

NOTICE: Summary decisions issued by the Appeals Court pursuant to M.A.C. Rule 23.0, as appearing in 97 Mass. App. Ct. 1017 (2020) (formerly known as rule 1:28, as amended by 73 Mass. App. Ct. 1001 [2009]), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 23.0 or rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

19-P-1357

21ST MORTGAGE CORPORATION

vs.

KAREN M. LAPHAM.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

In this postforeclosure summary process action, Karen Lapham (wife¹) appeals from a summary judgment awarding possession of the property at 6 Garden Drive in Carver (property) to 21st Mortgage Corporation, and denying her cross motion for summary judgment. The wife also appeals from the orders denying her motions to alter or amend the judgment, pursuant to Mass. R. Civ. P. 59, 365 Mass. 827 (1974), and for relief from the judgment under Mass. R. Civ. P. 60 (b) (4), 365 Mass. 828 (1974). We affirm.

¹ Although Karen Lapham's former husband, Arthur, was a party in the summary process action, he defaulted before judgment entered, and is not a party to this appeal. For simplicity, we refer to Karen and Arthur Lapham as the "wife" and the "husband."

Background. The following material facts are undisputed. On October 7, 2002, the husband and wife executed a promissory note payable to Mansfield Mortgage Services, Inc., in the amount of \$160,000. The promissory note was secured by a mortgage on the property (Mansfield mortgage). On September 28, 2005, the husband alone executed a promissory note payable to Washington Mutual Bank, FA (WaMu), in the amount of \$191,000, also secured by a mortgage on the property. A portion of the proceeds of the loan (\$148,133.84) was used to pay off and discharge the Mansfield mortgage. The WaMu mortgage secured repayment of the loan "and all renewals, extensions and modifications of the Note." Although the husband is the only borrower identified on the WaMu mortgage, both husband and wife attended the closing, executed the mortgage instrument, and initialed each page.

The wife filed for divorce from the husband four months after the WaMu loan closed. On March 29, 2007, WaMu assigned the note and mortgage to Wells Fargo Bank, NA.² In October of that year, pursuant to a separation agreement, the husband agreed to make mortgage payments in lieu of child support. On February 10, 2008, the property was conveyed to the wife by quitclaim deed as part of the division of marital property. Some five months later, the husband and Wells Fargo entered into

² We continue to refer to this document as the WaMu mortgage to avoid confusion.

an agreement to modify the WaMu mortgage and promissory note (modification agreement). Outstanding interest and escrow payments on the note totaling \$6,831.20 were capitalized, resulting in a new principal balance on the note of \$191,828.21, and an extension of the maturity date.

On February 18, 2010, after realizing that the wife was not a named "borrower" on the WaMu mortgage, Wells Fargo brought an action in the Land Court alleging mutual mistake and seeking reformation of the mortgage to add the wife as a named borrower. In the alternative, Wells Fargo sought an order of equitable subrogation.³ The husband defaulted in the action. The wife disclaimed any rights or obligations under the WaMu mortgage, arguing that she was not a party to it. In March 2010, the husband stopped making payments on the note.

Summary judgment entered in the Land Court in favor of Wells Fargo on its claim for equitable subrogation, because there was no dispute that a portion of the proceeds from the WaMu loan was used to pay off the Mansfield mortgage, including

³ Under the theory of equitable subrogation, "[o]ne who fully performs an obligation of another, secured by a mortgage, becomes by subrogation the owner of the obligation and the mortgage to the extent necessary to prevent unjust enrichment" (citation omitted). East Boston Sav. Bank v. Ogan, 428 Mass. 327, 330 (1998). Here, Wells Fargo, the assignee of WaMu's interests in the note and mortgage, sought to be placed in the priority position of Mansfield Mortgage, whose mortgage on the property had been discharged with the proceeds of the WaMu loan.

the portion that encumbered the wife's interest in the property. Summary judgment on the reformation claim was denied in light of the wife's disavowal of her signature and initials on the mortgage instrument. Wells Fargo subsequently dismissed the reformation claim, and a final judgment dated June 11, 2012, entered by agreement, in which the WaMu mortgage was equitably subrogated to the prior position of the Mansfield mortgage in the amount of \$148,133.84.

On March 16-17, 2017, 21st Mortgage⁴ sent the wife notice that the note was in default, that the outstanding balance was \$309,987.90, and that 21st Mortgage intended to foreclose on the WaMu mortgage and sell the home to satisfy the debt. At the foreclosure sale on May 31, 2017, 21st Mortgage was the highest bidder. 21st Mortgage took title to the home by a foreclosure deed that was recorded along with an affidavit of sale in the statutory form. See G. L. c. 183, Appendix Form 12. On July 26, 2017, 21st Mortgage served the wife with notice to quit the property.

The next month, 21st Mortgage commenced a summary process action by filing a complaint for possession.⁵ The wife asserted

⁴ Wells Fargo had assigned the note and mortgage to 21st Mortgage on April 13, 2016.

⁵ The action was filed in the District Court before being transferred to the Housing Court. 21st Mortgage filed an amended summons and complaint in the Housing Court.

defenses and counterclaims based on her contention that 21st Mortgage's statutory notices and filings were materially incorrect because 21st Mortgage misstated the amount due.⁶ After a hearing, the motion judge rejected the wife's arguments and granted summary judgment in favor of 21st Mortgage. The judge reasoned that the subrogation judgment related only to 21st Mortgage's priority position on the mortgage and had no effect on the amount of the debt or the servicing of the debt. The judge also concluded that the wife was judicially estopped from challenging 21st Mortgage's compliance with the power of sale contained in the WaMu mortgage. The wife's cross motion for summary judgment was denied, and, on March 22, 2019, judgment for possession entered in favor of 21st Mortgage.

Seven days later, the wife moved for relief from the judgment on the ground that the foreclosure was void because 21st Mortgage failed strictly to adhere to the notice requirements contained in par. 22 of the mortgage. On April 1, 2019, the wife filed a motion to alter or amend the judgment in which she claimed, for the first time, that the modification

⁶ The wife also counterclaimed under G. L. c. 239, § 8A; G. L. c. 93A; and the implied warranty of habitability, which the motion judge dismissed without prejudice because the wife was a former owner of the property. The wife makes no argument in her brief with respect to this aspect of the judgment, and we do not address it. See Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019).

agreement was void because the husband had no interest in the home at the time he executed it. The motion judge denied the wife's motions after a hearing.

Discussion. Summary judgment is appropriate where the pleadings and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. Juliano v. Simpson, 461 Mass. 527, 529-530 (2012).

"[I]n a summary process action a foreclosure deed and statutory form constitute prima facie evidence of the right of possession." Federal Nat'l Mtge. Ass'n v. Hendricks, 463 Mass. 635, 642 (2012). Once 21st Mortgage submitted this evidence, it was "incumbent on [the wife] to counter with [her] own affidavit or acceptable alternative demonstrating at least the existence of a genuine issue of material fact" with respect to 21st Mortgage's legal title. Id. See Bank of N.Y. v. Bailey, 460 Mass. 327, 333 (2011), quoting Wayne Inv. Corp. v. Abbott, 350 Mass. 775, 775 (1966) (challenge to title is defense in summary process action). "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." U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 428 (2014), quoting Bailey, supra.

The motion judge concluded that the wife was judicially estopped from raising claims based on the terms of the foreclosed mortgage. "Judicial estoppel is an equitable doctrine that precludes a party from asserting a position in one legal proceeding that is contrary to a position it had previously asserted in another proceeding" (citation omitted). Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 639-640 (2005). Judicial estoppel applies only if the wife's assertion was directly inconsistent with the position taken in a prior proceeding and she prevailed on that basis in the prior proceeding. Id. at 641. "Application of the equitable principle of judicial estoppel to a particular case is a matter of discretion." Id. at 640. "Where, as here, application of judicial estoppel has resulted in the entry of summary judgment, abuse of discretion remains the appropriate standard -- if the judge has not abused his or her discretion in invoking the doctrine of judicial estoppel, the doctrine bars the claim in question, making summary judgment appropriate." Id.

Here, the wife's position in the 2010 Land Court action was that she was not a party to the WaMu mortgage. Based on that assertion, the Land Court judge denied summary judgment on Wells Fargo's claim seeking to reform the WaMu mortgage by making the

wife a party to it, a decision which prompted Wells Fargo to dismiss that claim. Thus, the wife succeeded in convincing the Land Court judge that there was a genuine issue of material fact regarding her status as a mortgagor, and she benefited by the resulting dismissal of the claim to reform the mortgage. In these circumstances, the Housing Court judge did not abuse her discretion in deciding that judicial estoppel precluded the wife from claiming rights under the mortgage that she had previously disavowed. Accordingly, we discern no error in the rejection of the wife's arguments that the foreclosure was void because 21st Mortgage did not send her notice of acceleration, as required by par. 22 of the mortgage, or the notices required by G. L. c. 244, §§ 35A and 35B.⁷ Because the foreclosure was not void, the judge properly denied the wife's motion for relief from the judgment for possession. See Field v. Massachusetts Gen. Hosp., 393 Mass. 117, 118 (1984) ("Rule 60 [b] [4] allows relief only from void judgments. A court must vacate a void judgment. It may not vacate a valid one. No discretion is granted by the rule").

⁷ We note, however, that any failure of compliance with G. L. c. 244, § 35A, would not affect the validity of the foreclosure in any event, Schumacher, 467 Mass. at 422, and that the wife's claim that notices were not sent to her at the property is belied by the record. The wife received statutory notices by certified mail, at the property, in March and May of 2017.

The wife would fare no better even if we were to reach the merits of her argument that 21st Mortgage's notices were defective because they misstated the amount of the debt. The argument misapprehends the effect of the equitable subrogation judgment in the Land Court. By the subrogation judgment, to which the wife agreed, Wells Fargo and its successor, 21st Mortgage, became "the owner of the [wife's] obligation" as a tenant by the entirety to repay the entire debt that was secured by the Mansfield mortgage. East Boston Sav. Bank v. Ogan, 428 Mass. 327, 330 (1998), quoting Restatement (Third) of Property (Mortgages) § 7.6(a) (1997). There is no dispute that WaMu paid to discharge the Mansfield mortgage and that the wife has not repaid any of that debt. In recognition of these facts, and to avoid a windfall to the wife, the subrogation judgment placed 21st Mortgage in a priority position to receive from any foreclosure sale the \$148,133.84 paid on the wife's behalf. See Ogan, supra at 329 n.3 ("subrogation is allowed only to the extent necessary to avoid unjust enrichment"). Cf. Travelers Ins. Co. v. Graye, 358 Mass. 238, 240 (1970). We agree with the motion judge that nothing in the equitable subrogation judgment affected the amount of the underlying debt or how it was serviced. The subrogation judgment simply established the priority position of 21st Mortgage's security interest in the property. Accordingly, any dispute regarding the amount owed on

the underlying debt is not material to 21st Mortgage's superior right to possession of the property.

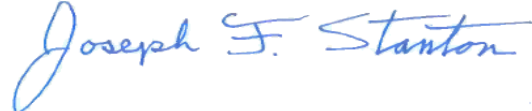
The wife's claim, that the husband's loan modification capitalizing \$6,831.20 in interest and escrow amounts due was void, fails for the same reason. In addition, the argument is waived because it was not timely raised. See R.W. Granger & Sons v. J&S Insulation, Inc., 435 Mass. 66, 79 (2001).

Accordingly, the judge did not abuse her discretion in denying the wife's motion under Mass. R. Civ. P. 59 (e). See R.W. Granger & Sons, supra (motion under rule 59 [e] is "addressed to the judge's discretion").

Judgment affirmed.

Orders denying motions for
postjudgment relief
affirmed.

By the Court (Meade, Kinder &
Hand, JJ.⁸),



Clerk

Entered: October 6, 2020.

⁸ The panelists are listed in order of seniority.