

1. For reasons set forth on the record, the landlord established the elements of his claims for possession and unpaid rent of **$4,400.** The tenant has not established any defenses. Accordingly, judgment for possession, **$4,400** and court cost shall enter in favor of the landlord.

2. The tenants' counterclaims were dismissed without prejudice, meaning they are available to the tenants to pursue affirmatively.

2. The execution shall issue upon written application, copied to the tenant, upon expiration of the 10 day statutory appeal period.

So entered this 6th day of December, 2019.

Dina E. Fein
First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-4995

AULA FRANKS,

Plaintiff,

v.

ORDER

COLLEEN AYERS,

Defendant.

This matter came before the court for trial on December 5, 2019, at which both parties appeared without counsel. For the reasons explained on the record at the conclusion of the trial, the following order shall enter and the case shall be dismissed:

1. Background: The plaintiff, Aula Franks (hereinafter, "landlord") owns a four-unit building at 135 Brown Avenue in Springfield, Massachusetts. There, he rents Unit #2L (hereinafter, "premises") to the defendant Colleen Ayers (hereinafter, "tenant") for a monthly rent of $550. The landlord attempted to terminate the tenancy for non-payment of rent and thereafter commenced this eviction proceeding. The defendant's defense is that she does not owe rent, having paid herm monthly rent each month since the commencement of the tenancy.

2. Rent and Last Month's Rent: At the commencement of the tenancy on September 3, 2019, the landlord wanted first and last month's rent paid in advance. When the tenant could

only pay first month's rent, the parties agreed that he would allow her to move in and to pay last month's rent by paying $50 extra each month. Thus, the tenancy began with the tenant paying $550 for September, 2019 rent. The tenant then paid October, 2019 rent in full on October 3, 2019. On October 17, 2019 the tenant paid an additional $280 towards the last month's rent. On November 8, 2019 the tenant paid rent for that month and then on November 25, 2019 paid $50 towards the last month's rent. The tenant then paid December, 2019 rent on December 5, 2019.

3. Given these payments, the tenant has never been behind in her rent. The October 10, 2019 notice to quit for non-payment of rent, seeking rent for October, 2019 even though October, 2019 rent was paid in full on October 3, 2019, was incorrect and invalid as a matter of law. The landlord's case, therefore, is dismissed.

4. Conclusion and Order: Accordingly, judgment shall enter for the tenant for possession.

So entered this 6th of December, 2019.

Robert Fields, Associate Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPSHIRE, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-CV-1033

LUMBER YARD NORTHAMPTON LIMITED PARTNERSHIP,

Plaintiff

v.

KELLI HUDSON,

Defendant

RULING AND ORDER ON PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Following hearings on November 15, 2019 and November 26, 2019, the plaintiff's (landlord's) motion for preliminary injunction is allowed. Based upon the credible evidence, I find and rule that the landlord has shown a substantial likelihood of prevailing on its claims against the defendant (tenant) and a risk of irreparable harm in the absence of injunctive relief. More specifically, the court finds and rules as follows:

1. **Facts:** When Ms. Hudson tenant moved into the subject property on or around June 26, 2019, she brought her dog Roxy with her. The lease prohibit pets, except that "management will give permission for a service animal where appropriate as a reasonable accommodation." While I credit the tenant's testimony that she is disabled, Roxy was not formally approved as a service animal at the inception of the tenancy: no paperwork was completed, and no licensure or vaccination records were provided.[1] It is the landlord's policy not to approve animals with a history of violence as service animals.

[1] On November 8, 2019, after the incident that gave rise to this case, the tenant provided the landlord with a doctor's note indicating that Roxy was an emotional support animal, but no such documentation was provided prior to the incident. For purposes of this ruling, I assume but do not decide that an emotional support animal would qualify as a

2. On November 3, 2019 the tenant and Roxy were standing by the elevator at the premises. Mr. Martinez, another resident at the premises, and his dog Rango (a Chihuahua which had been approved as a service animal) exited the elevator, and Roxy attacked Rango. Ms. Hudson and Mr. Martinez attempted to separate the dogs, but were unable to do so immediately, and the attack caused very serious injuries to Rango and relatively minor physical injuries to Mr. Martinez. As a result of the attack, Rango required surgery and medical treatment, for which Mr. Martinez received a bill in the amount of $2,034.68. There is no evidence that Roxy had a history of attacking any other animals or people prior to this incident.

3. Following the attack, the tenant confined Roxy to the interior of her unit for approximately 12 days, until ordered by the court on November 15, 2010 to remove the dog from the premises pending further hearing.

4. The Northampton animal control officer, Shayla Howe, met with the tenant and Roxy following the attack, and recommended that the tenant use a basket muzzle and Martindale collar for Roxy. Ms. Howe is not a dog behavioral specialist, and does not have an opinion as to whether Roxy is likely to repeat violent behavior.

5. The landlord has been told by its liability insurance carrier that the carrier will neither defend not indemnify for any claims arising out of behavior by Roxy if the dog remains on the premises.

6. **Analysis:** In considering the landlord's request for injunctive relief, the court applies the standard set forth in *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609 (1980).

> "...when asked to grant a preliminary injunction, the judge initially evaluates in combination the moving party's claim of injury and chance of success on the merits. If the judge is convinced that failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the judge must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. What matters as to each party is not the raw amount of irreparable harm the party might conceivably suffer, but rather the risk of such harm in light of the party's

service animal under the lease. The landlord has indicated that it is prepared to approve an emotional support animal assuming the proper documentation, just not this animal.

> chance of success on the merits. Only where the balance between these risks cuts in favor of the moving party may a preliminary injunction properly issue.

Id., 380 Mass. At 617.

7. In this case, the balance of harm mitigates in favor of entering the preliminary injunction. In so holding, the court does not intend to minimize the role that Roxy plays in the tenant's life. It being the landlord's reasonable policy not to approve animals with a history of violence as service animals, however, the tenant is unlikely to secure belated approval by the landlord to have Roxy at the premises as a reasonable accommodation, and the landlord is prepared to consider an application by the tenant to have another dog. The landlord, on the other hand, is on notice of this attack, and is unable to insure against its liability were there to be another incident in the future. Nor is it reasonable or practical to permit Roxy to remain on the premises conditioned on her being confined to the tenant's unit: not only is there a risk of property damage if the dog is unduly confined to the interior, but there are also foreseeable situations in which representatives of the landlord could be required to enter the unit without notice, such as to address emergencies, bringing them into contact with Roxy. Finally, the landlord has a duty to protect the safety and quiet enjoyment of other tenants, and their service animals lawfully on the premises. This duty extends to reassuring tenants that attacks such as that by Roxy are taken seriously, and that the landlord will take all necessary steps to prevent them.

8. **Order:** Based upon the foregoing, an injunction shall issue permanently prohibiting the tenant from having Roxy present at the subject property.

So entered this 10th day of December, 2019.

Dina E. Fein
First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

Housing Court Department
Western Division
No. 19-SP-4804

DEBRA MORSEN,

Plaintiff,

v.

ROBERTA DUBOVIK,

Defendant.

AGREED UPON ORDER

After hearing on December 5, 2019, for which both parties were present, the following agreed upon order shall enter:

1. The defendant (tenant) shall vacate the subject premises on or before January 1, 2020.
2. All rent owed through January 1, 2019 is hereby waived by the plaintiff (landlord) in settlement of the tenant's counterclaims.
3. The landlord shall serve and file a motion seeking judgment for possession, if the tenant fails to vacate as noted above.

So entered this 9th of December 2019.

Robert Fields, Associate Justice AM.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 18-CV-305

DAVID PERRY,

Plaintiff,

v.

MARJORIE BRITTON, SIMON E. ROSS, ROBERT SCARPETO, and DEVIN WALTER MOLAGHAN,

Defendant.

ORDER

This matter came before the court on December 3, 2019, at which counsel for the plaintiff failed to appear and counsel for the defendants appeared and the following order shall enter:

1. This matter is dismissed due to the plaintiff's failure to appear at this pre-trial conference and his failure to file a pre-trial memorandum[1].

So entered this 9th of December, 2019.

Robert Fields, Associate Justice

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[1]The defendants' counterclaims are dismissed without prejudice.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-CV-212

TIMOTHY SCOTT, et al.,

Plaintiffs,

v.

RACE STREET PROPERTIES, LLC, and DAVID P. WHITE,

Defendants.

ORDER ALLOWING FOR THE SUBSTITUTED COSTS OF THE DEPOSITION OF DAVID. P. WHITE

After hearing on November 21, 2019 on the plaintiff Timothy Scott's motion for the court to have the costs of a deposition of the defendant David P. White, principal of Race Street Properties, LLC to be substituted by the Commonwealth. The defendants do not oppose the motion.

The court is satisfied that the plaintiff Timothy Scott is indigent in accordance with G.L. c.261, §§27A-27G and that the deposition of Mr. White is appropriately part of the plaintiff's prosecution of the case and assures him an effective prosecution as he would have if he was financially able to pay.

Accordingly, the request is allowed and the court shall complete the appropriate form and send it out to Mr. Scott, substituting the costs of the deposition of David P. White.

So entered this 9th of December, 2019.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

Housing Court Department
Western Division
No. 19-SP-4977

15 RAILROAD AVENUE REALTY,

Plaintiff,

v.

JOHANA PERKINS,

Defendant.

ORDER

After trial on December 5, 2019, for which both parties were present, the following order shall enter:

1. For the reasons stated on the record, judgment shall enter in favor of the plaintiff (landlord) for possession, $2,250 in use and occupancy, plus court costs.

2. The execution (eviction order) shall issue at the expiration of the statutory appeal period upon application copied to the defendant (tenant).

So entered this 10th of December 2019.

Robert Fields, Associate Justice AM

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-960

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716 SPRING VALLEY, LLC,

Plaintiff,

v.

AGREED UPON ORDER

VANESSA RODRIGUEZ,

After hearing on December 5, 2019 on the tenant's motion to stay use of the execution, at which the landlord appeared through counsel and the tenant appeared *pro se*, the following agreed upon order shall enter:

1. If the tenant pays the landlord $850 by no later than Monday, December 9, 2019 at 4:30 p.m. she may continue to occupy the premises until January 1, 2020. If the tenant complies with this payment, the landlord may return the execution (which expires on December 19, 2019) and obtain a new one from the Clerks Office, with a copy of the correspondence copied to the tenant.

2. If tenant fails to comply with the above, the landlord has leave to utilize its current execution[1].

So entered this 10th of December, 2019.

Robert Fields, Associate Justice

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[1]If the tenant fails to make the required payment and the landlord is seeking a new execution it will have to file a motion for said issuance.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-4922

SIMON SHAPOVALOV,

Plaintiff,

v.

ORDER

EVELYN ANDINO,

Defendant.

This matter came before the court for trial on December 5, 2019, and for hearing of motions, at which the landlord appeared with counsel and the tenant appeared with LAR counsel, Daniel Bahls. After hearing, the following order shall enter:

1. The tenant's motion to continue the trial for a date in January, 2020 is allowed. There were several factors upon which the motion was allowed. It was 4:15 p.m. when the case was first called for hearing and the matter was going to have to be rescheduled, anyway. [redacted] Additionally, the tenant is alleging very serious conditions of disrepair retaliation for reporting same and the LAR counsel is actively seeking counsel through his agency (Community Legal Aid) for the tenant.

2. The landlord's motion for the tenant to pay her rent, use, and occupancy to the landlord directly (or in the alternate to the court) pending trial is denied, *without prejudice*. In accordance with *Davis v. Comerford*, 483 Mass. 164 (2019), the landlord failed to articulate with sufficient specificity his monthly financial obligations or whether he faced threat of foreclosure. In contrast, the tenant is asserting serious conditions of disrepair and that she withheld the rent due to same and that the eviction is based on retaliation. The record established at this hearing was unpersuasive that the tenant is unlikely to be successful on the merits of her claims. Additionally, it is anticipated that the trial will be scheduled for January, 2020 (one month beyond the original hearing date).

3. A Case Management Conference shall be scheduled with the Clerks Office on **December 30, 2019 at 2:00 p.m.**

So entered this 10th of December, 2019.

Robert Fields, Associate Justice

cc: Daniel Bahls, Esq. (Community Legal Aid, LAR counsel for the tenant)

COMMONWEALTH OF MASSACHUSETTS
HOUSING COURT DEPARTMENT
OF THE TRIAL COURT

HAMPDEN, SS.

WESTERN DIVISION
DOCKET NO. 19CV1087

SPRINGFIELD HOUSING AUTHORITY,
Plaintiff

v.

BARBARA MCNABB,
Defendants

ORDER

After hearing on December 9, 2019, 2019 with Plaintiff present and represented by counsel and Defendant not present, the Court ORDERS:

1. That Defendant is referred to Tenancy Preservation Program and agrees to comply with intake and, if accepted, any and all referrals and recommendations;

2. The Defendant is ordered to not cause any disturbance on the property;

3. The Defendant is ordered not to smoke anywhere on the premises or in her unit or in common areas;

4. The Defendant is ordered to control herself and act in a respectful manner with other residents and Housing Authority staff

5. The Defendant is ordered to appear in court on December 20, 2019 at 9:00 A.M. for further review and hearing.

6. The case is scheduled for further hearing and review on December 20, 2019 at 9:00 AM.

Dina E Fein 12/10/19
Dina E. Fein, First Justice

cc. TPP
CHS Pothier

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 18SP5463

PYNCHON I, LP
v.
BRENDALIZ KELLEY

ORDER

After hearing on December 11, 2019, at which both parties appeared, the following enter is to enter:

1. The plaintiff's motion for entry of judgment and issue of the execution is denied for reasons stated on the record.
2. The tenant shall pay her new current rent amount plus $100 towards the arrears, no later than the 15th of each month until the total balance is paid by the end of March 2020.
3. The tenant shall provide any changes in information to the management office in a timely manner to comply with the recertification process.

So this entered on the 12th day of December, 2019.

DINA E. FEIN, First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Berkshire, ss:

Housing Court Department
Western Division
No. 19-CV-1105

KAITLIN SECORD,

Plaintiff,

v.

ORDER

JASON CASEY,

Defendant.

After hearing on December 11, 2019 on the plaintiff tenant's complaint for injunctive relief, at which she appeared with the Lawyer for the Day and the defendant landlord appeared *pro se*, the following order entered on the record and memorialized herein:

1. The Pittsfield Board of Health will inspect the subject premises on December 13, 2019 at a time scheduled with the parties and the city.
2. The landlord will comply with any written report that is resulted by said inspection in the time frame indicated by the report.
3. The landlord shall provide the tenant with at least 48-hours advance notice in writing (or text) of a day and time needed for access for inspection/repairs. Such notice shall describe the nature of the work to be performed during that time. The tenant shall not unreasonably deny access for same.

4. Any and all work performed at the premises by the landlord that requires licensure or permits shall only be effectuated by a licensed person with proper permits.

5. The parties agree that there are bed bugs at the subject premises. The landlord has hired a professional exterminator who is scheduled for December 19, 2019. The landlord shall provide the tenant with an instruction sheet on how to prepare her unit for said extermination. Additionally, the tenant shall have all of her clothing and linen and drapes washed and cleaned at high heat and shall either pay for same initially and get reimbursed by the landlord for such costs or shall inform the landlord that she can not pay for this initially and the landlord shall provide the tenant with funds sufficient to effectuate this cleaning of her washable belongings.

So entered this 12th of December, 2019.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss:

Western Division
Housing Court Department

Docket No. 19-CV-1123

Dorothy Charvis,
Plaintiff
vs.
Patricia Robinson,
Defendant

ORDER

After a hearing on December 13, 2019 at which the plaintiff appeared self-represented and the defendant failed to appear, the following order is to enter:

1. Patricia Robinson, or anyone acting on her behalf, shall forthwith restore occupancy to Ms. Charvis at 84 Wilton Street, Springfield, Massachusetts, pending further order of this Court.
2. Ms. Charvis shall provide the Hampden County Sheriff's Civil Process Division with a copy of this order forthwith and the order shall be posted at the 84 Wilton Street address and a second copy of this order shall be served on Ms. Robinson at 9 Maple Street, Wilbraham, Massachusetts.
3. All parties shall appear at the next court appearance, and if the party cannot appear, a lawyer (not a person with power of attorney) shall appear on Wednesday, December 18, 2019 at 2:00 pm. for further hearing.

So entered this 13th day of December 2019

Dina E. Fein, First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

Hampden ss:

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-CV-273

Michelle Hall,

Plaintiff

v.

Charles Ramadan,

Defendant

ORDER

After hearing on December 11, 2019 at which time both parties appeared, the following order is to enter:

1. The plaintiff's (tenant's) motion to withhold rent is hereby continued generally.

2. The tenant may re-mark said motion for a hearing upon receipt of a recent code enforcement report.

So entered this 13th day of December, 2019.

Dina E. Fein
First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-SP-2481

Morton Haberman Realty,
Plaintiff
v.
Elizabeth Agron,
Defendant

ORDER

After a hearing on December 13, 2019, at which time then landlord and the tenant appeared, the following order is to enter:

1. The motion for issuance of execution is allowed.
2. There is a stay on use of the execution conditioned upon the tenant taking all the necessary steps to complete the RAFT application forthwith.
3. The landlord is ordered to cooperate with the tenant with respect to the RAFT application by signing the landlord documents.
4. The case shall remain open through March 2020.
5. The tenant is ordered to pay rent in full and on time beginning in January 1, 2020.

So entered this 13 day of December, 2019.

Dina E. Fein
First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19-SP-1014

75 Avon Place LLC,
Plaintiff
v.

Linda (Abrue) Perez,
Defendant

ORDER

After a hearing on December 12, 2019, at which time the landlord and the tenant appeared, the following order is to enter:

1. The motion to amend an agreement is allowed. A new execution (eviction order) shall issue and there shall be a stay on the use of the execution conditioned upon the tenant making the following payments:
   a. Rent plus **$200.00** for the month of January;
   b. Rent plus **$300.00** for the months of February, March, and April.
2. The tenant is ordered to pay the total amount of rental arrears owed by April 30, 2020 or vacate by that date.

So entered this 16th day of December, 2019.

Dina E. Fein
First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SC-128

ELAINE COTE,

Plaintiff,

v.

BONNIE ORCUTT,

Defendant.

ORDER

On October 15, 2019, this matter came before the court for trial, after appeal of a Magistrate's decision, at which each party appeared without counsel. After consideration of the evidence admitted therein, the following order shall enter:

1. **Background:** On or about November 2, 2017 the plaintiff, Elaine Cote (hereinafter, "plaintiff" or "Cote") moved into a house owned and occupied by the defendant, Bonnie Orcutt (hereinafter, "defendant" or "Orcutt"). The parties established a tenancy in which Cote rented a room for a rate of $130 per week and over the course of the tenancy Cote lived in several different bedrooms within the house. On May 30, 2019, Cote alleges she was forced to leave the premises, was thereafter illegally denied re-entry, and that Orcutt converted or discarded Cote's personal belongings. Orcutt denies that she violated Cote's rights nor that she took or discarded her belongings.

2. Self Help Eviction: On May 30, 2019 the parties had an argument and as a result, Orcutt forced Cote to immediately move out of the premises without the benefit of judicial process. Cote left the premises without taking any of her personal belongings. Orcutt immediately emptied Cote's room and texted Cote and informed her that she could pick up her things by the basement door. Orcutt texted Cote again on June 2, 2019 and told her that she could not move back in, that she could not come on to the property, and that she might as well say goodbye to her belongings. Her texts include profane and aggressive language such as "don't you fuckin come here!! You are not allowed on my property, your shit is gone you fuckin crack head....You have officially lost everything!! It's called karma..." Orcutt also placed some or all of Cote's personal property that was located inside the home onto the street with a sign that read, "Free".

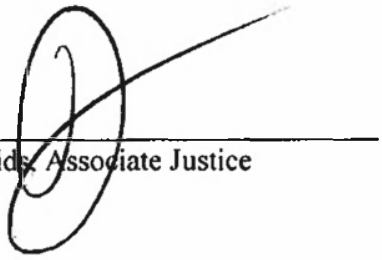
3. G.L. c.186, §15F: The above actions constitute a violation of Cote's rights under G.L. c.186, §15F and, accordingly, Cote shall be awarded statutory damages of three months' rent. Given that Cote paid $130 per week, the average monthly rent is calculated at $559. Thus, the award for the violation of this statute is **$1,677**.

4. Loss of Personal Belongings: Orcutt separated Cote from Cote's personal belongings by virtue of the illegal lock out described above. The result of this lock out was that Cote was never reunited with her belongings through no fault of her own. The evidence is sufficient to find that **$505.20** is the value of jewelry lost. Though the court appreciates that other items were lost, the evidence was insufficient to support an award of damages beyond those receipted costs of lost jewelry.

5. Conclusion and Order: Based on the foregoing, judgment shall enter for the

plaintiff, Elaine Cote, for **$2.182.20**.

So entered this 16th of December 2019.



Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-480

OCWEN LOAN SERVICING, LLC,

Plaintiff,

v.

ORDER

DANIEL and LISA WALKER,

Defendants.

After hearing on December 3, 2019, at which the plaintiff appeared through counsel but for which the defendants did not appear, the following order shall enter:

1. **Procedural History:** Having been determined by the court after a hearing on June 26, 2019 that the single factual issue in dispute in this matter is whether or not the plaintiff complied with the HUD "fact to face" requirements as part of its foreclosure procedures, an evidentiary hearing was scheduled regarding this sole disputed issue.

2. In accordance with an order dated July 29, 2019 the parties had until August 1, 2019 to provide each other and the court with a list of their witnesses. The parties complied with this and after several continuances the matter was scheduled for hearing on December 3, 2019.

3. The plaintiff appeared and the defendants failed to appear. Given that compliance with the face-to-face requirements of 24 CFR §203.604 are conditions precedent before the mortgage debt can be accelerated by the mortgagee and before it may proceed to

foreclosure (Paragraphs 9 and 18 of the mortgage), and thus part of the plaintiff's *prima facie* case, the plaintiff proceeded by putting on its witness. See, *Wells Fargo Bank, N.A. v. Nancy B. Cook & Another*, 87 Mass.App.Ct. 382 (2015).

4. **The Law on Face-to Face Meetings Requirements:** The parties agree that the requirements described in 24 CFR §203.604 apply to this mortgage. That regulation, at 24 CFR 203.604(b) states:

> The mortgagee must have a face-to-face interview with the mortgagor, or make a reasonable effort to arrange such a meeting, before three full installments due on the mortgage are unpaid. If default occurs in a repayment plan arranged other than during a personal interview, the mortgagee must have a face-to-face meeting with the mortgagor, or make a reasonable attempt to arrange such a meeting within 30 days after such default and at least 30 days before foreclosure is commenced...[.]

5. Additionally, that regulation defines a reasonable effort to arrange a face-to-face meeting as follows at 24 CFR 203.604(d):

> "a reasonable effort to arrange a face-to-face meeting with the mortgagor shall consist at a minimum of one letter sent to the mortgagor certified by the Postal Service as having been dispatched. Such a reasonable effort to arrange a face-to-face meeting shall also include at least one trip to see the mortgagor at the mortgaged property..."

6. **Evidence:** The plaintiff's witness, Robert Russell, is a Mortgage Field Inspector for Safeguard Properties, an entity hired by the plaintiff to monitor the subject premises and also to deliver "door hangers" that inform the occupants of their right to have a "face-to-face" meeting. Mr. Russell testified credibly that he was at the property on many occasions and that on several of these visits he left a "door hanger" envelope with a letter inside that informs the mortgagors of their right to have a face-to-face meeting. He testified that he left the "door hangers" with an enclosed letter which refers to 24 CFR §203.604 and the right to a face-to-face meeting, with contact information on January 23,

2018, March 5, 2018, and May 3, 2018.

7. Even though the court credits Mr. Russell's testimony, the record does not contain evidence that the plaintiff complied with the remaining requirements of the above regulations. Specifically, the required time frame for these attempts to arrange for a face-to-face meeting is delineated in the regulations and require that they occur "before three full monthly installments due on the mortgage are unpaid, or if the default occurred after a repayment plan "within 30 days after such default". 24 CFR §203.604(b). Thus, even if the court were to consider the "door hangers" and the letters contained therein as "reasonable efforts to arrange for such a meetin" there is no evidence that they were accomplish either prior to three months of non-payment of the mortgage or 30 days after default of a repayment plan. Additionally, there is no evidence that a letter was also mailed by certified postage in addition to Mr. Russell's visits to the property as required in 24 CFR 203.604(d) within the required time frames.

8. Because the record is not sufficiently clear whether this hearing was a trial on the merits (albeit, limited to the single issue in dispute) or an extension of the summary judgment proceedings, the court considered the attachments to the summary judgment pleadings as admissible. Even with doing so, the letters provided by the plaintiff therein as Exhibit J do not provide evidence of compliance with 24 CFR 203.604. These letters, dated November 25, 2013, October 30, 2015 and February 5, 2016 all informed the defendants of their right to a face-to-face meeting. Even if these letters provided sufficient proof of complying with the sending of letter by Postal Service (as noted in 24 CFR 203.604(d)), there is no evidence that any of them were sent within the time frames required by 24

CFR 203.604(b).[1]

9. **Conclusion and Order:** As noted above, the procedural record is not sufficiently clear as to whether this hearing was an extension of the summary judgment motion or a truncated trial with a singular issue in dispute. If it was a trial and the defendants failed to appear, it would likely have resulted in a default against them. If it was an extension of the summary judgment hearings, summary judgment would have been denied and the matter scheduled for trial. Additionally, the plaintiff counsel's comments at the beginning of the hearing indicate that he believed that the sole issue before the court was whether the plaintiff delivered notices giving the defendants information about their right to a face-to-face meeting. As discussed above, compliance with 24 CFR 203.604 requires multiple, additional steps.

10. Due to the lack of clarity of the procedural record, the appropriate and fundamentally fair way forward is to schedule this matter for a trial. A Case Management Conference with the judge shall be scheduled for **January 7, 2020 at 9:00 a.m.** At said conference, the parties should come prepared to discuss the extent of triable issues remaining in this action.

So entered this 16th of December, 2019.

Robert Fields, Associate Justice

[1]Exhibit C of the summary judgment attachments include the 150 Day Right to Cure letters dated February 21, 2014, which are sent within three installments due on the mortgage were unpaid. There is no language contained therein, however, that informed the mortgagors of their right to a face-to-face meeting—or can be construed to include a reasonable effort to arranges such a meeting in accordance with 24 CFR 203.604.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

BERKSHIRE, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET No. 19-SP-1829

APPLETON CORPORATION,
Plaintiff

v.

CAROL TEWKSBURRY,
Defendant

RULING AND ORDER REGARDING STANDING OF PLAINTIFF

DOCKET No. 19-SP-2599

APPLETON CORPORATION,
Plaintiff

v.

BEVERLY PLEITER,
Defendant

The above-captioned consolidated cases came before the court on October 2, 2019, for joint trial on the threshold issue of the plaintiff's standing to bring these summary process cases. Based upon the credible evidence, the court finds and rules as follows:

1. **Facts**: Berkshiretown LLC (Berkshiretown) owns the property located at 176 Columbus Avenue, Pittsfield, Massachusetts (the property). On or around November 1, 1999 Berkshiretown Associates and Appleton Corporation (Appleton) entered into a management agreement (Agreement). The Agreement provides in pertinent part that Appleton:

- is the exclusive agent to manage the property;
- will execute leases approved by Berkshiretown, identifying it as an agent of Berkshiretown;

- will collect and deposit rent in accordance with the terms of each lease;
- will maintain and repair the property in accordance with state and local codes, to include providing an emergency telephone and repair service on a 24-hour basis; and
- will terminate leases when "sufficient cause" for a termination exits.

The Agreement was assigned by Berkshiretown Associates to Berkshiretown LLC on August 5, 2005.

2. The tenants' leases do not identify Appleton explicitly, but were signed by the property manager who is employed by Appleton, Kim Gosselin. Ms. Gosselin signed a lease with Tewksbury on August 25, 2014 and Pleiter on March 24, 2014 (collectively, the tenants). Ms. Gosselin also signed correspondence to the tenants and the tenants' annual unit inspections, identifying herself as "Property Manager."

3. Gosselin's duties as property manager include the following: reviewing and accepting applications; determining eligibility and qualifications of applicants; maintaining the waiting list; selecting qualified applicants and processing their applications; approving and denying individuals; executing the lease and move-in paperwork; collecting rent; depositing rent; performing annual recertifications; handling complaints by and about tenants; maintaining the budget for the property; hiring and overseeing staff; and sending notices to quit.[1]

4. The tenants make their rent checks payable to Berkshiretown. The tenants are familiar with Ms. Gosselin in her role as property manager. The tenants have received written

[1] When Ms. Gosselin executed the lease between the parties, she failed to identify herself as an Appleton employee and failed to identify Appleton as the agent for Berkshiretown, contrary to the terms of the Agreement. Those terms are for Berkshiretown to enforce, however, and in and of themselves neither void the lease nor deprive the plaintiff of standing.

communication and inspection reports on "Berkshiretown" or "Berkshiretown Apartments" letterhead or forms, signed by Ms. Gosselin as property manager; she is not identified as an agent of Appleton on those documents.

5. **Rulings of Law**: The tenants' argument that Appleton is neither the owner nor the lessor, and therefore does not have standing to bring this summary process case under *Rental Property Management Services v. Hatcher*, 479 Mass. 542 (2018), over-interprets that decision. While holding in part that "[a] plaintiff may bring a summary process action to evict a tenant and recover possession of his or her property only if the plaintiff is the owner or lessor of the property," *id.* at 546, *Hatcher* did not define the term "lessor," nor is the Court aware of any other cases or statutes that expressly define "lessor" or "landlord" in such a way as to preclude Appleton's standing in this case.[2] With the exception of being identified in the lease as the "landlord," there is no evidence that Berkshiretown operates as such in managing the property or the tenancies at issue here. To the contrary, the day-to-day running of the property and management of the tenancies is performed entirely by Appleton employees; functionally, Appleton is the landlord, in contrast to the plaintiff in *Hatcher,* Rental Property Management Services, which was retained by the owner exclusively to initiate a summary process case against the tenant. See *id.* at 544.

6. Nor do the facts in this case trigger the concern expressed in *Hatcher* that a plaintiff without standing potentially shields the owner or lessor from defenses and counterclaims that

[2] The *Hatcher* decision cited to *Ratner v. Hogan*, 251 Mass. 163, 165 (1925), which held that a "lessor" and a "landlord" both have standing to initiate summary process. *Id.* at 165 ("To recover the possession of real estate under the provisions of G. L. c. 239, s. 1, it is essential that there should be proof of the relation of lessor and lessee, or of landlord and tenant, between the plaintiff and defendant or between the occupant and a person through whom or under whom the plaintiff claims."). While *Ratner* may have intended "landlord" to apply only to tenancies as will, as to which by definition there is no lease and therefore no "lessor," the decision did not so state.

would otherwise be available to the tenant. *Id.* at 554 ("Where the named plaintiff in a summary process action is not the true landlord, a self-represented tenant with viable defenses or counterclaims based on the landlord's misconduct or the poor condition of the premises will be unable to assert them against the plaintiff—who is, of course, not the landlord—without impleading the true landlord. In effect, such conduct confers an unfair advantage on landlords, shielding them from tenants' potential defenses and counterclaims...."). When a duly constituted agent, such as Appleton, acts in accordance with its instructions from a principal, such as Berkshiretown, the agent has power to affect the legal relations of the principal with third parties to the same extent as if the principal had so acted itself. See RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. g (2006). As Appleton and its employees acted upon express authority granted to them by Berkshiretown, their conduct binds Berkshiretown, including for purposes of any claims brought by the tenants. Appleton also meets the definition of "owner" in the State Sanitary Code and the Attorney General's Regulations. Pursuant to the Agreement, Appleton (through Ms. Gosselin) "manages, controls, and/or customarily accepts rent on behalf of the owner," 940 C.M.R. § 3.01, thereby affording additional protection to the tenants under 940 C.M.R. § 3.17.

7. Furthermore, Appleton did not bring this case in its own name, but rather as "Appleton Corporation, Managing Agents for Berkshiretown, LLC." Assuming without deciding that the plaintiff should more properly have been designated as "Berkshiretown, LLC, Through its Managing Agents Appleton Corporation," the distinction is without dispositive legal significance, as it would be well within the court's discretion to allow a motion to amend the

plaintiff's name under G.L. c. 231, §51 and Mass. R. Civ. P.17(a). See *Castlegate Prop. Mgt. v. Brenes*, Docket No. 19-SP-976 (Mass. Housing Ct., W. Div., October 18, 2019) (Fein, J.).

8. Finally, unlike in *Hatcher*, Appleton is represented by counsel, as is required given that it is a corporation. *LAS Collection Mgt. v. Pagan,* 447 Mass. 847 (2006).

9. **Conclusion and Order**: Based upon the foregoing, the court finds and rules that the plaintiff has standing to bring these cases. As such, the balance of the trials in these cases shall proceed as scheduled.

So entered this 17th day of December, 2019.

Dina E. Fein
First Justice

cc: ACM Laura Fenn

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Franklin, ss:

Housing Court Department
Western Division
No. 19-SP-1556
19SP1556

GEORGE NEWCOMB,

Plaintiff,

v.

RICHARD and PATRICIA CUCCHIARA,

Defendants.

RULING ON DEFENDANTS' MOTION TO ALTER OR AMEND THE JUDGMENT AND ON THE DEFENDANTS' ATTORNEY FEE PETITION AND ENTRY OF FINAL JUDGMENT

This matter came before the court for trial on June 24, and July 26, 2019 and a decision and order issued on August 7, 2019. The defendants, Richard and Patricia Cucchiara (hereinafter, "tenants" or "defendants"), were awarded damages for the plaintiff's breach of their covenant of quiet enjoyment. As prevailing parties in that claim, the defendants were afforded an opportunity to petition the court for reasonable attorneys fees and costs. A petition for the defendants' attorneys fees and costs, and opposition thereto, were filed with the court. The matter was before the court again on September 9, 2019 for hearing on the defendants' motion to alter or amend the court's decision. After hearing and consideration of said motion to alter or amend, and after consideration of the attorneys fees petition and opposition thereto, the following order and final judgment shall enter:

1. **Defendants' Motion to Alter or Amend:** The motion to alter or amend seeks the

court's reconsideration on its finding and ruling that the tenants did not meet their burden of proof on their retaliation claim. Though the court admittedly issued its finding on this claim in a cursory manner, its consideration in reaching its conclusion shall articulated in greater detail herein.

2. The Counterclaim and Affirmative Defense of Retaliataion: Under G.L. c. 239, s.2A (affirmative defense) and G.L. c. 186, s.18 (damages) a tenant has a claim for retaliation if the landlord has terminated the tenant's tenancy in retaliation for, among other things, the tenant's reporting a violation or suspected violation of law to a health or building department, or reporting a violation or suspected violation of law *in writing* to the landlord. Under both statutes the tenant is entitled to a rebuttable presumption of retaliation if the landlord serves the tenant with a written notice which purports to terminate the tenancy, increase rent or substantially alter the terms of the tenancy within six (6) months of the tenant's action of reporting to a housing inspection entity or complaining to the landlord of such violation or suspected violation. The burden then shifts to the landlord to rebut the presumption of retaliation by presenting clear and convincing evidence that such actions were not taken in reprisal for the tenant's protected activities, that the landlord had sufficient independent justification for taking such action, and that the landlord would have taken such action in any event, even if the tenant had not taken the actions protected by the statute.[1]

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[1] "Clear and convincing" proof means evidence which "induces in the mind of the trier a reasonable belief that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist." *Callahan v Westinghouse Broadcasting Co.. Inc.*, 372 Mass 582 (1977), quoting, *Dacey v. Connecticut Bar Assoc.* 170 Conn. 520, 537, n. S (1976); *Stone v Essex County Newspapers, Inc.*, 367 Mass. 819, 871 (1975).

3. Here, the tenants argue that they should be entitled to the rebuttable presumption of retaliation because they claim to have notified the landlord in writing on March 1, 2019 of their intention to withhold rent due to conditions—though no documents evidencing such writing were introduced into evidence—and then the landlord had them served with a notice to quit on March 19, 2019. The court, however, does not find that the tenants met their burden of clear and convincing proof that they in fact notified the landlord in writing of conditions of disrepair and/or within the context of a rent-withholding letter and/or by email—prior to the March 19, 2019 notice to quit. Accordingly, the tenants are not entitled to a defense to possession under G.L.c. 239, s.2A, and have not established a claim for damages under G.L.c.186, s.18.

4. Reasonable Attorneys Fees: The determination of reasonable attorneys fees is within the discretion of the judge. *Fontaine v Ebtec Corp.*, 415 Mass. 309, 324 (1993). In ruling on a petition for statutory attorney's fees, a court "should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Linthicum v. Archambault*, 379 Mass. 38, 388 (1979). Time spent on unnecessary work, duplicative work, or claims on which the party did not prevail, should be excluded. *Simon v. Solomon*, 385 Mass. 91, 113 (1982).

2. Hourly Rate: Counsel for the defendants, Carla Halpern, has petitioned for an hourly rate of $175. In his opposition to the attorney fee petition, the plaintiff did not dispute the hourly rate for Attorney Halpern and the court finds the hourly rate of $175 reasonable for said counsel.

3. Number of Hours: The petition seeks compensation for 38 hours and 10 minutes

totaling $6,667.50 in attorneys fees. The court, however, finds a number of the petition's entries as excessive or non-compensatory for various reasons as described herein. Specifically, all entries for time expended on researching, filing, and arguing the defendants' post-trial motion to alter or amend shall not be compensated. Additionally, entries for travel time are not compensable. Finally, the entry for 4 hours for the trial date on June 24, 2019 is reduced to 2.5 hours and the entry for 8 hours for the trial on July 26, 2019 is reduced to 6 hours, to more accurately reflect actual court time.

4. Accordingly, the petition for attorneys fees is reduced to 21 hours and 45 minutes @$175 totaling **$3,806.25**.

5. Costs: The petition did not seek costs *per se,* other than for Mr. Cucchiara's missed wages due to court attendance. Such funds are not appropriate to be compensated as part of a petition for fees and costs..

6. Conclusion and Order: In accordance with the above, final judgment shall enter for the plaintiff for possession and for **$2,800** plus court costs and interest. A judgment shall also enter for the defendants for attorneys fees in the amount of **$3,806.25**.[2]

So entered this 19th day of December, 2019.

Robert Fields, Associate Justice

[2]The court record includes a motion by the plaintiff, landlord, for attorneys fees based on a statement that there is a lease between the parties and that it has language requiring the tenants to pay the landlord's attorneys fees in this action. The court shall not at this time act on said motion as no such motion was ever marked for hearing and no lease was introduced into evidence at trial.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden, ss:

Housing Court Department
Western Division
No. 18-SP-1789

BERNARD PHILLIP,

Plaintiff,

v.

TONYA FLOWERS,

Defendant.

RULING ON ATTORNEY FEE PETITION AND ENTRY OF FINAL JUDGMENT

This matter came before the court for trial on November 6, 2018 and a decision and order issued on April 19, 2019 and after hearing on the defendants' motion for reconsideration on June 18, 2019 same was denied on that same day. The defendant, Tonya Flowers (hereinafter, "tenant" or "defendant"), was awarded damages for the plaintiff's breach of her covenant of quiet enjoyment. As a prevailing party in that claim, the defendant was afforded an opportunity to petition the court for reasonable attorneys fees and costs. After consideration of said timely filed petition for fees, and the opposition thereto, the following order shall enter:

1. Reasonable Attorneys Fees: The determination of reasonable attorneys fees is within the discretion of the judge. *Fontaine v Ebtec Corp.*, 415 Mass. 309, 324 (1993). In ruling on a petition for statutory attorney's fees, a court "should consider the nature of the case and the issues presented, the time and labor required, the amount of damages involved, the result obtained, the

experience, reputation and ability of the attorney, the usual price charged for similar services by other attorneys in the same area, and the amount of awards in similar cases." *Linthicum v. Archambault*, 379 Mass. 38, 388 (1979). Time spent on unnecessary work, duplicative work, or claims on which the party did not prevail, should be excluded. *Simon v. Solomon*, 385 Mass. 91, 113 (1982).

2. Hourly Rate: Counsel for the defendant, Amy Springstoub, has petitioned for an hourly rate of $200. In his opposition to the attorney fee petition, the plaintiff did not dispute the hourly rate for Attorney Springstoub and the court finds the hourly rate of $200 reasonable for said counsel.

3. Number of Hours: The petition seeks compensation for 51 hours and 24 minutes totaling $10,280 in attorneys fees. The court, however, finds a number of the petition's entries as excessive for various reasons as described herein. Specifically, the entries dated July 15 through 19, 2018 all relate to a water shut off and emergency motion hearing that was denied by the court and were unnecessary given the facts of the water shut off which were explored on the record on July 19, 2018. The entry for October 12, 2018 relating to a second motion for discovery sanctions should not have taken more then 40 minutes given the first round of pleadings on this issue. Finally, the entries for May 3, 2019 and June 18, 2019 relate to a motion for reconsideration that was denied and no compensation shall be awarded for said entries.

4. Plaintiff's counsel sought further reductions, including for the time spent on September 17 and 18, 2018 relating to a motion for discovery sanction—alleging that it was denied. After re-listening to the hearing on October 23, 2019, the motion was taken under advisement until trial but the time incurred was clearly necessary and fruitful in attaining long

awaited and very late discovery. As such, no reduction shall be made on those entries.

5. Accordingly, the petition for attorneys fees is reduced to 38 hours and 51 minutes @$200 totaling **$7,703.33**.

6. Costs: The petition did not seek costs.

7. Conclusion and Order: In accordance with the above, and with possession being moot, the following final judgment shall enter: Judgment shall enter for the plaintiff Bernard Phillip for $4,966.66 and for the defendant, Tonya Flowers for **$7,703.33** for attorneys fees.

So entered this 19th day of December, 2019.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-CV-484

WILLIAM GRAY,

Plaintiff,

v.

DAVID PINARD, FRANCIS PINARD, and JO-ANN PINARD,

Defendants.

ORDER

This matter came before the court on December 17, 2019 and was heard along with a related code enforcement action (19-CV-222), and the following order shall enter:

1. A separate order issued in the code enforcement matter (19-CV-222) which included an inspection by the city scheduled for December 19, 2019 and for several emergency violations to be corrected by the Pinards immediately.
2. The Pinards reported to the court that they have contracted to sell the premises with a closing date on the sale scheduled for December 20, 2019.
3. Mr. Gray's motion to amend the complaint to add the City of Springfield will be under advisement. That portion of the motion to add Joseph Eisenstein and Samuel Higgins was withdrawn by Mr. Gray.

4. Mr. Gray's motion for Lis Pendens and for Alternate Housing are under advisement.

5. The contempt matter shall be continued to a date to be determined.

6. This matter shall be heard on review for an update on the city inspection and the sale of property on **Monday, December 23, 2019 at 9:30 a.m.** (along with the city case).

So entered this 20th of December 2019.

Robert Fields, Associate Justice

cc: Amber Gould, Esq, (City of Springfield)

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden, ss:

Western Division
Housing Court Department

City of Springfield Code Enforcement Department
Plaintiff,
v.
David Pinard, et al.,
Defendants,

No. 19-CV-222

William Gray,
Plaintiff,
v.
David Pinard, et al.,
Defendants.

No. 19-CV-484

ORDER

After a hearing on December 23, 2019, at which the City of Springfield (the "City") appeared via counsel, Mr. Gray appeared self-represented, all other parties failed to appear, the following order of the court does hereby issue:

1. The clerk's office shall issue a capias against David Pinard, Francis Pinard, and Jo-Ann Pinard (the "Pinard Defendants") due to their failures to appear.

2. Mr. Gray's request for alternative housing is allowed. The Pinards, jointly and severally, shall provide alternative accommodations in the form of a hotel room with cooking facilities to Mr. Gray until further order of this Court.

3. The City shall forth with identify a potential receiver for the limited purpose of emergency repairs and all parties and the proposed receiver shall appear on **December 27, 2019 at 9:30 a.m.** for a hearing on the appointment of a limited receiver—with notice any and all persons/entities with financial interest in the subject premises in any manner practicable. The City shall simultaneously mark up a motion for appointment of a receivership with time lines required by the statute.

So entered this 23rd day of December, 2019.

Robert G. Fields by [illegible]
Robert G. Fields
Associate Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

Hampden, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

Docket No.: 18-CV-1273

JAMES M. PETTINGAIL
Plaintiff

v.

PLANNING BOARD of the CITY OF WESTFIELD, William Carellas, Cheryl Crowe, Jane Magarian, Phillip McEwan, Raymond St. Hilaire, John Bowen, Bernard Puza as members thereof; MACTREM, LLC; and DAVID MACIVER

Defendants

RULING AND ORDER ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

1. The present case is brought before the Court through Plaintiff's appeal of the Planning Board of the City of Westfield's ("the Board's") decision allowing a special permit to Mactrem, LLC ("Mactrem") allowing variances in the minimum setback distances and density requirements for the lot. On July 23 and 26, 2019, Defendants filed motions for summary judgment under separate theories that Plaintiff did not have standing to challenge the board decision, and, if Plaintiff does have standing, the Board's decision was not arbitrary and capricious. The Court held a motion hearing on October 8, 2019.

STANDARD OF REVIEW

2. Summary judgment is appropriate when there are no material facts in dispute, and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56(c); *Highlands Ins. Co. v. Aerovox*, 424 Mass. 226, 232 (1997). When reviewing the record for summary judgment, the court will view the evidence in the light most favorable to the nonmoving party. *Bisson v.*

Eck, 430 Mass. 406, 407 (1999); *Gray v. Giroux*, 49 Mass. App. Ct. 436, 437 (2000). The moving party must demonstrate that the moving party is entitled to a judgment in her favor as a matter of law. *Cmty. Nat'l Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). "If the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts which would establish the existence of a genuine issue of material fact . . . ." *Pederson v. Time Inc.*, 404 Mass. 14, 17 (1989).

3. Substantive law will identify which facts are material, and only disputed salient facts that might affect the outcome of the suit under the governing law will preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Carey v. New England Organ Bank*, 446 Mass. 270, 278 (2006); *Molly A. v. Comm'r of the Dep't of Mental Retardation*, 69 Mass. App. Ct. 267, 268 n.5 (2007). In determining if a dispute concerning 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 nonmoving party." *Anderson*, 477 U.S. at 248.

4. Once the moving party establishes the absence of a triable issue and makes its prima facie case, the non-moving party must respond with facts supported by the record establishing the existence of a genuine issue of material fact. Mass. R. Civ. P. 56(e). The non-moving party may not rest on "mere assertions of disputed facts," but must show the existence of actual material facts. *LaLonde v. Eissner*, 405 Mass. 207, 209 (1989). 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." *Korouvacilis v. Gen. Motors Corp.*, 410 Mass. 706, 714 (1991).

UNDISPUTED FACTS

5. The City of Westfield ("the City") took possession of real property located at 8 Lewis Street, Westfield, Massachusetts ("the Property") on July 26, 2017 through a tax taking. The Property is located within a residential C district. A single-family home was located at the property, but, due the structures state of disrepair, it was demolished on or before January 1, 2018. The Property remains vacant to date. Defendant Mactrem purchased the Property on June 24, 2018 at public auction. Mactrem approached the Board with a proposed plan for a two-family, duplex-styled residence of roughly 3,500 square feet. Along with the proposed plans, David MacIver ('MacIver"), the sole member of Mactrem, filed for a special permit seeking variances of Westfield Zoning Ordinances 3-70.4(9) and 4-20.2 on October 16, 2018.

6. Ordinance 3-70.4(9) states that a special permit shall be required to alter the property in adhering with the minimum setback for side yards of 15 feet. Ordinance 4-20.2 states that the Planning Board may issue a special permit to allow for the reduction in the dimensional and/or an increase in the density requirements for lots within a residential C district so long as they follow several requirements found throughout the City's ordinances. One of the several requirements is for on-site parking to be provided. The applicable zoning parking ordinances that Mactrem must adhere to is 3-70.7 and 7-10.2, which both require two off-street parking spaces for each dwelling unit.[1]

7. The Board held a meeting on November 20, 2018 that was open for public comment concerning the special permit for the proposed residence. The matter was discussed but ultimately continued to December 4, 2018 so that Mactrem could bring in several revised

[1] Ordinance 3-70.7 states that "two and two-tenths" off-street parking spaces are required, but if a number is under 5/10s, then the number shall be rounded down. Westfield Zoning Ordinance, § 7-10.1. Therefore, the requirement, in reality, is to provide for 2 parking spaces per unit.

building plans for the Board to review. At the conclusion of the December 4 meeting, the Board approved special permits for zoning ordinances 4-20.2 and 3-70.4(9). Plaintiff, an abutter to the Property, attended both meetings. The Board's decision was released on December 7, 2018.

DISCUSSION

8. Plaintiff argues that the Board exceeded its authority in allowing the special permit, rendering the decision arbitrary and capricious. He states that the building plans nor the Board provided for sufficient off-street parking, as required under the dimensional/density variance. Further, Plaintiff alleges that as a direct abutter to the property he is aggrieved by the increased noise, dust, light pollution, loss of open space, and overall intensity of use of the Property. Defendant Mactrem contends that although Plaintiff is a presumed person aggrieved under G.L. c. 40A § 17, he lacks standing to challenge the Board's decision. Defendant City of Westfield argues that the Board's decision was not arbitrary and capricious but was a careful, well-thought plan open to public comment and addressed many of the Board's and public's concerns.

9. **Standing**. Under G.L. c. 40A § 17, only a "person aggrieved" may challenge a decision of a zoning board of appeals. See *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline*, 461 Mass. 692, 700 (2012). A plaintiff is a person aggrieved if he suffers "some infringement of his legal rights." *Marashlian v. Zoning Bd. of Appeals of Newburyport*, 421 Mass. 719, 721 (1996); see *Circle Lounge & Grille, Inc. v. Bd. of Appeal of Boston*, 324 Mass. 427, 430 (1949). "[T]he right or interest asserted by a plaintiff claiming aggrievement must be one that the Zoning Act is intended to protect, either explicitly or implicitly." *81 Spooner Road, LLC*, 461 Mass. at 700.

10. Abutters of a property entitled to notice of zoning board of appeals' hearings are presumed to be an aggrieved person. *Marashlian*, 421 Mass. at 721; see G.L. c. 40A § 11

(presumption of standing conferred on "parties in interest," which includes "abutters"); *Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc.*, 421 Mass. 106, 107 (1995). "However, an adverse party can challenge said abutter's presumption of standing by offering evidence 'warranting a finding contrary to the presumed fact.'" *81 Spooner Road, LLC*, 461 Mass. at 700, quoting *Marinelli v. Bd. of Appeals of Stoughton*, 440 Mass. 255, 258 (2003). Defendants can rebut the presumption by showing that, as a matter of law, the claims of the aggrieved abutter are not interests that G.L. c. 40A is intended to protect, *Kenner v. Zoning Bd. of Appeals of Chatham*, 459 Mass. 115, 120 (2011), or that the claims are "not within the legal scope of the protected interest created by the bylaw." *Sweenie v. A.L. Prime Energy Consultants*, 451 Mass. 539, 545 (2008). If an abutter establishes that the interests are protected by the Zoning Act or local ordinance, defendants can still rebut the presumption by "establishing that an abutter's allegations of harm are unfounded or de minimis," *81 Spooner Road, LLC*, *supra* at 702, or "showing that the plaintiff has no reasonable expectation of proving a cognizable harm." *Picard v. Zoning Bd. of Appeals of Westminster*, 474 Mass. 570, 573 (2016).

11. If a defendant offers sufficient evidence "to warrant a finding contrary to the presumed fact," the presumption is rebutted and the plaintiff must prove standing with credible evidence to substantiate the allegations. *81 Spooner Road, LLC*, *supra* at 702; see *Cohen v. Zoning Bd. of Appeals of Plymouth*, 35 Mass. App. Ct. 619, 621 (1993). To do so, the plaintiff must establish that his injury is distinguishable and unique from the concerns of the surrounding community by bringing forward direct facts and not speculative personal opinions. *Standerwick v. Zoning Bd. of Appeals of Andover*, 446 Mass. 20, 33 (2006); see *Denney v. Zoning Bd. of Appeals of Seekonk*, 59 Mass. App. Ct. 208, 211 (2003) ("The claimed injury or loss must be personal to the plaintiff, not merely reflective of the concerns of the community.").

12. Credible evidence has both a quantitative and qualitative component. See *Butler v. City of Waltham*, 63 Mass. App. Ct. 435, 441 (2005) and cases cited. "Quantitatively, the evidence must provide specific factual support for *each of the claims* of particularized injury the plaintiff has made. Qualitatively, the evidence must be of a type on which a reasonable person could rely to conclude that the *claimed injury likely will flow from the board's action*." *Id.* (citations omitted) (emphasis added). Personal opinions and hypotheses are insufficient. *Id.* Fact finders reviewing these facts does not require a finding that the plaintiff's allegations are meritorious or "more likely than not" true. *Id.*; *Marashlian*, *supra* at 721.

13. Once standing is challenged, the jurisdictional question is decided on "all the evidence with no benefit to the plaintiffs from the presumption." *Marotta v. Bd. of Appeals of Revere*, 336 Mass. 199, 204 (1957). Determining whether a party is "aggrieved" is a "matter of degree" that calls for the exercise of discretion rather than the "imposition of an inflexible rule." *Paulding v. Bruins*, 18 Mass. App. Ct. 707, 709 (1984).

14. Plaintiff is clearly a presumed person aggrieved as he is a direct abutter to the Property. See G.L. c. 40A § 11; *81 Spooner Road, LLC*, *supra* at 700. Additionally, Plaintiff's allegations are those directly protected by the City's ordinances. Plaintiff alleges that the building plans do not provide for two off-street parking spaces, and that the lack of adherence to said requirements will exacerbate current on-street parking conditions. The City's ordinances mandate that, if receiving a special permit for dimensional and/or density variances, that the proposed structure must still adhere to several mandates, including off-street parking requirements. Westfield Zoning Ordinance, §§ 3-70.7, 4-20.2, & 7-10.2. Additionally, Plaintiff alleges how the vacant lot's conversion to a two-family residence with reduced 15-foot side yard setbacks and density/dimensional variances will lead to an increase of use on the land and

interference with noise, dust, and light pollution, and loss of open space and solar access. Again, the City's ordinances address these concerns by explicitly laying out dimensional restrictions for each property found within a residential C district. Westfield Zoning Ordinance, §§ 3-70.1, 3-70.4(9) & 4-20.2. Therefore, Plaintiff's grievances are protected under the City's ordinances.

15. The Defendants challenge Plaintiff's standing on the grounds that any harms Plaintiff alleges are *de minimis* or speculative concerning the dimensional variance and side yard setbacks, and that any harm alleged is non-existent for off-street parking concerns. Regarding off-street parking, Defendants provided for the Court the Board's final decision, the Board's minutes for meetings on November 20 and December 4, 2018, and the draft building plans that the Board relied on making their decision to approve the special permits. City of Westfield's Memorandum of Law in Support of Summary Judgment, Ex. A & E ("City's Motion"); Mactrem, LLC and David MacIver's Motion for Summary Judgment, Ex. A ("Mactrem's Motion"). The building plans show that on both sides of the proposed structure there will be a ribbon strip driveway. Mactrem's Motion, Ex. A. The plans show a vehicle parked in each driveway that takes up less than half of the driveway. *Id.* The Board found that, based from public hearings and the documents provided by MacIver, "[o]n-site parking will be provided in accordance with the zoning parking requirements as there is adequate driveway space available." City's Motion, Ex. A, *City of Westfield Planning Board Decision*, Finding (8) (Dec. 7, 2018).

16. Next, Defendants argue that the intensity of use the Property will see once construction of the approved residence is complete is *de minimis*. They claim that if the special permit did not get approved for the reduced side-yard setback that the building would still be used for a two-family residence. The special permit allows for less than a 15 foot side-yard setback on each side of the residence but is to be no less than 14 feet on either side. *Id.*, Special

Condition (4). Defendants state that if the permit was not allowed, there would still be a two-family residence constructed, but that it would just be a narrower building. Multiple renditions were provided to the City and the Board, and each rendition was for a two-family residence to be constructed. The Board discussed and moved the foundation of the proposed residence throughout the lot, and agreed—unanimously—that the approved building plan was the best location for the size of the building, and that narrowing the building by one foot on each side was unnecessary. Defendants' state that the residence to be constructed was always to be a two-family dwelling, and how the property would see an increase of use and intensity when going from a vacant lot to a lot with a two-family residence constructed upon it.

17. The Court finds that the Defendants have offered sufficient evidence warranting a finding contrary to the presumed fact that Plaintiff is an aggrieved person on both counts. Plaintiff has not brought forward credible evidence to prove standing or show that his injury is distinguishable and unique from the concerns of the surrounding community apart from being speculative personal opinions. See *Standerwick*, *supra* at 33; *Butler*, *supra* at 441.

18. Concern for loss of on-street parking can confer standing onto a plaintiff. See *Marashlian*, *supra* at 723 (holding that a reduced amount of "some public parking spaces" is sufficient to confer standing); *Hoffman v. Bd. of Zoning Appeal of Cambridge*, 74 Mass. App. Ct 804, 809–10 (Aug. 10, 2009). However, Plaintiff has provided no credible evidence to rebut the Defendants' contentions that the proposed residence's ribbon driveways provide for two or more off-street parking spaces per unit, but merely offers his opinion that the driveways only provide for one parking spot per unit. Absent any credible evidence provided by Plaintiff, he has failed to prove standing for his allegations regarding improper consideration of the Board due to a lack of off-street parking.

19. Additionally, Plaintiff has not brought forward any quantitative or qualitative credible evidence to support the allegation that the side-yard setbacks will lead to an increased use to the property than from another two-unit residence structure. The record shows that the proposed building plans have gone through several renditions before the approved plan on December 7, 2018. Each rendition of the proposed structure was for a two-family residence, which is allowed by-right in a residential C district. The Board's approval of the present building plans with a variance of side-yard setbacks in the present case does not add to the intensity of the use of the land that, when taken into account for, another two-family residence would not also produce. The property is currently vacant, and any structure built upon it will invariably add to the use and intensity of the land. The increase of use and intensity of the property are the grounds upon which Plaintiff relies, and no credible evidence was brought forward to support how a narrower house would be used differently in the present case than a house with an additional foot towards the boundary of each property. Therefore, Plaintiff has failed to combat the rebutted presumption for standing on all grounds.

20. Due to the finding that Plaintiff lacks standing in the present case, the Court does not need to address whether the Board's decision was arbitrary and capricious.

21. **ORDER**. For the foregoing reasons, the Defendants' motion for summary judgment to dismiss the case is ALLOWED.

So entered this 23rd day of December, 2019.

Robert G. Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-4616

MEDESTO NUNEZ, JR.,

Plaintiff,

v.

TROY JENKINS, et als.,

Defendants.

ORDER

After hearing on December 24, 2019 on the plaintiff landlord's motion for entry of the judgment and issuance of the execution, at which all parties appeared with counsel, the following order shall enter:

1. The court is satisfied that one of the tenants, Martha McCannon, violated the no-smoking terms of the lease.
2. For the reasons stated on the record, this shall not at this time result in a judgment for possession. That said, however, there shall be strict compliance with the no-smoking terms of the lease hereinafter. This means that no tenant nor guest of the tenants may smoke anywhere on the premises including on the front or back yards or outside stairways.
3. If the landlord alleges that the tenants or their guests violated the no-smoking lease terms

during the pendency of this summary process case, the landlord may file a motion for entry of judgment which describes in detail the alleged violation.

4. Upon review of the November 27, 2019 Agreement, it appears that there is no end date to this summary process action. The debt being sought to be paid by the tenants in the complaint was paid by virtue of an agreement to utilize the advance payment of Last Month's Rent and the Security Deposit. The only term that appears to be due beyond the Agreement (and this hearing) is the requirement to pay the rent by January 3, 2020 for that month's rent. Accordingly, the case shall be dismissed upon payment of the rent in January, 2020 rent (if paid by January 3, 2020). Thereafter, if a breach of the lease is alleged, the landlord shall have to commence a new summary process action.

So entered this 26th of December, 2019.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-4711

THE ARBORS AT CHICOPEE,

Plaintiff,

v.

RICHARD POMEROY,

Defendant.

ORDER

After hearing on December 19, 2019 on the defendant's motion to dismiss, at which both parties appeared through counsel, the following order shall enter:

1. Background: The plaintiff, The Arbors at Chicopee ("The Arbors"), is an Assisted Living Facility regulated by the Department of Elder Affairs. The Arbors terminated their tenancy with the defendant, Richard Pomeroy (hereinafter, "tenant") with a 14-day notice to quit for non-payment of rent in September, 2019 and thereafter commenced this summary process action. The tenant has filed a motion to dismiss, arguing that the notice to quit fails to comply with the relevant regulations at 651 C.M.R. 12.08.

2. Discussion: 651 C.M.R. 12.08 lays out the rights for every resident of an assisted living residence (ALR) and the requirements of ALRs to disclose each and every residence of said rights. Subsection 12.08(1)(v) reads as follows:

> Every Resident of an Assisted Living Residence shall have the right to:
> ....
> (v) Be informed in writing by the Sponsor of the Assisted Living Residence of the community resources available to assist the Resident in the event of an eviction procedure against him or her. Such information shall include the name, address and telephone number of the Assisted Living Ombudsman Program.

3. The defendant moves the Court to rule that the meaning within the Executive Office of Elder Affairs (EOEA) regulation requires the above quoted disclosure to be given to residents at the inception of eviction proceedings, and not just at the time of leasing up. This liberal reading of the regulations would render the eviction process taken by the plaintiff invalid because the plaintiff did not provide the name, address, and telephone number of the Assisted Living Ombudsman Program or inform the defendant of any resources available to him at the beginning of the eviction process, and only disclosed said information in the disclosure agreement at the inception of the tenancy.

4. The plaintiff urges that the regulations should not be liberally construed as the language does not identify a time frame or specific instance when the disclosures of information is to be given to a resident. The plaintiff states that the information was given to the defendant at the inception of the tenancy, and the information did not have to be given to him again once eviction began.

5. Analysis: Normally, courts "accord the words of a regulation their usual and ordinary meaning." *Warcewicz v. Dep't of Envtl. Protection*, 410 Mass. 548, 550 (1991). When multiple meanings of a word or phrase can be had within a regulation, we look towards the governing statute or proper agency for guidance on the matter. When looking at the governing statute, we look to determine "whether the Legislature has spoken with

certainty on the topic in question." *Mass. Hosp. Ass'n, Inc. v. Dep't of Med. Sec.*, 412 Mass. 340, 346 (1992). G.L. c. 19D, § 14 states that an ALR "shall enter into a written residency agreement with each resident clearly describing the rights and responsibilities of the resident and . . . . the conditions under which the agreement may be terminated by either party . . . and other similar provisions as the department may reasonably require by regulation." Under the language of the statute, it would appear that the disclosures required under 651 C.M.R. 12.08(1) are to be made at the inception of the ALR residency.

6. Unfortunately, EOEA has not released any clarification on when the disclosure of residents rights are to be made, but they merely restate the regulatory list found within section 12.08(1). *See,* Assisted Living Resident Rights, MASS.GOV (last visited Dec. 23, 2019), https://www.mass.gov/info-details/assisted-living-resident-rights#disclosure-of-rights.[1] However, the National Center for Assisted Living (NCAL) releases bi-annual state regulatory reviews which gives surface-level information for senior members which may shed light on the matter.

7. In the Reviews' summary, the NCAL states that during their survey of each state's regulations, the NCAL reviewed each state's regulations and statutes. 2019 ASSISTED LIVING STATE REGULATORY REVIEW, Methodology, NAT'L CTR. FOR ASSISTED

[1] There appear to be no secondary sources clarify when these disclosures are to be made but simply state that the disclosures are to be made, including subsection 12.08(1)(v) pertaining to contact information for the local Ombudsman advocate in the event of an eviction. See, e.g., Estate Planning for the Aging or Incapacitated Client in Massachusetts, Ch. 19, *Assisted Living: Services, Regulations, and Financing* (Mass. Continuing Legal Educ., 4th ed., 2018); Jeffrey A. Bloom & Harry S. Margolis, 56 Mass. Prac., Elder Law § 7:33, *Assisted Living—Resident's Rights* (June 2019).

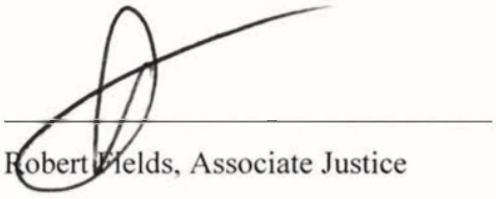
LIVING, at pg. v (2019). After review, the NCAL would send their research summary to both the state official responsible for assisted living licensure or certification and to NCAL's state affiliate staff for review. Id. NCAL additionally sent state officials and affiliate staff a survey asking about legislative or regulatory changes between recent years. Id. Both the 2017 and 2019 Reviews lists certain disclosures that are found within the regulations, mirroring their language in the report. Both reports discuss the timing of when the disclosures are to be made: "Before execution of a residency agreement or transfer of any money, sponsors shall deliver a disclosure statement to prospective residents and their legal representatives." Id., Massachusetts, at 146; 2017 ASSISTED LIVING STATE REGULATORY REVIEW, Massachusetts, NAT'L CTR. FOR ASSISTED LIVING, at 130 (2017), www.ahcancal.org/ncal/advocacy/regs/Documents/2017_reg_review.pdf.

8. It is worth noting, however, that the Review clearly states "[t]he report is for general informational purposes only and should not substitute for legal advice." 2019 REVIEW, Methodology, at pg. v. As this is not information released directly by the EOEA, it cannot be seen as the agency's interpretation of its own regulations. On the other hand, the methodology section of the reports state that the information summary is sent to applicable state personnel for review, and the information stating that all disclosures are to be made before execution of the residency agreement is also persuasive.

9. Conclusion and order: As there is no agency, regulatory, or statutory information shedding light on the legal question before us, it would appear, by the plain language of the governing statute that the disclosures should be made at the inception of the residency agreement. See id., Massachusetts, at 146. As there is no adopted view or

instructive information disseminated by the EOEA, the Court shall not at this time construe the regulations to require that the regulatory disclosures must be made an additional time at the beginning of a termination of tenancy process. Accordingly, the motion to dismiss is DENIED. The Clerks Office shall schedule a Case Management Conference.

So entered this 27th day of December, 2019.



Robert Fields, Associate Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS **HOUSING COURT DEPARTMENT**
WESTERN DIVISION

DOCKET NO. 19-SP-5236

GRADUATE HOUSING SERVICES, LLC

v.

MAGNOLIA PERDOMO

ORDER

After hearing on December 30, 2019, at which both parties appeared, the following order is to enter:

1. The plaintiff shall inspect the subject property on January 9, 2020 at 10:00 a.m., and the defendant shall provide access to both units at that time.
2. The plaintiff shall respond to the defendant's discovery requests concerning notice of the foreclosure auction. The plaintiff's motion to strike the defendant's discovery is allowed with respect to all other requests.
3. Ms. Perdomo shall appear at Court on January 2, 2020 at 2:00 for status conference to discuss an offer by Blue Hub Capital.
4.. All parties shall appear on January 9, 2020 at 2:00 p.m. for hearing on the plaintiff's motion for use and occupancy, if filed, for possible alternative dispute resolution, and to schedule trial.

So this entered on the 30th day of December 2019

DINA E. FEIN, First Justice

cc: No One Leaves

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-5257

ABDUL KABBA,

Plaintiff,

v.

EDWIN VASQUEZ,

ORDER

Defendant.

This matter came before the court for trial on December 26, 2019, at which each side was represented by a volunteer attorney through the court's Lawyer of the Day program. After hearing, the following order shall enter:

1. The tenant's motion for late filling of the Answer was allowed. The landlord was then given an opportunity to continue the trial to better prepared to defend the newly filed counterclaims of the tenant.

2. The trial was conducted and for the reasons stated on the record, and in accordance with G.L c.239, §8A, the tenant has until ten days after the date of this order noted below to deposit with the court $750. This represents the award of $3,750 in damages to the tenant under G.L. c.186, §14 for breach of his quiet enjoyment offset against the amount of

outstanding rent, use, and occupancy through December, 2019 of $4,500[1].

3. This matter shall be scheduled for further hearing on **January 16, 2020 at 9:00 a.m.** If the tenant has paid the $750 to the court timely as noted above, the parties shall be heard under G.L. c.239, §9 and §10 as to how long the tenant may have before he must vacate.

So entered this 30th of December, 2019.

Robert Fields, Associate Justice

[1]Upon said payment by the tenant to the court, the clerks office shall process said monies and disburse $750 to the landlord as soon as is practicable.

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 19SP1399

PHILLIP STOCKTON C/O CHASE MANAGEMENT SERVICE, INC., HELGA C/O CHASE MANAGEMENT SERVICE, INC.

v.

CURTIS JOHNSON, MARY JOHNSON

ORDER

After hearing on December 27, 2019, at which plaintiff (landlord), a representative from the Tenancy Preservation Program, the defendants (tenants), and the GAL Attorney Cohen appeared, the following order is to enter:

1. The landlord's motion to issue execution and levy upon order to regain possession is ALLOWED. There shall be a stay on the use of the execution through March 31, 2020 conditioned upon compliance with the terms of this order.
2. The tenants shall continue to comply strictly with efforts by TPP and Greater Springfield Services to locate alternative housing.
3. The tenants shall continue to pay rent for January, February and March as it comes due, plus $75 in January.
4. The tenants shall comply with landlord's efforts to exterminate the unit.
5. The GAL is authorized to assist in all efforts on behalf of the tenants to secure suitable housing. The GAL shall instruct Greater Springfield Senior Services on behalf of the tenants, with respect to its housing search assistance.

6. This matter is scheduled for further review on February 4, 2020 at 11:00 a.m., at which time the representative from the Greater Springfield Senior Services who is working with the tenant is requested to appear.

So this entered on the 30th day of December, 2019.

DINA E. FEIN, First Justice

cc: Tenancy Preservation Program
GAL Bernard Cohen, Esq.
Greater Springfield Senior Services.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 18-SP-3952

U.S. BANK, N.A.,

Plaintiff,

v.

ORDER

ERIC and CATHY ROY,

Defendants.

This matter came before the court on December 16, 2019 on the plaintiff's motion for summary judgment and the defendants' opposition thereto. After hearing, the following order shall enter:

1. One of the bases of the defendants' opposition to the plaintiff's motion for summary judgment is that the plaintiff failed to strictly comply with the power of sale in a manner that is essentially identical to that of a case that is currently pending before the Supreme Judicial Court (SJC). *Thompson v. JP Morgan Chase Bank, NA*, No. 18-1559 (1st Cir. 2019); The First Circuit Court of Appeals certified a question to the SJC that appears to be exactly the issue presented in this instant matter.[1]

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[1]More specifically, the First Circuit Court of Appeals certified the following questions to the SJC: "Did the statement in the [] default and acceleration notice that "you can still avoid foreclosure by paying the past-due amount before a foreclosure sale takes place" render the notice inaccurate or deceptive in a manner that renders the subsequent foreclosure sale void under Massachusetts law?

2. The defendants are requesting that this matter be stayed until the SJC issues a ruling in that matter. The defendants have also agreed to make monthly use and occupancy payments during that stay period.

3. Based on the foregoing, the defendants' request that this proceeding be stayed until the SJC rules in *Thompson*, is allowed. By agreement of the defendant to pay use and occupancy pending final adjucation of this case, counsel for the parties shall communicate regarding the establishment of a monthly use and occupancy amount and file a stipulation regarding same. If they are unable to do so, they shall mark up an evidentiary hearing for the court to determine the monthly use and occupancy amount.

4. A Case Management Conference shall be scheduled for **January 13, 2020 at 9:00 a.m.** at the Hadley Session of the court.

So entered this 30th of December 2019.

Robert Fields, Associate Justice

cc: Assistant Clerk Magistrate Caitlin Castillo (for scheduling)

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-5315

KARL WILLIAMS,

Plaintiff,

v.

ORDER

MARK BUDREAU,

Defendant.

After hearing on December 26, 2019, at which both parties appeared through volunteer attorneys through the Lawyer for the Day Program, the following order shall enter:

1. The parties' agreement to dismiss this action against Mark Budreau is allowed.
2. The landlord's motion to name the occupants, Andrew Budreau and Nicole Krafchk, is allowed contingent upon his having them served with a new summons and complaint (as per his request).
3. The Clerks Office shall be made aware that the filing of said summonses after service shall not incur an additional filing fee.

So entered this 30th of December 2019.

Robert Fields, Associate Justice

cc: Abigail Kline, Esq. (LFD)
J.J. Moore, Esq. (LFD)

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 18-CV-1233

ZENNEDA BLAKE-HUGHEY,

Plaintiff,

v.

ROBERTO ARROYO,

Defendant.

ENTRY OF ORDER FOR AWARD OF DAMAGES

This matter came before the court on July 3, 2019 for an Assessment of Damages at which only the plaintiff appeared. After hearing the following order shall enter:

1. Background: This matter began as a code enforcement action by the City of Springfield (18-CV-246). A motion for leave to file cross-claims by the plaintiff Zennada Blake-Hughey (hereinafter, "plaintiff") against the defendant Roberto Arroyo (hereinafter, "defendant") were allowed and filed in September, 2018. Said claims were then severed into this instant civil action (18-CV-1233) on December 11, 2018. On March 12, 2019 a default entered against the defendant. On May 5, 2019 the then co-defendants, George Arroyo and Daniel Guadalupe, were dismissed from this case.

2. Discussion: The plaintiff was a tenant of the defendant when she rented a unit located at 33 Alberta Street in Springfield, a dwelling owned by the defendant. The plaintiff moved onto

the premises on March 1, 2018 and moved out of the premises on September 30, 2018. The monthly rent at the premises was $1,250. The plaintiff has several claims arising out of the tenancy including breach of the warranty of the habitability, breach of the covenant of quiet enjoyment, retaliation, and violations of the consumer protection laws[1].

3. Warranty of Habitability: The subject premises had conditions of disrepair that were subject of inspections and notices of violations issued by City of Springfield Department of Code Enforcement, Housing Division. Additionally, the City filed a court action to coerce the defendant to make said repairs. The conditions of disrepair included but were not limited to rubbish and debris in the yard, faulty outlets, rotting kitchen cabinets, defective bathtub/shower, smoke and or water damage, sagging ceilings, improper toilet seat, broken wall plaster, exterior shingles missing, rotted, and peeling. These conditions violate the minimum standards of fitness for human habitation as established by Article II of the State Sanitary Code, 105 CMR 410.00 et seq. Although it is well settled law that a landlord is strictly liable for breach of the implied warranty of habitability irrespective of the landlord's good faith efforts to repair the defective condition [*Berman & Sons, Inc., v Jefferson*, 379 Mass. 196 (1979)], these conditions existed at least from the September 1, 2018 initial inspection by the city until mid-December, 2018 when the city indicated that all conditions had been remedied. It is usually impossible to fix damages for breach of the implied warranty with mathematical certainty, and the law does not require absolute certainty, but rather permits the courts to use approximate dollar figures so long as those figures are reasonably grounded in the evidence admitted at trial. *Young v. Patukonis*, 24

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[1]Plaintiff's verbal motion to amend her complaint to include a Security Deposit claim is denied without prejudice.

Mass.App.Ct. 907, (1987). The measure of damages for breach of the implied warranty of habitability is the difference between the value of the premises as warranted, and the value in their actual condition. *Haddad v Gonzalez*, 410 Mass. 855 (1991). I find that the average rent abatement of 30% fairly and adequately compensates the plaintiff for the diminished rental value of the premises resulting from these conditions. The plaintiff's actual damages for the defendant's breach of the warranty of habitability are **$1,312.50**. This represents the contract rent of $1,250 X 30% ($375 per month) for 3.5 months.

4. Chapter 93A: By failing to address various conditions of disrepair after being told by the plaintiff and cited by the City and then not until six months after the City filed an action in court, the defendant committed unfair and deceptive trade practices in violation of G.L. c. 93A and the Attorney General's regulations thereunder, 940 CMR 3.17. As such, the plaintiff is entitled to an award of multiple damages (not less than double nor more than treble) if the court finds that the defendant's violation of Chapter 93A was willful or knowing. "The `willful or knowing' requirement of §9(3), goes not to actual knowledge of the terms of the statute, but rather to knowledge, or reckless disregard, of conditions in a rental unit which, whether the [landlord] knows it or not, amount to violations of the law." *Montanez v. Bagg*, 24 Mass.App.Ct. 954,, 510 N.E.2d 298, 300 (1987). The court may consider the "egregiousness" of a landlord's conduct in determining whether to double or treble damages. *Brown v. LeClair*, 20 Mass.App.Ct. 976, 980, 482 N.E.2d 870, 874 (1985). The defendant's actions in failing to address conditions of disrepair in the manner described above, were willful or knowing as that concept applies to Chapter 93Apursuant to G.L. c.93A, §9, and the court shall therefore awarding double damages, or $1,312.50 x 2 = **$2,625**, plus costs and attorney's fees.

5. Breach of the Covenant of Quiet Enjoyment: At one point of the tenancy, there was no hot water for 1.5weeks. During that time, the plaintiff was forced to take showers away from the premises, at the homes of her family members. Additionally, the plaintiff complained numerous times about a leak in the basement. The landlord failed to address this leak and said leak cause damage to the plaintiff's belongings due to mildew and dampness. The plaintiff's insurance company reimbursed the plaintiff close to $6,000 for the damaged items but there was a $500 deductible that the plaintiff had to pay to the insurance company[2]. Landlords are liable for breach of the covenant of quiet enjoyment if the natural and probable consequence of their acts or omissions causes a serious interference with the tenancy or substantially impairs the character and value of the premises. G.L. c. 186, s. 14; *Simon v. Solomon*, 385 Mass. 91, 102, 431 N.E.2d 556, 565 (1982). Although a showing of malicious intent in not required, "there must be a showing of at least negligent conduct by a landlord." *Al-Ziab v. Mourgis*, 424 Mass. 847, 851, 679 N.E.2d 528, 530 (1997). I find that the landlord's failure to provide hot water to the premises for 1.5 weeks and to more promptly repair the leak in the basement that caused excessive dampness and damage to the plaintiff's property violated the plaintiff's covenant of quiet enjoyment and G.L. c.186, §14 and hereby award the plaintiff damages equaling three months' rent for this claim of breach of quiet enjoyment, totaling ($1,250 X 3) **$3,750** plus reasonable

[2]The plaintiff testified that there were other items destroyed for which she was not reimbursed by the insurance company. The court, however, finds that there was insufficient testimony or other evidence upon which further damages can be awarded for these items.

attorneys fees and costs[3].

6. Retaliation: There is insufficient evidence upon which a retaliation claim can be found. Though there was a city code enforcement inspection on September 1, 2018 and a summons for a summary process action served on the plaintiff by the defendant for non-payment of rent, it would appear that the notice to quit pre-dates the code enforcement action and there is no evidence when the summary process summons and compliant was served upon the plaintiff.

7. Conclusion and Order: Based on the foregoing, the plaintiff shall be awarded **$6,375.** As a prevailing party in her claims for Chapter 93A and G.L. c.186, §14, counsel for the plaintiff has 15 days from the date of this order noted below to file and serve a petition for reasonable attorneys fees and costs. The defendant shall have 15 days after receipt of said petition to file and serve any opposition thereto. The court shall issue a ruling on the petition for fees and costs and enter a final judgment at that time, without need for a hearing.

So entered this 3rd of January 2020.

Robert Fields, Associate Justice

[3]The plaintiff did not meet her burden of proof on her claim that she was forced to move from the premises prematurely and that the move caused emotional distress on her and/or her children.

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-CV-300

CHICOPEE HOUSING AUTHORITY,

Plaintiff,

v.

JOHN O'DONNELL,

Defendant.

ORDER

This matter was before the court for a contempt trial on December 31, 2019, at which the plaintiff appeared through counsel and the defendant failed to appear. After hearing, the following finding of contempt and order shall enter:

1. Background: On September 18, 2019 the parties entered into an Agreement of the Parties (hereinafter, "Agreement") in which the defendant (hereinafter, "tenant") agreed to no smoke in his unit. Specifically, the Agreement states in paragraph #1:

> Defendant, John O'Donnell, agrees not to smoke in the unit and to abide by the "CHA Smoke Free Policy".

On November 8, 2019, the plaintiff (hereinafter, "landlord") filed a complaint for contempt, alleging that the tenant violated the terms of the Agreement. A summons issued and was served in hand to the tenant on December 12, 2019 for a December 20, 2019 trial. On December 20, 2019, the tenant did not appear and the landlord's witnesses also did not appear and the matter

was rescheduled by court order to December 31, 2019.

2. Discussion: At the trial, the only witness that the landlord had was the landlord's employee, an Inspector by the name of Anthony Whalen. Mr. Whalen testified that on October 21, 2019, after the landlord received complaints about smoking in the tenant's apartment, he was dispatched to the tenant's unit and observed the "slight odor of smoking", an ashtray and cigarettes on a table in the living room. Mr. Whalen also saw in the bedroom, an ashtray with half a rolled cigarette in it and some loose tobacco.

3. The above observations represent the totality of the evidence the landlord presented in support of contempt complaint, and the court finds that they are insufficient upon which a finding of contempt can be found. Having smoking paraphernalia at the premises is not a violation of the no-smoking terms of the Agreement. Nor is the "slight odor of smoking" in an apartment in which smoking occurred for a period of time prior to the Agreement.

4. Conclusion and Order: Accordingly, judgment shall enter for the defendant tenant in this complaint for contempt. The underlying Agreement shall remain in full force and effect. With no date for dismissal noted in the Agreement, this matter shall be dismissed on the year anniversary of the Agreement, on September 18, 2020 (unless otherwise ordered by the court).

So entered this 3rd of January, 2020.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden ss:

Housing Court Department
Western Division
No. 19-SP-4994

SPRINGFIELD HOLDINGS LLC,

Plaintiff,

v.

ALICE MARTINEZ-BALSECA

Defendant.

ORDER

After hearing on January 2, 2020, on the defendant's (tenant's) motion to stay use of the execution (eviction order), for which both parties appeared, the following order shall enter:

1. The tenant's motion to stay use of the execution is hereby allowed conditioned upon the tenant complying with all of the terms set forth in this court order.
2. It is established that the amount of rent arrears through January, 2020 is $2,400 plus $165 in court costs.
3. The tenant shall pay the landlord $1,000 by January 3, 2020.
4. The tenant shall pay her rent in the amount of $800 plus $100 no later than February 10, 2020 and March 10, 2020.
5. The tenant shall pay all remaining arrears with her 2019 Tax Returns no later than March 31, 2020.

So entered this 6th of January, 2020.

Robert Fields, Associate Justice RM

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No19-SP-2901

PYNCHON I, L.P.,

Plaintiff,

v.

ORDER

YAMILET RODRIGUEZ,

Defendant.

After hearing on January 2, 2020, on the tenant's motion to stop a physical eviction, at which the landlord appeared through counsel and the tenant appeared *pro se*, and at which a representative from the Tenancy Preservation Program (TPP) appeared, the following order shall enter:

1. For the reasons stated on the record, the landlord shall cancel the physical eviction scheduled for January 3, 2020.
2. The tenant shall pay the landlord $600 on January 3, 2020 by no later than 10:00 a.m. This payment shall go towards the costs associated with the cancelling of the physical eviction and then to any outstanding arrearage.
3. The tenant shall work with TPP and shall meet with Ms. Aviles from TPP on January 3, 2020 at 1:00 p.m. at the tenant's home.
4. The outstanding balance owed to the landlord is $2,970.80 through January 31, 2020.

The tenant has asserted that she believes that she can make this payment from Social Security Administration account by January 21, 2020.

5. This matter shall be scheduled for review on **January 23, 2020 at 2:00 p.m.**

So entered this 6th of January, 2019.

Robert Fields, Associate Justice

cc: Tenancy Preservation Program

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Franklin, ss:

Housing Court Department
Western Division
No. 19-CV-1084

GREENFIELD BOARD OF HEALTH,

Plaintiff,

v.

DOUGLAS WIGHT, et als.,

ORDER

Defendants.

After hearing on January 3, 2020, on further hearing on the plaintiff's motion for injunctive relief at which the plaintiff City appeared through counsel, the defendant property owner appeared *pro se*, one of the defendant tenants Jackie Wilson (Wilson) appeared with LAR counsel, and at which another of the defendant tenants Danny Ayala Cocano (Ayala) appeared *pro se*, the following order shall enter for the reasons stated on the record:

1. Wilson and Ayala may no longer reside at the subject premises.
2. Mr. Wight (property owner) shall provide alternate housing accommodations for Wilson and Ayala at the Red Roof Inn in South Deerfield until further of the court as noted below. Additionally, because that hotel does not have cooking facilities, Mr. Wight shall provide Wilson and Ayala with a daily food stipend of $75. Said stipend shall be paid in cash and made available to Wilson and Ayala either in person each morning for that day

2 W.Div.H.Ct. 110

or in advance of that schedule.

3. If Mr. Wight identifies a different hotel with cooking facilities and Wilson and Ayala agree to relocate to that hotel in writing, the requirement for a daily food stipend shall be suspended.

4. Wilson and Ayala shall diligently search for alternate housing and keep a record of such efforts to report of same at the next hearing noted below.

5. Wilson and Ayala continue to be able to visit the premises to interact with their belongings. Mr. Wight shall not touch Wilson and Ayala's belongings and shall ensure their safety at the premises.

6. Mr. Wight shall not permit anyone to occupy the premises other than the five defendants remaining as tenants at the premises. Until further order of the court, this applies to temporary guests.

7. This matter shall be scheduled for **January 13, 2019 at 2:00 p.m.** for further hearing.

So entered this 7th of January, 2020.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 18-CV-314

KEITH FOURNIER, FELIX GONZALEZ, JAMES FIGUEROA, and JESUS HERNANDEZ,

Plaintiffs,

v.

ORDER

WHITING BUILDING, LLC, DMITRY ZHIVOTOVSKY and CHRISTOPHER CROGAN,

Defendants.

After hearing on the defendants' motions for reconsideration and for a stay on the ruling pending appeal, the following order shall enter:

1. After consideration of the Joint Memorandum of Stipulations and consideration of the arguments presented at the August 5, 2019 hearing, the Court is not moved from its July 25, 2019 Order. The motion for reconsideration is, therefore, DENIED.

2. Based on the findings and rulings of the court that Mr. Fournier did not violate the terms of the Agreement and has vacated the premises, the bargained for funds that are due him are to be disbursed to him and the motion to stay said release of funds pending appeal is DENIED.

So entered this 8th of January 2020.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden, ss:

Western Division
Housing Court Department

No. 19 CV 273

MICHELLE HALL,
Plaintiff

v.

CHARLES RAMADAN,
Defendant

ORDER

As a result of a hearing held before the undersigned on January 3, 2020, at which the plaintiff appeared self-represented and the defendant appeared through counsel, the following order of the court does hereby issue:

1. The defendant landlord shall forthwith take all steps necessary to remediate the conditions cited in the Town of Palmer Correction Order dated December 12, 2019 in accordance with the following schedule:
   a. Heating system shall be installed by January 8, 2020; and
   b. All other conditions corrected by February 7, 2020.
2. A re-inspection shall be completed by the Town of Palmer by February 7, 2020, after which time either party may bring this matter back before the court upon a properly filed and served motion.

So entered this 9th day of January, 2020.

Dina E. Fein
First Justice

cc: Palmer Board of Health

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-CV-749

DONNA MCCAUL,

Plaintiff,

v.

PHILIP THIBEAULT and ANNA GAUTHIER,

Defendants.

ORDER

After hearing on January 7, 2020 for review, at which the plaintiff appeared but for which the defendants did not appear, the following order shall enter:

1. The plaintiff reported to the court that the defendants vacated the premises.

2. Accordingly, and for the reasons stated on the record, no further order shall enter and the matter shall be dismissed.

So entered this 9th of January 2020.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden, ss:

Western Division
Housing Court Department

No. 19 CV 1174

RUBY REALTY, LLC,
Plaintiff

v.

DAVID GABY and BONITA DILLARD-GABY,
Defendants

ORDER

As a result of a hearing held before the undersigned on January 3, 2020, at which the plaintiff appeared through counsel and the defendants failed to appear, the following order of the court does hereby issue:

1. The Defendants shall provide access to the interior and exterior of the property, upon 24 hour advance notice, to the Plaintiff to perform a safety inspection and allow the Plaintiff to change the locks to the property, providing the Defendants with a new key(s).

2. Thereafter, the Defendants shall provide access to the property, upon 24 hour advance notice, to the Plaintiff to perform any necessary repairs or to show the property to agent, prospective buyers and/or interested parties.

So entered this 9th day of January, 2020.

Dina E. Fein
First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 20CV-19

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32 BYERS STREET, INC.,

Plaintiff,

v.

ANDRES BONILLA,

Defendant.

ORDER

After hearing on January 10, 2020 on the plaintiff's emergency motion for a restraining order, at which only the moving party appeared, the following order shall enter:

1. The defendant Andres Bonilla, who the plaintiff reports is an unauthorized occupant of the premises located at 32 Byers Street, Unit #205, in Springfield, Massachusetts (premises), is prohibited from being present at the premises until further order of the court.

2. This matter shall be heard further on **January 16, 2020 at 9:00 a.m.** to determine if this order shall be extended. Mr. Bonilla may be heard if he believes that the order should be vacated or amended in any way. The plaintiff has agreed to take reasonable steps to secure the presence of Idaliz Maldonado at said hearing to determine whether or not she needs to be added as a party to this matter.

So entered this 10th of Jan 2020.

Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 18-SP-137

HSBC BANK USA, N.A.,

Plaintiff,

v.

DEBORAH FERGUSON and KATHERINE FERGUSON,

Defendants.

ORDER ON DEFENDANT DEBORAH FERGUSON'S MOTION FOR RECONSIDERATION OF THE COURT'S BOND ORDER

This matter came before the court on December 3, 2019 on the defendant, Katherine Ferguson's, motion for reconsideration of the court's November 5, 2019 bond order. After hearing, at which the plaintiff appeared through counsel, the defendant Deborah Ferguson appeared *pro se*, and the defendant Katherine Ferguson did not appear, the following order shall enter:

1. **Background:** This is post-foreclosure summary process action that was originally filed in January of 2018.[1] After a trial on December 11, 2018, at which all parties were represented by counsel, the court entered a judgment for the plaintiff for possession. The defendants filed appeals and after considerable delays in the assembly of the record, a bond hearing was conducted on November 1, 2019 at which Deborah Ferguson moved the court to

[1]This matter was originally filed as two separate Summary Process actions, one for each of the separate units of this two family home. By agreement of the parties on April 17, 2018, the matter of HSBC Bank v. Deborah and Katherine Ferguson 18-SP-136 was consolidated with the second matter, HSBC v. Deborah Ferguson 18-SP-137.

waive the appeal bond in accordance with G.L. c.239, §§5 & 6. Co-defendant Katherine Ferguson did not file any motions regarding the bond and did not appear at the bond hearing. The bond order that issued on November 5, 2019 found that Deborah Ferguson had no non-frivolous defenses and found her not to be indigent in accordance with G.L. c.261, §§27A-G. It also found that the monthly use and occupancy for the premises is $1,400 (for both units together). In accordance with G.L. c.239, §§5 & 6, in matters when the court finds no non-frivolous defenses and no indigency, the court calculated the bond as all use and occupancy due from the date of foreclosure (October, 2017) through the month of the hearing (November, 2019) totaling $33,600—to be deposited with the court's Clerks Office. The court also required the defendants to pay monthly use and occupancy of $1,400 as long as they continued to occupy the premises (for both units together) going forward each month pending adjudication on appeal.

2. Discussion; Indigency: Deborah Ferguson filed a motion for reconsideration of the bond order and a hearing was held on December 3, 2019.[2] Deborah Ferguson's motion relies on her belief that the court based its ruling on incorrect information about her income and finances and filed an updated Affidavit of Indigency and Supplement to Indigency Affidavit. According to both the November 1, 2019 and December 3, 2019 affidavits and financial statements filed by Deborah Ferguson, she indicates a similar annual income of approximately $18,000. The significant difference identified in the newer affidavit of indigency is Deborah Ferguson's

[2] Deborah Ferguson also filed at the same time, an appeal to a single justice of the Appeals Court. On November 15, 2019 the Single Justice issued an order, staying proceedings in that court pending the Housing Court's hearing on the motion for reconsideration. In said order, the Single Justice indicates a concern that Katherine Ferguson may not have been afforded her due process rights as it was unclear to him at which point, if ever, Katherine Ferguson was made a party. I am satisfied from the record that Katherine was served a notice to quit and a summons and complaint and was properly before the court in Case No. 18-SP-136, which was then consolidated by agreement of the parties with Case No. 18-SP-137.

assertion that she has three dependents (her three adult children). Plaintiff did not challenge that assertion and indicated that the plaintiff is not challenging whether Deborah Ferguson is indigent under the statute. With a family of four, Deborah Ferguson is found to be indigent under the Poverty Guidelines which establishes indigency for household income for a family of four anything below $32,187.50. Accordingly, based on this new information about family size the court reconsiders its earlier order and finds that Deborah Ferguson is indigent in accordance with G.L. c.261, §§27A-G.

3. Non-Frivolous Defense: Having found the defendant, Deborah Ferguson, indigent the court must then apply the second prong of the bond waiver statute at G.L. c.239, §5 which is that she "has any defense which is not frivolous". She does not. The parties agreed in this matter at trial on the merits that the only defense was the challenge to the foreclosure proceedings due to an alleged forged signature assigning Ms. Katherine Ferguson's ownership interest in the property to her mother who was then foreclosed upon by the plaintiff. The evidence was overwhelming at a trial on the merits that Katherine Ferguson signed documents relinquishing her ownership interest in person before a Notary Public who testified credibly at said trail. As such, the defense being asserted in this appeal "imports futility without 'a prayer of chance'." *Pires v. Commonwealth*, 373 Mass. 829, 838 (1977).

4. The Effect of Indigency on the Bond: In accordance with the statutes (G.L. c. 239, §§5 & 6), the moving party in a motion to waive an appeal bond requires both indigency and a "defense which is not frivolous". Having not met that burden—showing indigency but not a non-frivolous defense—there is no basis to waive the bond.

5. In its November 15, 2019 order, the Single Justice directs the Housing Court judge to consider the case of *US Bank Trust, NA v. Johnson*, 96 Mass. App. Ct. 291, 296 (2019) when

analyzing Deborah Ferguson's request for a waiver and, in particular, her indigency. The court is aware of other cases, in addition to *Johnson* in which the Appeals Court has recently examined the interrelatedness of indigency and setting of the bond in post-foreclosure eviction matters. See, *Bank of New York Mellon v. Deidre A. Dundon*, 2019-J-257 and 2019-P-116; *Bank of New York Mellon v. Alton King, Jr.*, 2019-J-0560 and 2019-P-1743[3]; *21st Mortgage Corporation v. Karen M. Lapham*, 2019-J-394 and 2019-P-1422. All of these cases are distinguishable, however, from the instant matter in that the Trial Court judges waived the bond in each of those matters and now it appears that the Appeals Court and Supreme Judicial Court have identified a question of law about whether a judge can require use and occupancy payments prospectively when a bond has been waived without consideration of the moving party's indigency on the amount of those payments. Thus, the legal question common in those cases is not the same as is posed herein[4].

6. Clarification of the Bond Order: The November 5, 2019 bond order requires the defendants to pay $1,400 per month for use and occupancy. This sum is based on competent testimony by a real estate broker who concluded that the monthly value of the premises is $750

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[3]Bank of New York Mellon v. Alton King, Jr. is now pending before the Supreme Judicial Court, SJC-12859.

[4] The Court also appreciates that the Single Justice in *21st Mortgage Corporation v. Karen Lapham*, 2019-J-394 finds there to be no basis for a judge to require use and occupancy in a post-foreclosure eviction appeal because G.L. c.239, §5(e) speaks of "rent which shall become due after the waiver" and there can be no rent in when the parties are not in a landlord-tenant relationship. That holding, in *Lapham*, is not applicable in this instant matter because the court is not waiving the bond and therefore is applying G.L. c.239, §6 (having applied and dispensed with §5) in setting the bond and use and occupancy payments. In §6, the bond shall include "a reasonable amount *as rent* of the land from the day that the purchaser obtained title to the premises until the delivery of possession thereof to him..." It seems clear that the legislature appreciated that the parties in any such controversy applicable to G.L. c.239, §6 are not landlord and tenant but former lender (or purchaser after foreclosure) and former mortgagor(s) and, as such, used the term "as rent".

for each of the two units. The court reduced that sum to $1,400 ($700 per unit) based on testimony by Deborah Ferguson that there are conditions of disrepair. The order grouped the two defendants and the two units together in its order and given the opportunity to clarify the order the court shall make it clear that what is required is $700 to be paid by Deborah Ferguson and $700 to be paid by Katherine Ferguson each month, as long as each continues to occupy the premises.[5] Additionally, the court shall make it clear with this order that the obligation for payment of the $33,600 bond is to also be split by the two defendants with Deborah Ferguson responsible for payment of $16,500 and Katherine Ferguson responsible for $16,500. Lastly, the language in G.L. c.239, §6 is unambiguous that the bond (including an "amount as rent" pending appeal) is to be paid directly to the plaintiff. Thus, that aspect of the earlier bond order shall reflect the clear direction of the statute.

7. Conclusion and Order: Based on the foregoing, and with the deadlines of the original bond order issued on November 5, 2019 having already passed, the bond order shall be as follows:

A. Deborah Ferguson shall pay the plaintiff $16,800 no later than January 31, 2020.

B. Katherine Ferguson shall pay the plaintiff $16,800 no later than January 31, 2020.

C. Deborah Ferguson shall thereafter pay the landlord $700 per month for use and occupancy for those months that she occupies the premises until further order of the court by the last day of each month beginning in February, 2020. Said payments are payable at the end of each month are for the occupancy of said premises during that month.

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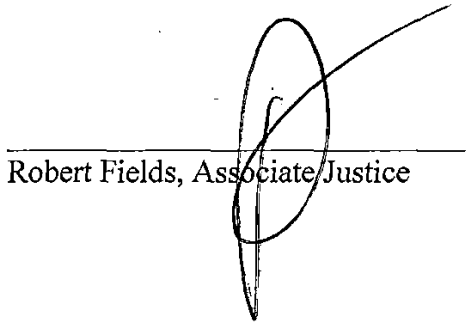
[5] On December 20, 2018, counsel for both Katherine and Deborah Ferguson filed an appeal of the December 13, 2018 Order of Final Judgment but did not file a motion or appear to make an oral request to waive the bond as it relates to her.

D. Katherine Ferguson shall thereafter pay the plaintiff $700 per month for use and occupancy for those months that she occupies the premises until further order of the court by the last day of the month beginning in February, 2020. Said payments are payable at the end of each month for the occupancy of said premises during that month.

So entered this 10th day of January, 2020.



Robert Fields, Associate Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hamdpen, ss:

Housing Court Department
Western Division
No. 19-SP-480

OCWEN LOAN SERVICING, LLC,

Plaintiff,

v.

ORDER

DANIEL and LISA WALKER,

Defendants.

After a judicial case management conference was conducted on January 7, 2020, at which the plaintiff appeared through counsel and the defendant, Lisa Walker, appeared, the following order shall enter:

1. The parties agree that the only remaining factual and legal issue for trial is whether the plaintiff complied with the requirements at 24 CFR §203.604.
2. The parties agreed that the plaintiff does not have to recall Robert Russell who testified at an evidentiary hearing on December 3, 2019 and whose testimony is a matter of record.
3. The parties shall share lists of witnesses each side plans to call for the trial scheduled below by no later than February 10, 2020.
4. A trial shall be scheduled for February 25, 2020 at 2:00 p.m.

So entered this 10th of January, 2020.

Robert Fields, Associate Justice

2 W.Div.H.Ct. 123

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden, ss:

Western Division
Housing Court Department

No. 19 SP 415

SPRINGFIELD PORTFOLIO HOLDINGS, LLC,
Plaintiff

v.

ORDER

JAMES DOMINGUEZ,

Defendant

As a result of a hearing held before the undersigned on January 10, 2020, at which plaintiff's counsel appeared and the defendant James Dominguez appeared self-represented, the following order of the court does hereby issue:

1. The defendant's wife, Mavis Williams-Dominguez, is ordered to appear for further hearing on the Emergency Motion to Stop Physical Eviction on **Tuesday, January 14, 2020 at 9:00 a.m.**

2. The defendant James Dominguez and Mavis Williams-Dominguez are referred to the Tenancy Preservation Program (TPP), who shall attend the January 14, 2020 hearing to complete an assessment and provide recommendations to the Court.

So entered this 10th day of January 2020.

Dina E. Fein
First Justice

cc: Tenancy Preservation Program (TPP)

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS

HOUSING COURT DEPARTMENT
WESTERN DIVISION

DOCKET NO. 17-SP-4537

Mason Square Apartments,
Plaintiff
v.
Trina Pritchard,
Defendant

ORDER

After a hearing on January 7, 2020, at which time the landlord and the tenant appeared, the following order is to enter:

1. The motion to stop a physical eviction is allowed conditioned upon the tenant working with Tenancy Preservation Program and setting up a representative payee forthwith.

2. The tenant is ordered to pay rent plus $200.00 towards the arrears forthwith.

So entered this 13th day of January, 2020.

Dina E. Fein
First Justice

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

HAMPDEN, SS **HOUSING COURT DEPARTMENT**
WESTERN DIVISION

DOCKET NO. 19-CV-492

Tommie McReynolds,
Plaintiff
v.
Juan Santos et al. ,
Defendant

ORDER

After a hearing on January 7, 2020 at which time the plaintiff and the tenant appeared, the following order is to enter:

1. The motion to enforce agreement is allowed in part.
2. The plaintiff has agreed not to have any guests after 10:00 p.m., except for the mother of his children, his children, and grandchildren.
3. The defendant is ordered to contact the SHA and immediately report when there is loud noise.
4. The SHA shall take all the necessary steps to relocate the plaintiff forthwith.
5. Any further filings by the defendant shall include a statement that he has followed the requirements of this order. All pleadings by the defendant that do not include such a statement must be approved by a judge before they are filed.

So entered this 13th day of January, 2020.

Dina E. Fein
First Justice

THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

Hampden ss:

Housing Court Department
Western Division

No. 20-CV-24

WITMAN PROPERTIES, INC AS MANAGING AGENT FOR THE CITY OF SPRINGFIELD,

Plaintiff,

v.

RONALD SUMMERVILLE A/K/A RONALD SOMERVILLE et al
Defendants.

ORDER

After hearing on January 14, 2020, on the plaintiff's request for a temporary restraining order, for which the plaintiff appeared through counsel and Mr. Sommerville appeared, the following order shall enter:

1. The defendants are ordered to vacate the subject premises forthwith.

2. The defendants are permitted to be at the subject premises to access and organize their belongings during daylight hours only.

So entered this 16th of January, 2020.

Robert Fields, Associate Justice AM.