United States Court of Appeals

For the First Circuit

No. 18-1559

MARK R. THOMPSON; BETH A. THOMPSON

Plaintiffs, Appellants,

v.

JPMORGAN CHASE BANK, N.A.,

Defendant, Appellee

ON PETITION FOR PANEL REHEARING OR EN BANC REHEARING FILED BY JPMORGAN CHASE BANK, N.A.

BRIEF OF MASSACHUSETTS MORTGAGE BANKERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF JPMORGAN CHASE BANK, N.A.

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RULE 26 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the federal Rules of Appellate Procedure, Massachusetts Mortgage Bankers Association ("MMBA") states:

MMBA is a non-profit professional trade association. It has no parent corporations and no publicly held corporations have an ownership stake of 10% or more in Massachusetts Mortgage Bankers Association.

STATEMENT OF COMPLIANCE WITH F.R.A.P. 29(E)

Pursuant to Rule 29(E), of the Federal Rules of Appellate Procedure for the First Circuit:

(a) Counsel designated herein for Massachusetts Mortgage Bankers Association authored this brief;

(b) Massachusetts Mortgage Bankers Association contributed money that was intended to fund the preparation and submission of this brief; and

(c) No person or entity other than Massachusetts Mortgage Bankers Association, its members or its counsel contributed money that was intended to fund the preparation and submission of this brief.

TABLE OF AUTHORITIES

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Statutes

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STATEMENT OF INTEREST IN CASE

The Massachusetts Mortgage Bankers Association (MMBA) is one of the largest mortgage professional associations in the country advocating for and representing the interests of the mortgage lending and mortgage servicing community. It's more than 300 members include local credit unions, state chartered and national banks, mortgage lenders and mortgage servicers as well as local law firms and title companies.

The members of the MMBA are a diverse group. Seventy percent of its membership includes locally grown community based financial institutions. Member institutions include those of modest size with one or more community-based branches to those of more substantial size and net worth, with multiple locations from which to serve their customers. The member institutions enjoy strong and enduring relationships with their customers who have relied on them for many of their banking needs from the purchase of their first and subsequent homes, servicing of their home loan, providing home equity loans to finance home improvements, offering car loans and credit cards as well as providing student loans when their children head off to college.

Through its training, outreach activities, continuing education programs, conferences and general involvement with the mortgage banking industry, the

MMBA works collaboratively with stakeholders on matters of importance both to the membership and to the industry at large. For example, each year the MMBA hosts the New England Mortgage Bankers Conference, the second largest gathering of real estate finance professionals in the country. In Massachusetts, the MMBA works diligently to foster and increase sustainable home ownership, advocate for responsible lending and foreclosure avoidance as well as supporting reasonable legislation and regulations in furtherance of these efforts. The MMBA works directly with state legislators and regulators participating in events such as the annual Day on the Hill, submitting comments on and testifying before regulators on pending laws and regulations of importance to its members and working collaboratively with local community groups to foster best practices and communication.

The members of the MMBA are committed to serving the needs of their customers while aligning their practices with industry standards and taking the necessary steps to ensure that mortgage originations and the servicing of those loans complies in all respects with applicable Massachusetts law and regulations as well as the terms of the mortgage instrument. These efforts include assisting borrowers whose loans have fallen into default.

In furtherance of this dual commitment to legal compliance and foreclosure avoidance, the MMBA and its members have embraced the movement in the

Commonwealth over the past decade to implement laws that assist homeowners in avoiding foreclosure. Since 2007, with the initial enactment in Massachusetts of laws and regulations aimed at assisting homeowners in default on their mortgages, MMBA members have embraced these efforts. They have worked directly with various stakeholders including state regulators and legislators in crafting model form disclosures and notices reflecting Massachusetts law and practice, creating processes to assist homeowners in curing their mortgage defaults and working with homeowners and housing counselors to fashion achievable modifications of their mortgage loan. These endeavors are all in furtherance of the commitment of Member institutions to help homeowners save their homes.

INTRODUCTION AND SUMMARY OF ARGUMENT

If the Appellee's Petition for Rehearing is denied and the decision of the Panel is given full effect, it would have significant and serious consequences for MMBA members. The decision would: (1) prevent MMBA members from reconciling the mandatory form notice with the Panel's decision requiring notice of the reinstatement limitations in the mortgage; (2) significantly reduce protections currently afforded to mortgage customers in default by frustrating the custom and practice of accepting reinstatement funds up until the foreclosure sale and (3) negatively affect titles to properties previously foreclosed upon.

LEGAL ARGUMENT

I. A rehearing is warranted because the panel misunderstood Massachusetts law and misapprehended the facts before it

A. MMBA Members are faced with a legal conundrum in choosing between compliance with a mandatory notice form and the terms of the mortgage

This Panel's misunderstanding and erroneous interpretation of Massachusetts law has left MMBA members and their customers in a state of uncertainty as to the status of pending foreclosures, post-foreclosure real estate titles and property ownership.

The Panel's failure to apprehend the true facts of the Thompson's foreclosure and the retroactive application of its incorrectly reasoned opinion will

leave MMBA members and their customers unable to buy, sell, finance or refinance homes with an affected foreclosure in the title. The harsh reality is that MMBA members and their customers will be the inadvertent casualties of a flawed decision.

A transformative period of foreclosure legislation and regulatory protections began in Massachusetts with the enactment in 2007 of G.L. c. 244, §35A. This was followed by a series of landmark and seminal cases affecting foreclosure practice. This evolution resulted in voluminous and highly complex foreclosure law within the Commonwealth. Many members of the MMBA do not have the resources to maintain large compliance departments. They look to lawmakers, regulators and the courts to guide their compliance efforts. See Appellee Petition at pages 3-4 and 10-12. To a certain extent they should be entitled to rely on form documents promulgated by national investors[1], as well as form notices promulgated by the Massachusetts Division of Banks ("Division"), through its regulatory authority, including the Right to Cure Notice in 209 C.M.R. 56.04 ("Right to Cure Notice"). Appellee Petition at page 4.

As Appellee points out in its Petition for Panel Rehearing or Rehearing En Banc (the "Petition"), the use of the Right to Cure Notice, is *mandatory*. Id.; 209

[1] The Uniform Security Instruments issued by the Federal National Mortgage Association and the Federal Home Loan Corporation are prime examples.

C.M.R. 56.03. To help manage the risk of a challenge to the pre-foreclosure process, MMBA members do not deviate from this form. The promulgated Right to Cure Notice contains the statement: "you can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place." The Panel found this single statement to be deceptive as compared to the reinstatement limitations in the mortgage. However, a mortgage lender or servicer should not be subjected to ensuing liability under G.L. c. 183 §21 for using the form mandated by the regulations. "Accordingly, the deviation in language that occurred, which ultimately afforded more grace to the mortgagor, is not grounds for invalidating the title to the property out of a foreclosure sale." Lom v. Selene Fin. LP, et al, 18 MISC 000324 (Mass. Land Ct. Sept. 27, 2018).

B. The Panel's decision would frustrate custom and practice of accepting reinstatement funds prior to foreclosure sale

The Panel's determination will frustrate a mortgagee's ability to effectively communicate with its customers regarding its practice of accepting reinstatement funds until the time of the foreclosure sale. As Massachusetts Courts have recognized, permitting borrowers to cure a mortgage default will protect and preserve home ownership. U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 431 (2014).

The exercise of the power of sale forever bars the homeowner from all right and interest in the mortgaged premises provided that the mortgagee has complied

with the terms of the mortgage and applicable law. Housman v. LBM Fin., LLC, 80 Mass.App.Ct. 213, 220 (2011); Cranston v. Crane, 97 Mass. 459, 466 (1867). A foreclosure under a power of sale terminates a homeowner's statutory right of redemption upon the signing of the Memorandum of Sale G.L. c. 244, §18. Outpost Café, Inc. v. Fairhaven Sav. Bank, 3 Mass.App.Ct. 1, 7 (1975); Williams v. Resolution GGF Oy, 417 Mass. 377, 384 (1994). Thereafter, the right of redemption is terminated by the foreclosure sale and the borrower's interest in the property is forever lost. See Housman at 220.

It is the custom and practice of MMBA members to accept funds up to the time of the foreclosure sale. Deutsche Bank Trust Co. Ams v. Beauvais, 188 So. 3d 938 (Fla. Dist. Ct. App. 2016) (custom and practice may have a binding force between banks and its customers). Notwithstanding any limitation in the mortgage related to the borrower's right to reinstate after acceleration, the aforementioned prevailing custom and practice affords the greatest protection and benefit to mortgagors to avoid loss of the right to reinstate.

While MMBA members may be entitled to enforce the reinstatement provisions of the mortgage limiting reinstatement, they should not be *forced* to do so. If, as the Panel's decision states, it is misleading to omit the mortgage reinstatement limitation provision in default notices to homeowners, then it would be equally misleading to notify homeowners that a limitation exists which MMBA

members would not enforce. Mortgage lenders should not be penalized for complying with state law or utilizing forms created by the regulatory agencies.

The Right to Cure Notice provides that a mortgagor "can still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place". Despite this clear benefit to the Borrower, it is this exact language this Panel found "potentially deceptive" in comparison to the terms of the mortgage. However, there is nothing misleading or deceptive about the language in the Right to Cure Notice, as it reflects the custom and practice of accepting reinstatement funds. Mortgagees remain entitled to expressly waive certain provisions of the mortgage through communications with its customers. See Wilshire Enterprises, Inc. v. Taunton Pearl Works, Inc., 356 Mass. 675, 678 (1970).

Providing mortgagors with greater protections and ability to avoid foreclosure is at the heart of the laws and regulations governing Massachusetts foreclosure practice. This Panel's decision would act to limit those protections in contradiction to and derogation of those laws.

C. Compliance with the Division of Bank's Regulations helps MMBA members manage risk

The Division promulgated regulations to aid in the administration of G.L. c. 244 §35A, including the Right to Cure Notice. 209 C.M.R. 56.03 mandates that a Right to Cure Notice conform to the provisions of 209 C.M.R. 56.04. Failure to do so may subject mortgage lenders and servicers to a risk of challenge and claim for

damages by borrowers. Massachusetts law provides consumers with a cause of action as a protection from unfair or deceptive acts. See G.L. c. 93A §2. Any deviation from a regulatory agency form that could be construed as deceptive or unfair to a borrower could expose members to civil liability. Sovereign Bank V. Sturgis, 863 F. Supp.2d 75, 86 (D.Mass. 2012) (one of two avenues for a homeowner to sue for damages for wrongful foreclosure) (citing Kattar v. Demoulas, 433 Mass 1 (2000)). The Panel's decision appears to encourage MMBA members to deviate from a regulation that mandates inclusion of the very language in the Right to Cure Notice that the Panel found offensive. The Panel's determination that inclusion of the provision which permits the borrower to cure the default up to the time of foreclosure was deceptive places MMBA members in a difficult position. They can face risk of challenge to the foreclosure process if their Right to Cure Notice complies with the requirement of 209 C.M.R. 56.04 or they can face risk of the same challenge if their Right to Cure Notice deviates from 209 C.M.R. 56.04. This dilemma entangles the MMBA members in a Gordian knot that is impossible to sever.

D. A waiver of mortgage requirements should not be construed as deceptive

Generally, maturity of the debt occurs upon acceleration of the mortgage loan, nothing less than full payment will cure the default. Centerbank v. D'Assaro, 600 N.Y.S.2d 1015, 1017 (1993). However, following acceleration, if a lender

accepts a lesser amount, it may constitute a waiver of both acceleration and the lender's ability to proceed with the foreclosure process. See Wilshire at 678 (acceptance of a sum to cure after default but prior to acceleration is a waiver of the right to accelerate). To be effective, a waiver must be a voluntary and intentional abandonment of a known right. Nassau Trust Co., v. Montrose Concrete Products Corp., 56 N.Y.2d 175, 184 (1982). In the case before the Panel, the foreclosing entity made a knowing, willing and voluntary waiver of the limitation on borrower's right to reinstate contained in paragraph 19 of the subject mortgage.

The form language in the Right to Cure Notice was neither deceptive, nor potentially deceptive. Rather, the explicit waiver of the paragraph 19 limitation corresponds to the custom and practice of the MMBA members relative to reinstatement for the benefit of its customers. This accommodation should not be construed as deceptive or misleading. Lom, 18 MISC 000324. The Panel should have construed the form language in the Right to Cure Notice as a waiver of the 5-day reinstatement limitation period set forth in paragraph 19 of the mortgage.

The default notice to the Thompsons contained an affirmative statement that the borrower was permitted to cure the default up to the time of the foreclosure sale, which mirrored the requirements of 209 C.M.R. 56.04. However, the Panel's decision assumed that the Appellee would be permitted to enforce the limitation

provisions of paragraph 19 and insist that reinstatement occur no less than 5 days prior to the foreclosure sale. Thompson v. JPMorgan Chase Bank, N.A., 2019 U.S.App.LEXIS 3989 **7 (1st Cir. 2019). The law of equitable estoppel would adequately protect the borrower from such a scenario. Equitable estoppel serves to "forbid one to speak against his own act, representations, or commitments to the injury of one to whom they were directed and who reasonably relied thereon." Great Lakes Aircraft Co., v. Claremont, 135 N.H. 270, 290 (1992) (citing 28 Am.Jur.2d *Estoppel and Waiver* § 28, at 629); See In re Spenlinhauer, 573 B.R. 343, 367 (Bankr.D.Mass. 2017). Therefore, the Panel's decision voiding the foreclosure sale was unnecessary since the borrower was adequately protected under existing law and equitable principles.

II. The issues raised in this case are questions of exceptional importance as they relate to the reliability of real estate titles

Massachusetts foreclosure laws, regulations and judicial decisions have provided additional protections to mortgagors and inserted greater transparency into the foreclosure process. The Massachusetts Supreme Judicial Court has recognized that a decision changing or clarifying foreclosure law has the potential to adversely affect title to real property, including conveyances by foreclosure[2].

[2] Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569 (2012); Pinti v. Emigrant Mortgage Company, Inc., 472 Mass. 226 (2015)

By electing to apply the Eaton and Pinti decisions prospectively, the Court effectively maintained the status quo with respect to enforcement of the mortgage contract. The retroactive effect of this Panel's decision will adversely affect the validity of titles to thousands of properties foreclosed prior to the issuance of its decision which is a significant issue justifying reconsideration by the Court. Pinti at 243.

The procedural safeguards afforded by the Massachusetts statutory foreclosure process are intended to protect both the borrower and any prospective purchaser of the property. See Supra. The Panel's decision creates grave uncertainty as to the validity of a foreclosure sale where the default notices appear valid on their face[3], but the foreclosure is deemed invalid. Thompson at **7. The Panel's decision also acknowledges that there is no notice requirement imposed by paragraph 19 of the mortgage, nor is there a requirement that the lender detail the procedure to exercise the right to reinstate. Id. However the Panel's decision allows an otherwise facially compliant default notice to be challenged based on the failure to incorporate a provision of the mortgage that is not subject to a notice requirement. This uncertainty frustrates the MMBA members' ability to conduct a fair and reasonable foreclosure sale.

[3] The Panel's decision acknowledged that "at first glance" the acceleration and notice of default appeared to strictly comply with paragraph 22 of the mortgage.

Third party bidders at a foreclosure sale seldom have access to the Right to Cure Notice and default notice required by the terms of the mortgage. Without this information, MMBA members are legitimately concerned that the Panel's decision may have a negative effect on a third party's willingness to bid at foreclosure sales. This could reduce competitive bidding at the sale and suppress the ultimate sale price. A suppressed sale price may limit or significantly reduce surplus funds available to the mortgagor when there is equity in the property. It may also result in MMBA members acquiring properties at foreclosure sale that otherwise would have been sold to third parties. As owners of these properties, MMBA members will incur post foreclosure carrying costs they could otherwise avoid. These include satisfaction of outstanding taxes, municipal liens, sanitary and building code violations as well as property repairs and maintenance. These are significant expenses for MMBA members, some of which are modest sized community lenders that conduct few foreclosures annually.

A significant portion of MMBA members not only provide mortgage lending for properties purchased at foreclosure sale, they provide financing, refinancing and title services for properties previously foreclosed upon. The retroactive reach of the Panel's decision may adversely affect refinance of existing mortgages and origination of future lending where the chain of title includes a foreclosure completed during or after 2012. While this was recognized and

addressed by the Massachusetts Supreme Judicial Court in Eaton and Pinti, the retroactive application of this Panel's decision, would subject the title of any foreclosed property to challenge in a District Court proceeding within this Circuit. Chevron Oil Co. v. Huson, 404 U.S. 97, 106-107 (1971)[4]. As stated by the Eaton Court, prospective effect of judicial decisions, although limited, include "circumstances where the ruling announces a change that affects property law." Eaton at 588.

CONCLUSION

MMBA's members consider mortgagors as their valued customers and fellow members of the community. They have an interest in assisting their customers to remain in their homes. MMBA members are acutely and negatively impacted when a change or interpretation of the law impacts title to real estate and prior foreclosures sales. MMBA members and their customers should not be the

[4] The US Supreme Court weighed the inequity of a decision of the Court that could produce substantial inequitable results if applied retroactively. The Court found that there is ample basis in existing caselaw for avoiding injustice or hardship by a holding of nonretroactivity. Citing Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

inadvertent casualties of this Panel's decision. MMBA urges this Court to grant the Petition for a Panel rehearing.

Respectfully submitted
Massachusetts Mortgage Bankers Association
By its attorney

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and Fed.R.App.P. 29(4), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2534 words. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of Microsoft Word in preparing this certificate.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman font.

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April 1, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of April, 2019, I filed the foregoing petition for rehearing with the Clerk of the U.S. Court of Appeals for the First Circuit via the CM/ECF system, to be served on the following counsel of record via ECF:

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