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16-P-1011

Appeals Court

U.S. BANK, NATIONAL ASSOCIATION, trustee,<sup>1</sup> vs. STEVEN L. MILAN  
& another.<sup>2</sup>

No. 16-P-1011.

Essex. March 1, 2017. - December 4, 2017.

Present: Green, Wolohojian, & Sullivan, JJ.

Mortgage, Foreclosure, Real estate. Summary Process. Real Property, Mortgage, Sale. Notice, Foreclosure of mortgage. Sale, Real estate. Practice, Civil, Summary process, Retroactivity of judicial holding. Retroactivity of Judicial Holding.

Summary process. Complaint filed in the Northeast Division of the Housing Court Department on July 23, 2012.

The case was heard by David D. Kerman, J., on motions for summary judgment.

Michael R. Murphy (Michael R. Stanley also present) for the plaintiff.

Carl D. Goodman for the defendants.

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<sup>1</sup> Of Credit Suisse First Boston ARMT 2005-10.

<sup>2</sup> Karen J. Milan.

GREEN, J. The plaintiff (U.S. Bank) appeals from a judgment of a Housing Court judge, dismissing its complaint for summary process. The Housing Court judge based his order of dismissal on the failure of U.S. Bank's notice of default to comply strictly with the requirements of paragraph 22 of the mortgage it foreclosed against the defendants, Steven and Karen Milan (Milans), incident to U.S. Bank's acquisition of title to the property. In so doing, the judge applied the holding of Pinti v. Emigrant Mort. Co., 472 Mass. 226, 241-242 (2015) (Pinti), to invalidate U.S. Bank's claim of title. We conclude that was error, and reverse.

Background. The Milans are the former owners and current occupants of residential property located at 56 Jasper Road in Saugus. On May 16, 2005, incident to a loan refinance, the Milans granted to Mortgage Electronic Registration Systems, Inc. (MERS), a mortgage on the property to secure a note made to Saugus Federal Credit Union.<sup>3</sup> In 2007, the Milans defaulted on the mortgage loan, and on June 18, 2007, U.S. Bank's servicing agent (which had succeeded MERS as mortgagee by assignment) sent to the Milans the first of several notices of default.<sup>4</sup> The

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<sup>3</sup> The mortgage recites that MERS "is acting solely as nominee for [Saugus Federal Credit Union] and [its] successors and assigns."

<sup>4</sup> Notices of default were sent on June 18, 2007, September 17, 2007; January 14, 2008; August 28, 2008; December 14, 2008;

Milans assert, and the Housing Court judge concluded, that the notices did not comply strictly with the requirements specified for such notices in paragraph 22 of the mortgage.<sup>5</sup> Thereafter, U.S. Bank conducted a foreclosure auction, pursuant to the statutory power of sale contained in the mortgage, and (as U.S. Bank was the successful bidder at the auction) a foreclosure deed in favor of U.S. Bank was recorded on June 21, 2012. The Milans remained in possession of the property, prompting U.S. Bank to initiate the present summary process action in the Housing Court on July 23, 2012.

We describe in some detail the trajectory of the summary process action as it progressed to the judgment of dismissal, as the parties' conduct of the matter bears on a determination whether the Pinti rule applies to it. On July 26, 2012, the

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April 19, 2009; December 13, 2009; February 7, 2010; and April 18, 2010.

<sup>5</sup> The last notice preceding foreclosure, dated April 18, 2010, stated that "[i]f foreclosure is initiated, you have the right to argue that you did keep your promises and agreements under the [m]ortgage [n]ote and [m]ortgage, and to present any other defenses that you may have." It does not include notice, as required by paragraph 22 of the mortgage, of the right to bring a court action to assert the nonexistence of a default or any other defense to acceleration.

U.S. Bank contends that one of the notices it sent (on December 13, 2009) complied with the requirements of paragraph 22, and that the two subsequent noncompliant notices do not vitiate its right to foreclose based on the one compliant notice, even if the Pinti requirement of strict compliance applies to this case. Because we conclude that the Pinti holding does not apply to this case, we need not resolve the question.

Milans filed their answer to U.S. Bank's complaint. The answer used a printed form answer, with a series of blanks and checkboxes completed by hand, and a handwritten legend stating that it was "prepared with the assistance of counsel" appears at the bottom of the first page. On the second page of the printed form, within the section captioned to list defenses based on a claim that the tenancy was "not properly terminated and/or case not properly brought," a check appears next to a box reading "The landlord does not have a superior right to possession and/or does not have standing to bring this action." As reflected on the docket, on September 24, 2012, U.S. Bank served discovery requests on the Milans. At some point thereafter, but apparently before November 30, 2012, the Milans served on U.S. Bank their responses to U.S. Bank's discovery requests.<sup>6</sup> Among other interrogatories, U.S. Bank's interrogatory no. 8 asked the Milans to "[p]lease state in full and complete detail every fact and reason why you believe that the [p]laintiff does not have a superior right to possess the [p]roperty and/or lacks standing to bring this action." The Milans responded as follows:

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<sup>6</sup> We note that, according to the docket, the first scheduled trial date (September 25, 2012) was postponed when the parties entered a stipulation, providing that the Milans would respond to U.S. Bank's discovery on or before November 30, 2012. In a pleading filed May 27, 2014, U.S. Bank represented to the court that the Milans served their discovery responses on November 26, 2012.

"We, Karen and Steven Milan of 56 Rear Jasper Street, Saugus, MA 01906 do not believe that plaintiff [sic] has the right to possess, foreclose or evict us for the following reasons.

"We signed closing papers for a mortgage of \$524,000.00 to Saugus Federal Credit Union on May 10, 2005. Closing was done by Attorney Timothy J. Doyle, 99 Walnut Street - Suite A, Saugus North Professional Building, Saugus, MA 01906. We acknowledge signing these mortgage papers. We also have the letter from Attorney Timothy J. Doyle to Sebastian Insurance Agency of Saugus, MA requesting an insurance binder for the closing on May 10, 2005. We also have a copy of said binder. This mortgage of May 10, 2005, is our true and correct mortgage. Mortgage was recorded at Southern Essex County Registry of Deeds, Salem, MA on May 13, 2005.

"Another mortgage for \$524,000.00 to Saugus Federal Credit Union was done on May 16, 2005, by Attorney Timothy J. Doyle, 99 Walnut Street - Suite A, Saugus North Professional Building, Saugus, MA 01906. This mortgage assigned our mortgage to MERS. This mortgage was recorded at Southern Essex County Registry of Deeds, Salem, MA on May 18, 2005. We did not sign this mortgage. Also, our true mortgage of May 10, 2005, was still open and not discharged. Therefore, there were [two]."

On May 5, 2014, the Milans' present counsel entered his appearance on their behalf in the Housing Court. Shortly thereafter, on May 14, 2014, U.S. Bank filed its motion for summary judgment. In response, the Milans filed an "emergency motion to stay plaintiff's motion for summary judgment pursuant to M.R.C.P. 56(f)" and a separate "motion for leave to conduct discovery." In support of both motions, the Milans asserted that the mortgage on which U.S. Bank had foreclosed was procured by fraud, and that the Milans' signatures appearing thereon were forged; accordingly, the Milans suggested they were entitled to

conduct discovery into the question of fraud or forgery, including a deposition of the closing attorney and procurement of a handwriting expert. On May 27, 2014, the Milans' motion was allowed in part, to allow discovery "limited to the [three] requests made in open court" and to be completed within ninety days.<sup>7</sup>

The Supreme Judicial Court issued its opinion in Pinti on July 17, 2015. Just over three months later, the Milans filed a motion to amend their answer to U.S. Bank's complaint, asserting that U.S. Bank's title was invalid because the foreclosure notice preceding U.S. Bank's exercise of the statutory power of sale did not comply strictly with the requirements set forth in paragraph 22 of the mortgage.

As we observed in the introduction, a judge of the Housing Court denied U.S. Bank's motion for summary judgment and allowed the Milans' cross motion, based on his application of the Pinti rule to the present case.<sup>8</sup> A judgment entered, dismissing U.S. Bank's complaint, and U.S. Bank appealed.

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<sup>7</sup> The motion judge's endorsement written in the margin describes those requests as: "deposition of closing [attorney], limited documentation production, and a view of the original note and signatures at [plaintiff's attorney's] offices."

<sup>8</sup> Pinti stated that its holding would have prospective effect only, recognizing its potential impact on the validity of titles, while leaving open the question whether its holding "should be applied to any other class of cases pending on appeal." Id. at 243 & n.25.

Following oral argument, we stayed deliberations pending issuance of the opinion of the Supreme Judicial Court in Federal Natl. Mort. Assn. v. Marroquin, which had been argued but not decided at the time the present case was argued. On May 11, 2017, the Supreme Judicial Court issued its opinion in Marroquin, addressing the question (left open in Pinti itself) of the applicability of the Pinti rule to pending cases, at least in part, concluding that the Pinti holding would apply "to cases pending in the trial court where the Pinti issue was timely and fairly raised before [the Supreme Judicial Court] issued [its] decision in Pinti." Federal Natl. Mort. Assn. v. Marroquin, 477 Mass. 82, 88 (2017).<sup>9</sup> The court then analyzed the record in the Marroquin case itself and, noting that the judge had made a finding that the issue had been timely and fairly raised before the Pinti decision was released, concluded that the finding was not clearly erroneous. See id. at 89.

Following the release of Marroquin, we invited the parties to submit supplemental briefs concerning its effect on this case, and thereafter we remanded the matter to the Housing Court with the request that the judge who entered the judgment of dismissal (who was also the summary judgment motion judge in Marroquin) make a finding on the question whether the Pinti

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<sup>9</sup> In Aurora Loan Servs., LLC v. Murphy, 88 Mass. App. Ct. 726, 732 (2015), we previously had held that the Pinti holding would apply to cases pending on appeal when Pinti issued.

issue was timely and fairly raised before July 17, 2015, the date on which the Pinti decision was issued. Following further proceedings in the Housing Court, including an evidentiary hearing, the judge concluded that the Milans timely and fairly raised their "Pinti claim" of defective notice before July 17, 2015, so that the Pinti rule should be applied to the present case. We disagree.

Our review of the record compels the conclusion that the Pinti issue was not timely and fairly raised in the present case until after July 17, 2015. The Milans' first assertion of a general defense challenging title came in the form of checking a box on a form summary process answer. The form did not specify any particular defense challenging title, let alone identify a Pinti-type defense. Whether checking the box alone is sufficient to "fairly" raise a Pinti defense is a question that was left open in Marroquin and one we also need not answer here because the Milans subsequently identified the specific basis for the defense. Specifically, in response to an interrogatory seeking the basis for the defense, the Milans referred exclusively to their claim of forgery. Moreover, when the Milans opposed summary judgment on Mass.R.Civ.P. 56(f), 365 Mass. 824 (1974), grounds, they claimed only that they needed discovery with respect to the alleged forgeries, which they described as the "core issue in this litigation." In the

circumstances of the present case, where the Milans, who were represented by counsel before Pinti issued, expressly confined their claim of defective title to a claimed forgery until after Pinti was issued, and then moved to amend their answer to assert a Pinti defense, we reject any contention that the Milans fairly raised the Pinti claim before release of the Pinti decision.<sup>10</sup>

We stress that we do not decide whether, under other circumstances, checking the box on a form that asserted defective title but without describing the basis for the assertion would be sufficient to raise a Pinti defense.

In their principal brief, the Milans pressed an alternative theory why the Pinti holding should be retroactively applied to their case: because U.S. Bank is the same party that gave the defective notice of default, and not an innocent bona fide purchaser for value, the Pinti court's concerns about clear title and the equitable interests of innocent purchasers are inapplicable here. However, the Supreme Judicial Court in Marroquin did not adopt such a criterion for retroactive

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<sup>10</sup> We reject the Milans' contention that their amended answer should be treated as having raised the Pinti claim because, under Mass.R.Civ.P. 15(c), 365 Mass. 761 (1974), it "related back" to the date of their original answer. For purposes of Marroquin, the issue is not whether the claim "relates back" but whether U.S. Bank was placed on notice of the claim in real time before the date established in Pinti for applicability of the Pinti rule.

application of the Pinti holding, and we therefore decline to do so here.

The judgment of the Housing Court, dismissing U.S. Bank's complaint, is vacated and the matter is remanded for further proceedings consistent with this opinion.

So ordered.