No. 18-1559

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MARK R. THOMPSON; BETH A. THOMPSON,

Appellants,
v.

JPMORGAN CHASE BANK, N.A.,

Appellee.

ON APPEAL FROM A DECISION AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, NO. 18-CV-10131

ASSENTED-TO BRIEF FOR THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC. AND THE ABSTRACT CLUB AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE'S PETITION FOR PANEL REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The Real Estate Bar Association for Massachusetts, Inc. ("REBA") is a non-profit corporation organized under the laws of the Commonwealth of Massachusetts. There is no parent corporation and there is no publicly held corporation that owns 10% or more of REBA's stock.

The Abstract Club is a voluntary association.

STATEMENT OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(4)(E), the *amici* hereby certify that no party's counsel has authored the instant brief in whole or in part. No party, party's counsel or other person besides REBA, the Abstract Club, their members or their counsel has contributed money that was intended to fund preparing or submitting the brief.

Both parties to the case have assented to the filing of this brief.

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INTEREST OF *AMICI CURIAE*

The *amici* submitting this brief are the Abstract Club and The Real Estate Bar Association for Massachusetts, Inc. (formerly known as the Massachusetts Conveyancers Association) ("REBA"). The Abstract Club is a voluntary association of experienced lawyers who practice in the area of real estate law. It has been in existence for over 100 years and is limited by its by-laws to 100 members. REBA is the largest specialty bar in the Commonwealth. REBA has almost 2,000 members practicing throughout Massachusetts.

The Abstract Club and REBA both work toward the improvement of real estate law and practice through educational programs. REBA also promulgates title standards, practice standards, ethical standards and real estate forms, providing authoritative evidence to its members and the real estate bar generally as to the application of statutes, cases and established legal principles to a wide variety of circumstances practitioners face in evaluating titles and handling real estate transactions.

The Amicus Committee is a joint committee of the two organizations comprised of real estate lawyers with many years of experience. The Amicus Committee, from time to time, files *amicus* briefs on important questions of law. On several occasions it has been requested to do so by the

Massachusetts Supreme Judicial Court or the Appeals Court. All Committee members serve without compensation.

The memberships of the Abstract Club and REBA are keenly interested in the reliability of the land records of the Commonwealth. Members of the *amici* represent a variety of parties who deal with real estate titles, including owners, buyers, sellers, mortgagors, mortgagees, tenants, landlords, title insurers, lien holders, and contractors. The central concern of all of the parties represented and advised by members of the *amici* is certainty of title. The issues presented in the case now before the Court go to the very heart of the work of the conveyancing bar. This submission by the Abstract Club and REBA deals with the effect the Court's decision will have on the conveyancing bar's ability to determine with greater certainty the state of ownership of real estate titles.

REBA and the Abstract Club are uniquely situated to provide the court with a view of the broad practical impact the court's holding has on real estate transactions that are pending or have already been completed, including the holding's effect on marketability and insurability of titl

SUMMARY OF ARGUMENT

The court should grant the Defendant-Appellee's petition for rehearing because its ruling changes the parameters of review regarding a lender's strict compliance with contractual conditions precedent. The court has held, for the first time, that using the Division of Banks mandatory form for compliance with G.L. c. 244, §35A with an enclosure page that mirrors the notice requirements in the mortgage contract creates a potential for deception. This holding broadens the SJC's conclusion in *Pinti v. Emigrant Mortg. Co.* improperly, thereby calling into question the many affidavits already on record that reflect an accurate statement of compliance based on the affiants' understanding of the law as it stood prior to this decision. There is no ready remedy to "fix" these affidavits, nor can this court effectively tailor its ruling to apply only to affidavits signed in the future, as the Supreme Judicial Court has done repeatedly in this area of law. Closing attorneys will be unable to certify title; title companies will be unwilling to insure title; prospective purchasers will be reluctant to buy if a foreclosure is in their chain of title; and owners will be unable to sell or refinance. A rehearing will allow this court to consider the widespread, unintended negative consequences its decision will have on the state of record title.

ARGUMENT

A. THE COURT SHOULD GRANT THE APPELLEE'S PETITION FOR REHEARING BECAUSE THE COURT'S RULING PRESENTS A SIGNIFICANT, IRREMEDIABLE IMPAIRMENT OF RECORD TITLE TO THOUSANDS OF PROPERTIES.

1. Validity of record title is paramount to effective marketability of real estate transactions in Massachusetts.

For the residential real estate market in Massachusetts to function effectively, buyers and their closing attorneys must be able to depend on documents appearing on the public record to build an accurate report establishing the seller's authority to convey "good and clear record and marketable title," which is the standard set forth in Purchase and Sale Agreement forms designed by the Massachusetts Association of Realtors and the Greater Boston Real Estate Board for the sale of residential real estate. Title marketability "relates to defects affecting legally recognized rights and incidents of ownership." *Lyon v. Duffy*, 77 Mass. App. Ct. 860, 866, 934 N.E. 2d 831, 836 (2010). Record title creates the baseline for identifying defects relating to the seller's legal ownership of the property.

An attorney conducting a closing on the sale of a 1-4 family residential property secured by a purchase money mortgage must certify to the new mortgagor and mortgagee that the mortgagor holds good and

sufficient record title, with any exceptions enumerated. G.L. c. 93, §70. Willful failure by the attorney to do so is an unfair and deceptive practice. G.L. c. 93, §70. It is critical that the closing attorney be able to determine from a review of the public records at the Registry of Deeds (or, for registered land, the Registry District) that the ownership interests being acquired by the buyer and the mortgagee are valid and complete, with no latent defects.

2. The court's ruling calls into question the reliability and sufficiency of affidavits recorded in good faith as required by Supreme Judicial Court decisions.

In recent years, as a result of a pair of decisions rendered by the Massachusetts Supreme Judicial Court ("SJC"), it has become standard practice for a lender to record a post-foreclosure affidavit, or in some cases two affidavits, demonstrating that the lender had the requisite authority to foreclose. Title insurers, along with the conveyancing bar, have accepted the use by the mortgage industry of these standard affidavits, which typically recite in summary fashion that the mortgagee is the note holder or the note holder's authorized agent (thus complying with the SJC's holding in *Eaton v. Federal Nat'l Mortg. Ass'n*, 462 Mass. 569, 590 fn. 28, 969 N.E. 2d 1118, 1134 fn. 28 (2012)) and that the mortgagee has complied strictly with the conditions precedent in the

mortgage contract (thus complying with the SJC's holding in *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 243-244, 33 N.E. 3d 1213, 1227 (2015)).

In the instant case, for the first time, a court interpreting Massachusetts law has concluded that proper use of the form mandated by the Division of Banks for compliance, combined with an enclosure properly replicating the notices required by Paragraph 22 of the Fannie Mae/Freddie Mac uniform mortgage instrument, fails to comply strictly with the conditions precedent in the mortgage contract. In so ruling, the court prompts reviewers of title to disregard the recorded affidavit in favor of a review of the underlying documents in the case, because a title examiner will be unable to determine whether the lender's attestation to strict compliance with conditions precedent is founded on an outdated understanding of its contractual obligations (i.e. the affiant had not considered whether the lender's notice included a reference to, or waiver of, the time limitations set forth in Paragraph 19 of the mortgage). The holding in this case prompts the possibility that affidavits signed in good faith, accurately representing that the lender complied strictly with the conditions precedent in the mortgage based on the affiant's understanding of the law, might be subject retroactively to challenge.

Furthermore, the court's ruling invites borrowers in future cases to explore other means of incorporating additional contractual terms into the contract's notice requirements set forth in Paragraph 22. It is difficult to anticipate what novel arguments might be put forth to augment the notice language in Paragraph 22, but less difficult to anticipate that such arguments will be made, particularly given the magnitude of a favorable outcome for the borrower should such an argument be successful. Successive challenges to the language in lenders' notices will continue to erode confidence in affidavits that are already on record, accurately representative of the law as it stood at the time the affidavit was signed, required by the SJC and relied upon by reviewers of title to confirm strict compliance.

Finally, as noted below, prompting the title examiner to review extrinsic facts even beyond the underlying notices creates its own set of problems for the reviewer of title.

3. The fact that additional facts are needed before the court can properly determine whether Chase's letter was "potentially deceptive" further undermines the reliability of recorded affidavits.

As noted by the Defendant-Appellant in its Petition for Rehearing, there are additional facts Chase might establish, if given the opportunity, which would support its position that its notice to the borrower was not

potentially deceptive. For example, Chase might demonstrate that its business policy called for Chase to accept a reinstatement tender at any time prior to sale, thereby eliminating the potential for "deception." However, the notion that a demonstration of strict compliance with contractual standards requires a case-by-case review of facts that are not only off-record but in some cases intangible, such as business practices, eliminates the value of a recorded *Pinti* affidavit as anticipated by the SJC. While a lender will argue that its *Pinti* affidavit is truthful and accurate and a title reviewer should rely on it, the knowledgeable reviewer might insist on seeing the underlying documentation that supports the averments in the affidavit. Such a review would be unavailing if the lender's compliance relies in part on intangible evidence. It is critical that a reviewer of title be able to assess the accuracy of a recorded *Pinti* affidavit by cross-checking against written documentation.

4. Given the complexity of recent Massachusetts jurisprudence with respect to foreclosure-related procedures, the court should defer to the Supreme Judicial Court rather than anticipate how the state courts would rule.

The SJC has noted that the law in this area is so confusing and complicated "that our jurisprudence in this area of law is difficult for even attorneys to understand." *U.S. Bank Nat'l Ass'n as Trustee v.*

Schumacher, 467 Mass. 421, 431, 5 N.E. 3d 882, 890 (2014) (Gants, J., concurring). Moreover, recognizing that its decisions have widespread fundamental impact on real estate titles and transactions, the SJC has repeatedly stressed that its rulings in this area are intended to apply prospectively. *See Pinti*, 472 Mass. at 243, 33 N.E. 3d at 1227 ("We conclude that in this case, because of the possible impact that our decision may have on the validity of titles, it is appropriate to give our decision prospective effect only"); *Eaton*, 462 Mass. at 588, 969 N.E. 2d at 1132-1133 ("[W]e recognize there may be significant difficulties in ascertaining the validity of a particular title if the interpretation of 'mortgagee' that we adopt here is not limited to prospective operation, because of the fact that our recording system has never required mortgage notes to be recorded"); *Galiastro v. Mortgage Elec. Registration Sys.*, 467 Mass. 160, 4 N.E. 3d 270 (2014); *Federal Nat'l Mortg. Ass'n v. Marroquin*, 477 Mass. 82, 74 N.E. 3d 592 (2017).

The court's ruling in the case at bar presents yet another potential for widespread disruption to the public record, as noted above. How can a lender comply with both the statutory requirements set forth in G.L. c. 244, §35A and the contractual notice requirements set forth in the Fannie Mae/Freddie Mac uniform mortgage instrument using a single letter?

And from the standpoint of the real estate bar, how can a person reviewing title ever have confidence in the sufficiency of an affidavit attesting that the lender complied strictly with all of the conditions precedent in the mortgage contract when the definition of "conditions precedent" is open to interpretation? To the extent such an interpretation, and potential definitional change, is warranted, it should be undertaken by the Supreme Judicial Court, which has the authority to apply its decision prospectively in order to avoid calling into question the validity of documents already recorded in good faith, and relied upon in good faith by downstream purchasers and lenders alike. The availability of a prospective application is particularly important when one considers that since 2012, when the Massachusetts Division of Banks mandated the use of its published notice form for complying with the requirements of G.L. c. 244, §35A, virtually all residential mortgage foreclosures have been predicated on a form that includes the language this court found potentially deceptive. There is no ready corrective action by which one can "cure" the notice issue for a sale that has already taken place, and foreclosures suffering from a potential defect may be subject to invalidation for a period up to twenty years (at which time the current owner may raise an adverse possession claim or defense). The most

appropriate way to avoid widespread failure of title is to ensure that any changes in the analytical framework of foreclosure review are implemented in a purely prospective manner.

CONCLUSION

For the reasons stated above, REBA and the Abstract Club respectfully urge the court to grant the Appellee's Petition for Rehearing.

Respectfully submitted,
THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.

THE ABSTRACT CLUB
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Dated: April 1, 2019

CERTIFICATE OF COMPLIANCE

I, Francis J. Nolan, Esquire hereby certify that this brief complies with the type-volume limitation as set forth in Fed. R. App. P. 32(a) and Fed. R. App. P. 29(b)(4) because:

1. This brief contains 1,798 words, as measured by the word count function in the Microsoft Word 2007 program used to prepare the brief, excluding the items enumerated in Fed. R. App. P. 32(f); and
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Times New Roman, 14 point.

/s/ Francis J. Nolan
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CERTIFICATE OF SERVICE

I, Francis J. Nolan, Esquire, hereby certify that on April 1, 2019, a copy of the foregoing Assented-To Brief for The Real Estate Bar Association for Massachusetts, Inc. and the Abstract Club as *Amici Curiae* has been served on the following via the notice of docket activity generated by the court's CM/ECF system.

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