THE TRIAL COURT
COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS **HOUSING COURT DEPARTMENT**
CENTRAL DIVISION
NO. 16H85SP000682

BLB TRADING, LLC,
Plaintiff
v.
BRUCE BOGUSLAV and LINDA BOGUSLAV,
Defendants

ORDER ON POST-JUDGMENT MOTIONS

This matter came before the court on September 14, 2021 for consideration of (1) the defendants *Motion for Relief from Judgment* pursuant to M.R.Civ.P. 60 (b) (6); and (2) plaintiff's *Motion to Dismiss Appeal.*

Defendants' Motion for Relief from Judgment

This summary process case involves a post-foreclosure claim for possession brought by the plaintiff, BLB Trading, LLC against defendants Bruce and Linda Boguslav, the former owners of the foreclosed property. As their defense to BLB's claim for possession, the defendants challenged the validity of the foreclosure sale alleging that BLB did not hold the note or mortgage at the time of the foreclosure sale. In an order dated August 7, 2017 the housing court judge, Kerman, J., allowed BLB's motion for summary judgment on grounds of res judicata. Judgment entered in favor of BLB on its claim for possession. The defendants filed an appeal to the Massachusetts Appeals Court from the judgment. The appeal is pending. On May 25, 2021, the defendants filed their *Motion for Relief from Judgment* with the Housing Court pursuant to M.R.Civ.P. 60 (b) (6). In an order dated July 3, 2021, the Appeals Court granted the defendants' request for leave to file the motion for relief from judgment with the trial court. The Appeals Court did not place any limitations on the scope of the Housing Court's consideration of the motion in accordance with the standards applicable to Rule 60 (b) (6) motions.

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The defendants allege as the basis for their Rule 60 (b) (6) motion that there exists "newly available" evidence showing that BLB did not own or hold the defendants' note and mortgage at the time of the foreclosure sale.

Based upon the findings and rulings rendered by numerous courts, and the facts set forth in the record of this case, the procedural and factual history of this case is as follows:

The defendants, Bruce and Linda Boguslav, are the former owners of the single-family residence at 50 Whisper Drive, Worcester, Massachusetts (the "property"). In 2005 the defendants borrowed money and executed a promissory note secured by a mortgage on the property.

The plaintiff, BLB Trading, LLC ("BLB") acquired the note and mortgage by assignment on February 1, 2012. The defendants had defaulted on the mortgage loan in 2005 after having made one loan payment. They did not make a single payment on their mortgage loan between 2006 and December 2015 (when BLB foreclosed on the property).

In 2014 BLB notified the defendants of its intent to proceed with the foreclosure sale of the property.

In response, on September 16, 2014 the defendants brought a civil action against BLB in Worcester Superior Court seeking to enjoin BLB from foreclosing on the property. The defendants claimed that BLB did not hold the note and mortgage on the property and had no authority to foreclose on the defendants' mortgaged interest in property. BLB removed the case to U.S. District Court for the District of Massachusetts (*Boguslav v. BLB*, No. 14-40143). BLB provided the court with attested copies of the defendants' note (endorsed in blank by the original lender) and the mortgage. The federal court judge, Hillman, J., denied the defendants' request for injunctive relief finding that BLB was likely to prevail on its claim that it held the note and mortgage. After hearing BLB's motion to dismiss (both parties were represented by counsel) the judge dismissed the case with prejudice as set forth in a written ordered dated September 29, 2015. In his written order the judge found that BLB held the note and mortgage. The defendants filed an appeal. The First Circuit Court of Appeals affirmed the judgment in an order dated November 11, 2016.[1]

After obtaining relief from the automatic stay in the defendants' then pending bankruptcy court proceeding (one of many bankruptcy petitions filed by the defendants before and after the foreclosure sale), BLB notified the defendants that the foreclosure sale was scheduled for

[1] The judge's order is set forth in BLB Exhibit A (pps. 5 – 12) as is the First Circuit's order denying the defendants' appeal.

November 30, 2015. BLB postponed the scheduled foreclosure by public proclamation to December 7, 2015 and again to December 21, 2015.

In late 2015 (apparently shortly after the federal case was dismissed, after the automatic stay in the bankruptcy proceeding was lifted and after the defendants received notice of the scheduled foreclosure sale) the defendants filed a second civil action against BLB in Worcester Superior Court (No. 1585 CV 01904). The defendants again sought to enjoin BLB from foreclosing on the property and again alleged that BLB did not hold the note and mortgage at the time of the foreclosure sale.

In an order dated December 21, 2015, after conducting a hearing, the Superior Court judge, Curran, J., denied the defendants' request for injunctive relief concluding that BLB was likely to prevail on their *res judicata* defense based upon the preclusive effect of the federal court's findings and rulings rendered in the written order (dated September 29, 2015) dismissing the defendants' complaint with prejudice.[2] Judge Curran scheduled a prompt hearing on BLB's motion to dismiss. On the date of the scheduled hearing, December 29, 2015, the defendants withdrew their complaint. Apparently dissatisfied with the defendants' conduct, the judge issued an order dismissing the defendants' complaint with prejudice citing to his December 21, 2015 order.[3]

BLB foreclosed on the property by conducting a foreclosure sale on December 21, 2015. BLB was the high bidder at the foreclosure sale. BLB executed a foreclosure deed to itself on January 12, 2016.

In February 2016 BLB commenced this summary process action seeking to recover possession of the property from the defendants. The defendants filed an answer denying that BLB had a superior right to possession of the property claiming for the third time in a civil action that BLB did not hold the promissory note or mortgage on the property at the time of the foreclosure.

In an order dated June 16, 2016 the Housing Court judge, Kerman, J., stayed the summary process proceedings generally pending a ruling from the First Circuit Court of Appeals on the defendants' appeal from 2015 federal district court judgment in No. 14-40143. After the First

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[2] In his written order Judge Curran stated that, "[t]his complaint is insincere at best. Instead, Mr. and Mrs. Boguslav have 'gamed' the system of justice for nearly a decade, declaring bankruptcy and fraudulently transferred ownership on multiple occasions to avoid foreclosure. This Court will not countenance such a mockery of the law."

[3] The judge's order denying the request for injunctive relief and order of dismissal are set forth in BLB Exhibit B (pps.4 – 6).

Circuit affirmed the judgment in an order dated November 11, 2016, Judge Kerman scheduled a hearing on BLB's motion for summary judgment.

After conducting a hearing, Judge Kerman allowed BLB's motion for summary judgment in a written order dated August 7, 2017. The judge ruled that, based on the judgments entered in the Federal Court case and the state Superior Court case, under the doctrine of *res judicata* (claim and issue preclusion) the defendants were barred from re-litigating the established fact that BLB held the defendants' promissory note and mortgage on the property. Finding that BLB had established its claim for possession, Judge Kerman directed that judgment enter for the BLB.[4] Judgment for possession entered on August 9, 2017. The defendants filed an appeal from that judgment which is pending before the Appeals Court.

In an order dated September 11, 2017 Judge Kerman acting in accordance with G.L. c. 239, §§ 5 and 6 waived the appeal bond and authorized the defendants to proceed with their appeal subject to the condition that they make monthly use and occupancy payments of $2,500.00 to BLB pending the resolution of their appeal.

On July 5, 2018 BLB filed a motion to dismiss the defendant's appeal for failure to comply with the use and occupancy payment condition of the court's bond order. The hearing was scheduled for July 25, 2018.

On July 24, 2018, the day before the scheduled hearing on BLB's motion to dismiss, Linda Boguslav filed with the Housing Court "Defendant's Suggestion of Bankruptcy" notifying the court that she had filed a Chapter 13 bankruptcy petition in the Bankruptcy Court for the District of Massachusetts (No. 18-41367CJP). BLB filed an unsecured pre-petition Proof of Claim in the amount of $767,486.02 (the deficiency remaining on the mortgage loan after the foreclosure sale of the property). Linda Boguslav objected to BLB's pre-petition claim.

On March 21, 2019 BLB filed a motion in the bankruptcy court seeking relief from the automatic stay.

On March 25, 2019 Linda Boguslav filed (in the bankruptcy proceeding) an adversary complaint against BLB. In her complaint Linda Boguslav again argued that BLB did not hold the promissory note and mortgage at the time they foreclosed on the property. Her complaint refers

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[4] In a supplemental order the judge directed that $32,500.00 (13 $2,500.00 monthly use and occupancy payments from July 2016 to July 2017) that Judge Kerman ordered the defendants to place in escrow as a condition of his June 16, 2016 stay order) be released to BLB.

to "recently discovered" evidence in a 2015 Florida civil action entitled *John Olsen v James Frantangelo* (the "Florida case").[5] Linda Boguslav alleged that the documents in the case file establish that at the time of the December 21, 2015 foreclosure sale the defendants' mortgage loan (the promissory note) secured by the mortgage on the property was not owned by James Frantangelo (or entities controlled by Frantangelo, who at all times relevant was and is the controlling member/shareholder of BLB).

The bankruptcy court dismissed most, but not all, of the claims set forth in Linda Boguslav's adversary complaint against BLB. On February 27, 2020 the bankruptcy court judge, Panos, J., ruled that Linda Boguslav's objection to BLB's unsecured pre-petition claim pertaining to the property was *conditionally* allowed stating that "[i]n the event the state court determines the foreclosure deed was properly recorded the claim will be disallowed to the extent it seeks a deficiency."

On the same day, February 27, 2020, the bankruptcy court issued an order allowing BLB's motion for relief from the automatic stay "to pursue the pending state court litigation." This encompasses BLB's motion to dismiss of the defendants' appeal from the Housing Court judgment based upon the defendants' failure to comply with the use and occupancy provision of the bond order. On May 15, 2020, the bankruptcy court judge dismissed the remaining claims set forth in Boguslav's adversary complaint.[6]

On July 3, 2020 the Appeals Court (No. 2017-P-1631), apparently acting in response to the February 27, 2020 orders entered in Linda Boguslav's bankruptcy proceeding, issued two orders (the Appeals Court had issued a number of orders between October 2018 and May 2021 related to the status bankruptcy court's automatic stay). First, the Appeals Court ordered that BLB could pursue its motion to dismiss the defendants' appeal *nunc pro tunc* to the date the motion was originally filed in the Housing Court on July 5, 2018. Second, the Appeals Court ordered that the defendants could purse their motion for relief from judgment that had been filed in the Housing Court.

On May 25, 2021 the defendants filed a motion for relief from judgment pursuant to M.R.Civ.P. 60 (b) (6) based upon "newly available" evidence. The purported new evidence is the

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[5] The citation to the Florida case is *John Olsen v. James Frantangelo*, 11th Circuit Court in and for Miami-Dade County, Case No. 2015-018158ca01.

[6] On May 19, 2019 Bruce Boguslav filed a "no asset" Chapter 7 bankruptcy petition. On August 27, 2019 the bankruptcy court enter and Order of Discharge and closed the case on August 30, 2019

same evidence from the Florida case that formed the basis of Linda Boguslav's March 25, 2019 adversary complaint she filed in her bankruptcy action (No. 18-41367CJP).

For purposes of ruling on the defendants' motion for relief from judgment, I shall assume that the defendants first learned about the Florida case months prior to March 25, 2019 (the date on which Linda Boguslav filed her adversary complaint against BLB in the Bankruptcy Court).

In support of their motion for relief from judgment the defendants argue that newly discovered evidence contained in the Florida case file establishes that BLB had transferred the promissory note and mortgage on the property to another entity before the December 21, 2015 foreclosure sale. The defendants submitted only limited selected documents to the court that they represent came from the Florida case record.

From my review of the few (and in some cases incomplete) documents from the Florida case selected by the defendants, it appears that the parties in the Florida case (John Olsen and James Frantangelo) were joint business partners in a number of joint ventures (including BLB) that purchased mortgage loans (and other debt assets) on the secondary market. As stated above, Frantangelo was and is the controlling member/shareholder of BLB. The partners ended their relationship in 2014 and entered into a written agreement to divide their financial interests in the various joint ventures. The written agreement included three schedules of assets (mostly mortgage loans). Schedule A includes a list of assets that were to be transferred to Olsen. The defendants' mortgage loan is not on Schedule A. Schedule B includes a list of assets that were to be sold to an Olsen-controlled LLC. The defendants' mortgage loan is not on Schedule B. Schedule C includes a list of assets that were owned by Frantangelo and Frantangelo-controlled entities (including BLB). The defendants' mortgage loan appears on the first page of Schedule C.[7]

In the Florida case Olsen alleged that Frantangelo did not comply with the 2014 agreement. He claimed that in the course of assigning values to the various joint ventures Frantangelo had not fully disclosed all of the assets of the entities he controlled and that he had concealed certain assets from Olsen in order to devalue his interests in the joint ventures. The complaint does not include

[7] The defendant submitted a memorandum they prepared that contains unverified snippets of hearing or deposition testimony. This is not competent admissible evidence and I give it no consideration. The defendants also attached an unauthenticated document (a copy of what appears to be an e-mail) that references a purported transfer letter regarding the defendants' mortgage loan. The e-mail suggests that the letter would be sent to the defendants. The e-mail does not identify (1) what if any relationship the sender or reader may have had with BLB, and (2) whether the letter mentioned in the e-mail was ever in fact written and sent. This email constitutes inadmissible hearsay and cannot be afforded any weight. It does not provide any information that would allow a fact finder to conclude that the defendants' mortgage loan was ever transferred by BLB to any other entity.

claims specifically involving the ownership or control of the defendants' mortgage loan and mortgage. The complaint does not allege that the defendants' mortgage loan and mortgage were unaccounted for or missing. It appears that the Florida case was settled and dismissed sometime in 2018.

BLB argues that the defendants motion constitutes a motion under Mass.R.Civ.P. 60 (b) (2), that relief is not available under Mass.R.Civ.P. 60 (b) (6) to the extent the motion is based upon grounds set forth in Mass.R.Civ.P. 60 (b) (1-5). BLB further argues that if the court were to consider the defendants' claim under Rule 60 (b) (6), the claim should be rejected because of the unreasonabe delay in filing the motion. Finally, BLB argues that if the court were to consider the defendants claim under Rule 60 (b) (6), the claim that BLB did not hold the promissory note and mortgage on the property at the time of the foreclosure sale is without merit, and that no extraordinary circumstances exist that would warrant relief.

Rule 60 (b) (2). Under Mass.R.Civ.P. 60 (b) (2), a motion for relief from judgment based on newly discovered evidence must be made within one year of final judgment. In light of that limitation, BLB is correct that to the extent that the defendants' motion for relief from judgment is considered as a motion under Rule 60 (b) (2), the motion - filed on May 25, 2021 - was filed two years and two months (26 months) after entry of judgment on August 9, 2017. *Poskus v. Lombardo's of Randolph, Inc., & another*, 48 Mass. App. Ct. 527 (2000). Accordingly, the defendants are not entitled to relief under Rule 60 (b) (2).

Rule 60 (b) (6). The defendants fair no better if their motion for relief from judgment is considered under *Mass.R.Civ.P. 60 (b) (6)*.

Under *Rule 60 (b) (6)* the Court may relieve a party from a final judgment where there is "... any other reason justifying relief from the operation of the judgment." See, *Eastern Sav. Bank v. City of Salem*, 33 Mass. App. Ct. 140, rev. denied, 413 Mass. 1106 (1992). However, relief from judgment under subsection 6 is only appropriate when justified by some reason other than those set forth in rule 60 (b) (1) – (5)." *Sahin v. Sahin*, 435 Mass.396, 406 (2001). "In other words, to prevail under rule 60 (b) (6), a party must show that there is a reason to justify the relief, and also that the reason is not within the grounds set forth in rule 60 (b) (1)-(5)." *Parrell v. Keenan*, 389 Mass. 809, 814-815 (1983). It is clear that what the defendants are arguing is that they should be granted relief from judgment based upon what they claim to be "newly available" evidence (which is the equivalent of newly discovered evidence). Even though

they frame their motion as one under Rule 60 (b) (6), their contention falls squarely within the newly discovered evidence provision of Rule 60 (b) (2). For this reason, the defendants are not entitled to relief under Rule 60 (b) (6).

Even if I were to consider the defendants' motion for relief from judgment under Rule 60 (b) (6) by ignoring the subsection (b) (2) limitation, the defendants would not be entitled to the relief they request.

"In ruling on a motion under rule 60 (b) (6), the 'judge may consider whether the moving party has a meritorious claim or defense, . . . whether extraordinary circumstances warrant relief, . . . and 'whether the substantial rights of the parties in the matter in controversy' will be affected by granting the motion.''' *Adoption of Hugh*, 35 Mass. App. Ct. 346, 351, rev. denied, 416 Mass. 1107 (1993), citing to *Parrell v. Keenan*, 389 Mass. 809, 815 (1985). Further, "[a] rule 60 (b) (6) motion must be brought within a reasonable time, and a determination of what constitutes a reasonable time is similarly addressed solely to the judge's discretion." *Owens v. Mukendi*, 448 Mass. 66, 72 (2006). "In determining whether a motion was filed within a reasonable time, a judge may consider the reasons for delay; the ability of the movant to learn of the grounds earlier; prejudice to the parties, if any; and the important interest of finality." Id. at 74.[8]

In assessing whether the defendants filed their motion within a reasonable time I shall address the factors set forth in *Owens v. Mukendi*.

First, the defendants did not present their motion for relief from judgment within a reasonable period measured from the date on which they became aware of the purportedly newly discovered evidence.

It cannot be disputed that the defendants were aware of the Florida case (and many of the documents contained in the case file that they are relying upon in seeking relief from judgment) no later than March 25, 2019. This is the date when Linda Boguslav filed her adversary proceeding complaint against BLB in her then pending bankruptcy action. It is obvious that the defendants had to be aware of the documents in the Florida case well before March 25, 2019 given that they had to spend time to analyze, organize and distill the Florida case information into Linda Boguslav's adversary complaint. Linda Boguslav's adversary complaint included substantially

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[8] See *Owens v. Mukendi*, at p. 76-77, for citations to cases where courts have ruled that the delay in filing a Rule 60 (b) (6) motion were not reasonable when measured from the date of discovery of knowledge based upon purportedly new evidence (2 years delay, and 8 month delay), the date that judgment entered (3 year delay), the date that the moving party first learned that judgment had entered (10 month delay), or the date of a settlement (3 year delay).

identical factual allegations based on documents found in the Florida case that form the basis of the defendants' motion for relief from judgment filed in the Housing Court.

Nonetheless, the defendants did not file their motion for relief from judgment in this summary process action until May 25, 2021 which is more than two years after Linda Boguslav filed her adversary complaint in the bankruptcy court. This means that the defendants were aware of the "newly available" information from the Florida case more than two years before they filed their motion for relief from judgment. The defendants argue that they could not file a motion for relief from judgment in the Housing Court because of the automatic stay in Linda Boguslav's bankruptcy proceeding. Even if this is correct, the bankruptcy court lifted the automatic stay on February 27, 2020. The defendants have not presented any reasonable explanation for their more than fifteen (15) month delay (measured from February 27, 2020) in filing their motion for relief from judgment in the Housing Court that was based on this "newly available" evidence.[9]

Third, with respect to the last two considerations set forth in *Owens v. Mukendi*, both parties stand to be prejudiced depending on the outcome of the motion; however, the potential prejudice to the defendants is significantly diminished by the fact that over an 11-year period (measured from the date of the mortgage loan to the date of the foreclosure sale) they made only one mortgage loan payment and owe $767,486.02 (the deficiency remaining on the mortgage loan after the foreclosure sale of the property). However, given the extensive litigation history involving this foreclosure and the fact that every court that has ruled on the matter has concluded that BLB held the Boguslav promissory note and mortgage immediately prior to and at the time of the December 2015 foreclosure sale, any prejudice that might inure to the defendants is offset by the prejudice to BLB resulting from their inability to secure possession of the property, and the important interest in finality. See *Owens v. Mukendi*, supra. at 76.

I find and rule that the defendants delay in filing their motion for relief from judgment was not reasonable. And for this reason alone, the defendants are not entitled to relief under Rule 60 (b) (6).

Further, even if I were to reach the merits of the defendants' contention set forth in the motion, the defendants would not be entitled to relief from judgment under Rule 60 (b) (6). The defendants' contention that their "newly available" evidence proves that BLB did not hold the

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[9] The bankruptcy court never addressed the merits of the adversary complaint. The bankruptcy court dismissed the complaint for other reasons.

promissory note or mortgage on the property is without merit. Further, the defendants have not made any showing that extraordinary circumstances exist that warrant relief from the judgment.

First, it is undisputed based upon the Registry of Deeds records that BLB held the mortgage on the property at the time of the foreclosure sale.

Under Massachusetts law to properly exercise the power of sale to foreclose on a mortgage in accordance with G.L. c. 183, §21 and G.L. c 244, §11-17 the mortgagee must either hold the mortgage note or be authorized to act as the authorized agent of the note holder. *Eaton v. Federal National Mortgage Association*, 462 Mass. 569, 589 (2012) (Fn. 28 states that the mortgagee "may establish [its note holder status] at the time of the foreclosure sale by filing an affidavit in the appropriate registry of deeds pursuant to G. L. c. 183, § 54B"). See also, *Strawbridge v. Bank of N.Y. Mellon*, 91 Mass. App. Ct. 827, 830-831 (2017).

The two courts that have considered the merits of the defendants' claim (and entered judgments dismissing the defendants' complaints) have ruled that BLB held the promissory note and the mortgage on the property prior to the date of the foreclosure sale. *Boguslav v. BLB*, U.S. District Court, District of Massachusetts, No. 14-40143, aff'd by First Circuit; *Bogulsav v BLB*, Worcester Superior Court, No. 1585 CV 01904, appeal pending. These findings and rulings are binding on the defendants under the doctrine of claim/issue preclusion.

Second, even if I were to accept as true that there exists some document in the Florida case that support the defendants' contention that Frantangelo/BLB had agreed to transfer the defendants' promissory note and mortgage to another entity (an inference that I do not believe is supported by a reasonable reading of the limited documents the defendants included with their motion), the defendants have presented no evidence to show that such an asset transfer actually occurred. And the defendants do not have standing to challenge BLB's purported failure to transfer those assets. John Olsen (the plaintiff in the Florida case) would be the only person with legal standing to seek relief if, in fact, Frantangelo/BLB had agreed to transfer the defendants' promissory note/mortgage and failed to comply. BLB foreclosed on the property on December 21, 2015. The defendants have presented no evidence to show that, in the intervening five plus years since the foreclosure sale, John Olsen has ever made such a claim.

Third, it is difficult to imagine a scenario where former mortgagors, such as the defendants, could show extraordinary circumstances that would justify granting them relief from a post-foreclosure summary process judgment where they (1) made only one mortgage payment between

February 2005 and December 2015, (2) were in default on their mortgage loan in an amount that exceeded $1,000,000.00 at the time of the foreclosure sale, and (3) were on the losing side of two civil lawsuits where they asserted the same argument (three if you include the Housing Court judgment) where the courts determined that the mortgagee held the promissory note and mortgage. There is simply no credible "newly discovered" evidence to challenge the factual and legal conclusions rendered by the Housing Court judge that the December 21, 2015 foreclosure sale of the property was conducted by BLB in strict compliance with the statutory power of sale and the mortgage, that BLB holds legal title to the property as is evidenced by the foreclosure deed, and that BLB's right to possession of the property is superior to any right to possession the defendants had after the foreclosure sale.

For these reasons, the defendants **Motion for Relief from Judgment** is **DENIED.**

Plaintiff's Motion to Dismiss Appeal

This matter came before the Court on plaintiff BLB Trading, LLC's ("BLB") motion to dismiss the appeal taken by defendants Bruce and Linda Boguslav. The motion was first filed on July 5, 2018 and was renewed in a motion filed on May 26, 2021. BLB argues that the defendants failed to comply with the use and occupancy payment condition set forth in the court's bond waiver order.

The motion hearing was originally scheduled for July 25, 2018. On July 24, 2018, the day before the scheduled hearing on BLB's motion to dismiss, Linda Boguslav filed with the Housing Court "Defendant's Suggestion of Bankruptcy" notifying the court that Linda Boguslav had filed a Chapter 13 bankruptcy petition in the Bankruptcy Court for the District of Massachusetts (No. 18-41367CJP).

Bruce Boguslav was not a co-petitioner on the bankruptcy petition filed by Linda Boguslav. There is no question that since judgment entered in the Housing Court on BLB's claim for possession, except for the period from May 19, 2019 (when Bruce Boguslav file a "no asset" Chapter 7 bankruptcy petition) to August 27, 2019 (when the Order of Discharge entered), Bruce Boguslav remained obligated to comply with all state trial court orders, including the use and occupancy condition that was part of the appeal bond order.

On July 3, 2020 the Appeals Court (No. 2017-P-1631), apparently acting in response to the February 27, 2020 orders entered in Linda Boguslav's bankruptcy proceeding, ordered that BLB could pursue its motion to dismiss the defendants' appeal *nunc pro tunc* to the date the motion was

originally filed in the Housing Court on July 5, 2018. On February 27, 2020, the bankruptcy court issued an order allowing BLB's motion for relief from the automatic stay "to pursue the pending state court litigation." This encompasses BLB's motion to dismiss of the defendants' appeal from the Housing Court judgment based upon the defendants' failure to comply with the use and occupancy provision of the bond order.

Once the automatic stay was lifted and the Appeals Court issued its July 3, 2020 order, BLB sought to have its motion to dismiss appeal scheduled for hearing. The Housing Court did not schedule the motion for hearing in accordance with the state moratorium on evictions and court's implementing standing orders. The motion was finally scheduled and heard by the court on September 14, 2021.

At the motion hearing (conducted using Zoom technology) the parties presented oral argument, memoranda, documents and supporting affidavits. Upon consideration of all the competent evidence and arguments I find, and rule as follows:

The Housing Court, Kerman, J., allowed BLB's motion for summary judgment on its claim for possession. His written order is dated August 7, 2017. Judgment for possession entered in favor of BLB on August 9, 2017. The defendants filed an appeal from that judgment which is pending before the Appeals Court.

In an order dated September 11, 2017 Judge Kerman, acting in accordance with G.L. c. 239, §§ 5 and 6, waived the defendants' obligation to post an appeal bond and authorized the defendants to proceed with their appeal. However, the defendants' right to prosecute their appeal was made subject to the condition that they make monthly use and occupancy payments of $2,500.00 to BLB pending the resolution of their appeal. See *Bank of New York Mellon v. King*, 485 Mass. 37 (2020).

In an order dated November 6, 2017 Judge Kerman stayed the defendants' obligation to make monthly use and occupancy payments under the condition set forth in the appeal bond waiver order until the heating system at the property was repaired. On January 3, 2018 the court allowed BLB's motion for access to the defendants' premises to make the necessary repairs. The repairs were completed by January 18, 2018. In an order dated February 6, 2018 the court, Muirhead, J., allowed BLB's motion to reinstate the monthly use and occupancy payment condition of the bond waiver order. The defendants were ordered to make a pro rata payment for January 2018 in the

amount of $1,150.00 and pay $2,500.00 per each month thereafter. In an order dated May 30, 2018 the Appeals Court affirmed Judge Muirhead's reinstatement order.

The summary process appeal bond statute, G.L. c. 239, § 5 (h), provides with respect to a defendant's interlocutory appeal seeking review of a summary process appeal bond order (usually heard by a single justice of the Appeals Court) that

> "[u]pon the rendering of a decision on review, the reviewing court shall give notice of the decision to the parties and the defendant shall comply with the requirements of the decision within 5 days after receiving notice thereof. If the defendant fails to file with the clerk of the court rendering the judgment, the amount of bond, deposit or periodic payment required by the decision of the reviewing court within 5 days from receipt of notice of the decision, the appeal from the judgment shall be dismissed."

See, *Cambridge Street Realty, LLC v. Stewart*, 481 Mass. 121, 136 (2018).

I do not find persuasive the defendants' argument that the 3rd Plan of Agreement, as amended (approved on December 17, 2020) entered in the bankruptcy court proceeding stayed, nullified or superseded the use and occupancy payment condition set forth in Housing Court's bond waiver order. The use and occupancy payment provision was set by the state court as a condition the defendants were required to comply with to maintain their appeal to the state Appeals Court. The bankruptcy plan does not mention the court's order. And I do not believe that the bankruptcy court judge intended by approving the amended plan to stay, suspend, supersede or nullify the state court's use and occupancy payment condition set forth in the bond waiver order. Prior to approving the amended plan, the bankruptcy court had, on February 27, 2020, issued an order allowing BLB's motion for relief from the automatic stay "to pursue the pending state court litigation." This encompasses BLB's motion to dismiss the defendants' appeal from the Housing Court judgment based upon the defendants' failure to comply with the use and occupancy provision of the bond order.

Further, I do not find credible the defendants' contention that since the bond waiver order was reinstated, they have made payments related to the property that equal or exceed the amount due for 38 months of unpaid use and occupancy. There is simply no evidence in the record that supports the defendants' contention. While it is possible that during the period after the use and occupancy condition was reinstated the defendants made some nominal payments related to the property, there is no evidence that they made payments in an amount that come close to the $2,500.00 per month they were obligated to pay under the terms of the bond waiver order.

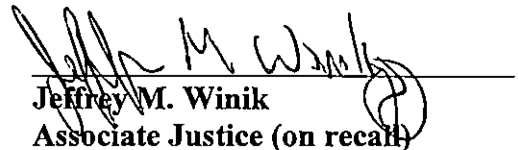
I find that the defendants have not complied with the use and occupancy payment condition set forth in the bond waiver order issued by Judge Kerman measured from the date it was reinstated by Judge Muirhead. The defendants did not make the required pro rata January 2018 use and occupancy payment and did not make any of the required monthly use and occupancy payments from February 2018 to August 2021. The defendants have failed to pay approximately $96,150.00 in breach of the use and occupancy condition set forth in the bond waiver order.

I rule the defendants' failure to make the required monthly use and occupancy payments constitutes a violation of a material condition of the bond waiver order. Accordingly, acting pursuant to G.L. c. 239, § 5 (h), BLB's Motion to Dismiss the Appeal is **ALLOWED.**

It is **ORDERED** that the defendants' appeal from the judgment for possession entered on August 9, 2017 be and hereby is **DISMISSED**, and execution for possession shall issue forthwith.

The Clerk-Magistrate is directed to transmit a copy of this order to the Appeals Court.

SO ORDERED.



Jeffrey M. Winik
Associate Justice (on recall)

September 28, 2021