COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF THE TRIAL COURT

DUKES COUNTY, ss.

DISTRICT COURT DEPARTMENT
EDGARTOWN DIVISION
Docket No. 1235SU0041

FNBN 1, LLC,
Plaintiff,
v.

CARLOS ANTONIO DeOLIVEIRA
and All Occupants,
Defendants.

MEMORANDUM OF DECISION AND ORDER ON "DEFENDANT'S MOTION FOR SUMMARY JUDGMENT" AND "PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT"

The defendant, Carlos Antonio DeOliveira ("DeOliveira"), moves this Court for summary judgment pursuant to Mass.R.Civ.P. 56 (b) on the ground that the plaintiff, FNBN 1, LLC ("FNBN 1"), has failed to comply with G.L. c. 244, §35A. Specifically, DeOliveira suggests that because FNBN 1 did not send to DeOliveira an adequate notice of default on his mortgage obligations before foreclosure, that foreclosure and the resulting deed are invalid, rendering this foreclosure action concerning 16 Bellevue Avenue, Oak Bluffs, void. FNBN 1, for its part, opposes that motion and itself moves for summary judgment on the grounds that G.L. c. 244, §35A, falls outside the scope of this foreclosure proceeding, that in any event it indeed complied with the terms of that section, and that because FNBN 1 demonstrates that it complied with the terms of the power of sale in the mortgage and the statutes governing foreclosure in foreclosing upon DeOliveira's mortgage, it is entitled to summary judgment—and thus possession of the subject property. Following a hearing on 8 February 2013, the Court denies both motions.

Motions for summary judgment are permissible in summary-process actions. *See Metropolitan Credit Union v. Matthes*, 46 Mass.App.Ct. 326, 330 (1999); *see also Bank*

of N. Y. v. Bailey, 460 Mass. 327, 334 (2011). In order to award summary judgment to DeOliveira, this Court must, viewing the facts in the light most favorable to FNBN1, determine that "there is no genuine issue as to any material fact and that [DeOliveira] is entitled to judgment as a matter of law." *Ryan v. Hughes-Ortiz*, 81 Mass.App.Ct. 90, 92 (2012) quoting Mass.R.Civ.P. 56(c), and citing, inter alia, *Humphrey v. Byron*, 447 Mass. 322, 325 (2006). The same standard obviously holds for FNBN1's motion against DeOliveira.

DeOliveira offers the following facts as undisputed.

DeOliveira purchased 16 Bellevue Avenue, Oak Bluffs, in 2007 as use for his primary residence. He gave a promissory note to First National Bank of Arizona and a mortgage to FNBA. The mortgage sets out specific disclosure requirements for a notice of default, which are further modified by applicable law: G.L. c. 244, §35A. In a Notice of Default of 12 July 2011 ("Notice"), Specialized Loan Servicing LLC identified itself as the creditor to which the mortgage debt was owed. It is this Notice that DeOliveira attacks as deficient in several material respects, chief among them that the Notice failed to provide the borrower the required 151 days in which to cure the default, but also arguing eight other shortcomings.[1] DeOliveira also asserts several other grounds supporting his motion and countering FNBN 1's motion, including "disput[ing]" the legitimacy of the affidavit of Joshua Ryan Polczinski. . . . "

FNBN 1 argues that compliance, or not, with the provisions of G.L. c. 244, §35A is irrelevant, and even if it were not, its terms were met.

As noted above, legal title to the property is the core issue in foreclosure summary-process actions: specifically, the issue is whether the mortgagee properly exercised the power of sale provided in the mortgage. Before selling a property at auction, the mortgagee must "first comply. . . with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale." G.L. c. 183, §21. The Supreme Judicial Court, in *Eaton v. Federal Nat'l Mortgage Ass'n*, 462 Mass. 569, 581 (2012) and *U.S. Bank Nat'l Ass'n v. Ibanez*, 458 Mass. 637, 645-646 (2011) defined the "statutes relating to the foreclosure of mortgage by exercise of a power of

[1] FNBN1's factual recitation differs from DeOliveira's. FNBN1 states that DeOliveira's mortgage was granted to Mortgage Electronic Registration Systems, Inc. ("MERS") as nominee for First National Bank of Arizona, which, in September 2011, assigned the mortgage to FNBN1. FNBN1 then, in April 2012, foreclosed on the mortgage and, in August 2012, caused a notice to quit to be served on DeOliveira. This action followed, in September 2012.

Further, contrary to the assertions of DeOliveira, who focuses solely on the Notice of July 2011, FNBN1 avers that DeOliveira was sent notices of default on four separate occasions; two in March 2011, one in May 2011, and then the one on 12 July 2011. The one of 14 March 2011 gave DeOliveira until 12 August 2011 to cure the default: 151 days from the date of that notice. The three notices following the initial one specifically gave DeOliveira "thirty-three (33) days from the date of this letter to cure the default." Thus, were the sufficiency of the notices an issue in this action, there would seem to have arisen a genuine issue of material fact, and DeOliveira would have firmer ground on which to argue. Given the decision of the Court, however, FNBN1's compliance with G.L. c. 244, §35A is not relevant in this summary-process action.

sale" as being "G.L. c. 244, §§11-17C." The United States District Court for the District of Massachusetts has put it bluntly: "The Supreme Judicial Court, in defining the statutory power of sale incorporated by. . . [the mortgage], did not include an obligation to comply with G.L. c. 244, §35A." *Sovereign Bank v. Sturgis*, 863 F.Supp.2d 75, 102-103 (D. Mass. 2012).

DeOliveira's arguments, then, regarding FNBN1's failure to comply with G.L. c. 244, §35A are insufficient to entitle DeOliveira to judgment as a matter of law, and his motion for summary judgment is therefore denied.

Similarly, however, the motion of FNBN1 must also be denied. In order to succeed on such a motion, FNBN1 must demonstrate its right of possession of the subject property. *E.g.*, *Bank of N. Y.*, *supra*, at 333, citing *Sheehan Constr. Co. v. Dudley*, 299 Mass. 51, 53 (1937). "The purpose of summary process is to enable the holder of the legal title to gain possession of premises wrongfully withheld. Right to possession must be shown and legal title may be put in issue. . . .Legal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; *and that alone is subject to challenge.*" *Id.* (emphasis added) (further citation omitted); *see also*, *e.g.*, *Federal Nat'l Mortg. Ass'n v. Hendricks*, 463 Mass. 635, 637 (2012); *Novastar Mortgage, Inc. v. Saffran*, 2010 Mass.App.Div. 117, 118. *See also*, *e.g.*, *Golfco Acquisitions, Inc. v. Golftown, Inc.*, 2004 Mass.App.Div. 141.

FNBN 1 submits that it has acquired title strictly according to the power of sale in the mortgage. "If the affidavit [attached to the foreclosure deed] shows that the requirements of the power of sale and [of G.L. c. 244, §14] have in all respects been complied with, the affidavit or a certified copy of the record thereof, shall be admitted as evidence that the power of sale was duly executed." G.L. c. 244, §15. *See also*, *e.g.*, *Hendricks*, *supra*, at 642-643. The deed itself shows that FNBN 1 conveyed to itself on 17 May 2012 a "Massachusetts Foreclosure Deed by Corporation" for the subject property. It is the deficiency of FNBN 1's affidavit that dictates the denial of its motion.

That affidavit, of Joshua Ryan-Polczinski ("Ryan-Polczinski"), is deficient.[2] The affidavit does not recite who the affiant is other than he holds the honorific of "Esquire" (from which the Court could infer that he is an attorney) and that he is "of Harmon Law Offices, PC as attorneys for FNBN 1, LLC. . . ." The affidavit recites that the principal and interest obligation referred to in the mortgage "were not paid or tendered or performed when due or prior to the sale," and that "this office [Harmon Law Offices] caused to be published" on three certain dates in 2012 in the *Vineyard Gazette* a notice, a

[2] The proper device for attacking the sufficiency of an affidavit is a motion to strike. *See HSBC Bank USA, N.A. v. Galebach*, 2012 Mass.App.Div. 155, 161 n. 12, quoting *Duffy v. Commerce Ins. Co.*, 2009 Mass.App.Div. 196, 198. As the Court in *HSBC Bank* noted, the defendants in that case did not move to strike the offending affidavit there but had no such opportunity since there was no hearing on the motion for summary judgment. *HSBC Bank*, *supra*, at 161 n. 12. (Why the lack of a hearing would have precluded filing a motion to strike is unclear; indeed, it would seem that the lack of a hearing would make filing such motions all that much more critical). DeOliveira did not file a motion to strike the Ryan-Polczinski affidavit, but he did specifically "dispute[] the legitimacy of [that] affidavit. . . as an affidavit of fact because it asserts only legal conclusions concerning issues central to this case and. . . otherwise disputes the accuracy and completeness of the affidavit concerning compliance with pre-foreclosure requirements."

copy of which is attached to the affidavit, for the auction, scheduled for 25 April 2012. The affidavit went on to recite that "[t]his office also complied with" the mailing requirements of G.L. c. 244, §14. It concludes by averring that FNBN 1 sold the mortgaged premises at public auction by Philip J. Norton, Jr., a licensed auctioneer, to FNBN 1 for $441,000.00. Ryan-Polczinski's signature was followed by an oath before a notary public.

The Ryan-Polczinski affidavit, then, seems to demonstrate strict compliance with the requirements of G.L. c. 244, §14. But there is no recitation whatsoever as to the participation, if any, by Ryan-Polczinski in any of the acts described. *See HSBC Bank USA, N.A. v. Galebach*, 2012 Mass.App.Div. 155, 157-161. As the Northern District of the Appellate Division pointed out in *HSBC Bank*, which decision will dictate this Court's here, G.L. c. 244, §15 "requires that the affidavit be executed by the 'person selling' or that person's attorney 'stating *his acts*, or the acts of his principal or ward.'" *HSBC Bank*, *supra*, at 159 (emphasis in original). "The statutory model form for a foreclosure affidavit set out as Form 12 of the Appendix to G.L. c. 183 reflects this requirement of an affiant describing his or her acts in the first person." *Id.*, at 159-160 (footnote omitted). Because the Ryan-Polczinski affidavit sets out acts of the Harmon law firm, and he is "of" that firm, it might seem he is a proper affiant regarding the acts of the firm. But the affidavit signals no indication of the form of the Harmon Law Firm—whether corporation, association or partnership—and no substantive indication as to who Ryan-Polczinski is as to that firm. Although, as *HSBC Bank*, *id.*, at 160, points out, the acts of a corporation may be narrated in the third person by one of its officers with knowledge of those actions, we do not know that to be the case here. More specifically, the Ryan-Polczinski affidavit does not indicate any personal knowledge, of anything. *See id.*

As the *HSBC Bank* Court went on to note in its case, "[t]he deficiencies in the. . . affidavit under G.L. c. 244, §15 are compounded when viewed for its compliance with the summary judgment requirements of Mass.R.Civ.P., Rule 56." *Id.* Such an affidavit "must be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Mass.R. Civ.P., Rule 56(e)." *Id.* The Ryan-Polczinski affidavit simply fails to establish critical evidence that the four newspaper notices of the auction were published as described, that certified-mail notices were sent pursuant to G.L. c. 244, §14, that FNBN 1 purchased the subject property at auction as described, and, indeed, that "the principal and interest obligation. . . were not paid or tendered or performed when due or prior to the sale. . . "

FNBN 1 has, then, not established by competent evidence for purposes of this motion for summary judgment that it has complied with the statutory power of sale, and its motion is therefore denied.

ORDER

The motion of the defendant, Carlos DeOliveira for summary judgment is **DENIED.** The counter-motion for summary judgment of the plaintiff, FBNB 1, LLC, is **DENIED.**

So ordered.

Dated: 11 MARCH 2017

H. Gregory Williams
First Justice