COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss

HOUSING COURT DEPARTMENT
EASTERN DIVISION
CIVIL ACTION
No. **19H84SP003962**

WILMINGTON TRUST NATIONAL ASSOCIATION, as Trustee for MFRA TRUST 2016-1,
Plaintiff

v.

RICHARD W. LOVERING, KEVIN MANFRA, MARIA MANFRA, KEVIN MANFRA, JR., and CHERYL LOVERING MANFRA
Defendants

ORDER FOR SUMMARY JUDGMENT

This matter was before the Court on January 6, 2020, for hearing on the motion of the plaintiff, Wilmington Trust National Association, as Trustee for MFRA Trust 2016-1, ("Plaintiff," "Bank," or "Wilmington Trust") for summary judgment pursuant to Mass. R. Civ. P. 56 against the defendants, Richard W. Lovering ("Mortgagor" or "Mr. Lovering");[1] Kevin Manfra; Maria Manfra; Kevin Manfra, Jr.; and Cheryl Lovering Manfra (collectively, without Mr. Lovering, "Defendants," "Occupants," or the "Manfras") in this post-foreclosure summary process eviction. The Manfras currently reside at 83 Lincoln St., Winthrop, MA 02152 (the "Premises"), which, the Bank asserts, is owned by Bank pursuant to a foreclosure sale. Pursuant to MRCP 56 (c), summary judgment may be awarded against the moving party.

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[1] Pursuant to the submissions of the other parties, Mr. Lovering was the owner of the Premises and previously resided there. While the owner of the Premises, Mr. Lovering mortgaged the Premises to Bank's predecessor in title. Mr. Lovering is the father of Cheryl Lovering Manfra. At some point prior to the foreclosure, Mr. Lovering permitted Cheryl Lovering Manfra and the remainder of her family (the other defendants in this matter and one disabled adult daughter not named as a defendant in this matter) to reside at the Premises. Mr. Lovering ceased to reside at the Premises. Mr. Lovering, although served in this matter, is not represented by counsel and did not respond to the summons and complaint. (He is named as an answering party in the caption of the answer, but not in the signature block.) He was voluntarily dismissed pursuant to Mass. R. Civ. P. 41 (a) (1) on December 13, 2019.

In addition, Wilmington Trust moved for leave to file a motion to strike the exhibits attached to Kevin Manfra's affidavit on the basis that the documents included in the attachment were not produced in discovery. The motion for leave to file was required because of this Court's December 23, 2019, Pretrial Order. The motion for leave to file the motion to strike is allowed and the motion to strike is allowed. As discussed below, however, even if the disputed exhibits had been in evidence, they would not have changed the decision on the motion for summary judgment.

Introduction

This is a summary process action brought pursuant to G.L. c. 239, § 1, in which Owner is seeking to recover possession of the Premises from Occupants. Owner served a courtesy 72-hour notice to quit to terminate Occupants' occupancy as tenants at sufferance holding over without legal right after foreclosure. Affidavit of Sarah Nelson ("Nelson Affidavit") Exhibit ("Ex.") E. Occupants filed an answer and counterclaims, alleging three affirmative defenses: (1) invalidity of the notice to quit, (2) violation of the Consumer Protection Act, G.L. c. 93A, for foreclosure-related conduct (this affirmative defense also being alleged as a counterclaim), and (3) Owner's standing. In addition, Occupants requested additional time in equity, which this Court treats as a motion for stay of execution by analogy to G.L. c. 239, §§ 9–13. *See Cazenove v. Hummel,* Dock. No. 12H84SP000767 (Housing Ct., Eastern Div. March 26, 2013).

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 pleadings, depositions, answers to interrogatories, admissions, responses to document requests, 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").

After after these motion were heard, but before they could be considered, the Housing Court Department issued a series of Standing Orders ("S.O.") that delayed entry of decision in this matter until October 19, 2020, due to emergency response to the COVID-19 pandemic. *See* S.O. 2-20, S.O. 3-20, S.O. 4-20, S.O. 5-20, and S.O. 6-20.

Background

The undisputed material facts, based on the submissions of the parties admissible under the summary judgment standard, demonstrate as follows:

On January 24, 2007, Gertrude Lovering executed a promissory note in favor of the original lender World Savings Bank, FSB in exchange for a loan. Nelson Affidavit Ex. A. She and her husband, Richard Lovering, executed a mortgage on the Premises to secure the loan. Gertrude Lovering died on November 9, 2009. Affidavit of Kevin Polansky ("Polansky Affidavit") Ex. 2. Under an unrecorded, informal memorandum, on January 25, 2010, Kevin Manfra and Richard Lovering agreed between themselves, and without authorization from Richard Lovering's mortgage lender, that Kevin Manfra would make certain payments to Richard Lovering and assume the responsibility for mortgage payments to the mortgage lender and, in exchange, Richard Lovering would convey the Premises to Kevin Manfra and Cheryl Lovering-Manfra. Affidavit of Sarah Nelson Ex. D. It is not contested that Kevin Manfra made the mortgage payments from 2010 through at least August 2014. Affidavit of Kevin Manfra ¶ 6.[2] On September 1, 2014, Richard Lovering defaulted on the payments due under the mortgage and failed to cure. Nelson Affidavit Ex. B. On April 27, 2016, Wells Fargo Bank, N.A. ("Wells Fargo"), as successor by merger to the original lender, sent Richard Lovering the required notice regarding mortgage modification pursuant to G.L. c. 244, § 35B. Nelson Affidavit Ex. C. On November 9, 2014, Isabelle Lewis, an officer of Wells Fargo, executed the affidavit as to its interest in the Premises under G.L. c. 244, §§ 35B, 35C. Polansky Affidavit Ex. 3. On May 18, 2018, Wells Fargo assigned the mortgage to

[2] Kevin Manfra's Affidavit states that he paid the mortgage through 2016. The Nelson Affidavit states that foreclosure occurred due to a default in the payment of the mortgage on September 1, 2014. Therefore, there is a dispute about whether Manfra continued to pay after September 1, 2014. As discussed below, that dispute is not material to the disposition of the summary judgment motion.

the Plaintiff. Polansky Affidavit Ex. 4. On June 27, 2019, Plaintiff invoked its statutory power of sale and foreclosed on the Premises. Plaintiff was the highest bidder at the foreclosure sale and purchased the Premises becoming the owner. Polansky Affidavit Ex. 5. Plaintiff, through its loan servicer, executed (on July 10, 2019) the foreclosure deed and, through its counsel, executed (on July 16, 2019) the statutory affidavit of sale, and had both documents recorded on July 19, 2019. Polansky Affidavit Ex. 5. Plaintiff, through its loan servicer, also executed (on July 10, 2019) and recorded (on July 19, 2019) the required post-foreclosure affidavit under G.L. c. 244, § 14; *Pinti v. Emigrant Mort. Co.*, 472 Mass. 266 (2015); and *Eaton v. Federal. Nat. Mort. Assn.*, 462 Mass. 569 (2012). Polansky Ex. 6.

Discussion

The Manfras were, at the time of foreclosure, tenants at will based on incidents of tenancy. They were obligated to the owner of the Premises, Richard Lovering, to pay the monthly mortgage payments, Affidavit of Sarah Nelson Ex. D, and did make such payments regularly, at least from 2010 through 2014. Affidavit of Kevin Manfra ¶ 6. Kevin Manfra and Cheryl Lovering-Manfra therefore were tenants at will for an indefinite period based on recognized incidents of tenancy, such as regular performance of services or payment of specified expenses. *See Lavelle v. Lavelle,* 2012 Mass. App. Div. 150; *Ducker v. Ducker,* 1997 Mass. App. Div. 147. In this case, the incident of tenancy was to pay the mortgage payments (at least until Richard Lovering conveyed the Premises to Kevin Manfra, which he never did). Although it could be assumed that the mortgage payments were due monthly, they were payable to the mortgagee or its assignee, not the owner of the Premises, and the amount was variable. *See* Affidavit of Kevin Manfra ¶ 7. If Richard Lovering

had desired to terminate the Manfras tenancy before the foreclosure, he would have had to serve the Manfras with a ninety-day notice to quit pursuant to G.L. c. 186, § 11, because there was no "rent reserved" for a shorter period of time. *See Lavelle v. Lavelle,* 2012 Mass. App. Div. 150; *Ducker v. Ducker,* 1997 Mass. App. Div. 147.

The Manfras are clearly not "tenants" under a bona fide lease or tenancy as defined in G.L. c. 186A, § 1, because Cheryl Lovering-Manfra is the daughter of the mortgagor, Richard Lovering. G.L. c. 186A, § 1 ("'Bona fide lease or bona fide tenancy', a lease or tenancy shall not be considered bona fide unless: (1) the mortgagor, or the *child,* spouse or parent *of the mortgagor* under the contract, is not the tenant; and (2) the lease or tenancy was the result of an arms-length transaction." (emphasis added)). The question is whether, as tenants at will, they are entitled to be treated as "tenants" under G.L. c. 186A, § 1, even though they are relatives of the mortgagor. "Tenant" for purposes of G.L. c. 186A is defined as "a person or group of persons who at the time of foreclosure is entitled to occupy a housing accommodation pursuant to a bona fide lease or tenancy *or* a tenancy at will." G.L. c. 186A, § 1 (emphasis added). As used in the statutory definition of "tenant," with the double *or, bona fide* could be read as disjunctive, only modifying *lease* or *tenancy,* but not *tenancy at will.* In other words, a person can be a "tenant" for purposes of G.L. c. 186A if the person is *either* a tenant under a "bona fide lease or bona fide tenancy," which the Mafras clearly are not, *or* a "tenant at will," which the Manfras are. Tenants in a foreclosed property have historically been treated differently depending on the nature of their tenancy. "A tenancy at will of property occupied for dwelling purposes is not terminated by opera-

tion of law by a foreclosure sale, but a foreclosure of residential property does convert an unexpired term for years or a lease for a definite term into a tenancy at will." 14C *Massachusetts Practice* (*Summary of Basic Law*) § 14:182 (2019) (footnotes omitted), citing G.L. c. 186, §§ 13, 13A. "Chapter 416 of the Acts of 1973 [adding a second sentence to G.L. c. 186, § 13] was entitled 'An Act Providing that the Conveyance, Transfer or Leasing of Property Occupied for Dwelling Purposes Shall Not Automatically Terminate Tenancies at Will.' It was passed a year after *Rubin v. Prescott,* [362 Mass. 281 (1972)], and was intended to have the effect of overruling the portion of which held that a conveyance automatically terminated a tenancy at will. Moreover, by using the broadly defined terms 'conveyance' and 'transfer,' the Legislature signaled an intent to cover terminations of tenancy by foreclosure." E. George Daher, Mary Winstanley O'Connor, Raymond Sayeg, Jr., 33 *Massachusetts Practice* (*Landlord and Tenant Law*) § 3:17 (2019) (footnote omitted). In this case, the Manfras were not gratuitous licensees or tenants at a nominal rent. They were family members occupying under an agreement to cover certain regular expenses of carrying the property, which is not uncommon. *See Lavelle* and *Ducker.*

Still, from a policy perspective, it does not make sense to differentiate between leases and tenancies at will in regard to whether a tenancy is bona fide, in other words, an arms-length relationship. That concern is based on the nature of the relationship, not on the legal incidents of the different types of tenure. Arms-length tenants are entitled to the protections of Chapter 186A because they are strangers to the foreclosure; family members of the mortgagor, on the other hand, are not at arms-length from the mortgagor and should not receive additional tenancy protections. It should not matter whether the family-member tenants are lessees or tenants at will. Therefore,

it makes more sense to interpret the send *or* in "bona fide lease or tenancy *or* a tenancy at will" as meaning "to wit." *See Gaynor's Case,* 217 Mass. 68, 89–90 (1914). Syntactical analysis in context confirms the policy perspective. *Tenancies* are of two standard types: leasehold (or by term of years) and at will (or week-to-week, month-to-month, etc.). *Tenancy* in "pursuant to a bona fide lease or tenancy or a tenancy at will" is completely redundant if both "*or*"s are read disjunctively, meaning "pursuant to a bona fide lease or a bona fide tenancy or a tenancy at will (whether bona fide or not)". A *bona fide tenancy* is either a bona fide leasehold tenancy (in other words a *bona fide lease*) or a bona fide tenancy at will (included with non-bona fide tenancies in tenancies at will in the above example). If, however, the second *or* is read as *to wit,* then *tenancy* is not redundant, but is rather exemplified by the explanatory term *tenancy at will* after "to wit": "pursuant to a bona fide lease or a bona fide tenancy, to wit (also known as) a bona fide tenancy at will." Therefore, under G.L. c. 186A, the Manfras as non-bona fide tenants at will are not entitled to the special notice and termination for cause provisions of G.L. c. 186A, §§ 2–4.

Nevertheless, the Manfras are still tenants. By virtue of G.L. c. 186, § 13, their tenancy at will was not terminated by the foreclosure (as it would have been at common law) and survives until proper termination. In order to terminate their tenancy, the owner in foreclosure must serve on the Manfras the notice to quit applicable to a tenant at will, which under G.L. c. 186, § 12, is a three-month notice to quit for a tenant at will for an indefinite term holding by incidents of tenancy (in other words without "rent reserved"). *See Lavelle* and *Ducker.* A 72-hour courtesy notice, which would be applicable to an owner in foreclosure, is not applicable to a tenant whose

tenancy survives the foreclosure. The thirty-day notice to quit referred to in G.L. c. 186, § 13, applies only to situations when a tenancy is terminated by action of law, which in Massachusetts (due to statutory provisions overriding the common law) has been narrowed to termination of tenancy by action of law in case of the owner's death. This does have a somewhat circular effect in this case where the incident of tenancy is regular payment of the mortgage, when the tenant's nonpayment may have caused the foreclosure on the mortgagor/landlord, and thereafter there are no mortgage payments due because of the foreclosure.

Wilmington Trust also argues that the Manfras have waived the argument that the notice to quit was invalid because they appeared through counsel, answered the complaint, and participated in discovery, citing *Raposo v. Evans,* 71 Mass. App. Ct. 379, 385 (2008). *Raposo v. Evans,* however, is clearly confined to the issue of a challenge for improper service of process. It does not apply to substantive defenses. While the propriety of the notice to quit is an issue that could have been raised earlier, and saved the parties time spent in litigation, it is not a service of process issue. Wilmington Bank was aware that the Manfras were obligated, between themselves and Richard Lovering, for the payment of the monthly mortgage payments, since the agreement was provided to the Bank and submitted by them in an affidavit supporting their summary judgment motion. Affidavit of Sarah Nelson Ex. D. In their response to the Bank's Interrogatory No. 10, the Manfras stated that there were improprieties as to who was named in the notice to quit. Wilmington Trust did not move to compel more specific responses. Small errors in the notice to quit will not deprive the court of jurisdiction over a case, *Adjartey v. Central Div., Housing Ct. Dept.,* 481 Mass. 830, 850 (2019), but filing the wrong notice to quit is a defense to a summary process action. *Id.*

Conclusion

Accordingly, on Wilmington Trust's motion for summary judgment, the motion is ALLOWED, as follows:

SUMMARY JUDGMENT shall be ENTERED for possession and costs in favor of the Occupants and against Wilmington Trust.

SO ORDERED.

Malamut, J.

MICHAEL E. MALAMUT
ASSOCIATE JUSTICE

October 19, 2020

cc: Kevin P. Polansky, Esq.
Jacob T. Simon, Esq.