

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2579CV00429

HAMPDEN COUNTY
SUPERIOR COURT
FILED

JAN 16 2026

ANTHONY M. BONAVIDA, JR. and another¹

vs.

SELENE FINANCE, LP and another²

J. Annacchino
CLERK OF COURTS

MEMORANDUM OF DECISION
AND ORDER ON DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Plaintiffs, Anthony M. Bonavita, Jr. and Laurie S. Bonavita, seek declaratory and injunctive relief and damages in connection with the foreclosure and sale of their home by the defendants, Selene Finance, LP and U.S. Bank National Trust Association, not in its individual capacity but solely as owner trustee for Legacy Mortgage Asset Trust 2021-GS4, after default by Plaintiffs under a mortgage secured by real property located at 24 Camelot Lane in Westfield (the "subject property"). Plaintiffs claim that the notice of default and right to cure provided by Defendants failed to strictly comply with paragraph 22 of the mortgage. Before the court is Defendants' motion to dismiss Plaintiffs' complaint under Mass. R. Civ. P. 12(b)(6). After review of the parties' submissions and oral argument, Defendants' motion to dismiss is **DENIED** in part and **ALLOWED** in part.

FACTUAL ALLEGATIONS

The following factual allegations, assumed to be true for purposes of deciding the motion to dismiss, are taken from the complaint and documents relied upon in framing it. See Iannacchino

¹ Laurie S. Bonavita.

² U.S. Bank National Trust Association, not in its individual capacity but solely as owner trustee for Legacy Mortgage Asset Trust 2021-GS4.

v. Ford Motor Co., 451 Mass. 623, 636, 625 n.7 (2008); Marram v. Kobrick Offshore Fund, Ltd., 442 Mass. 43, 45 n.4 (2004). On November 16, 2001, Plaintiffs granted a mortgage, secured by the subject property (the “Bonavita Mortgage”). Paragraph 22 of the Bonavita Mortgage states, in pertinent part:

“22. Acceleration; Remedies. Lender shall give notice to Borrower prior to acceleration following Borrower’s breach of any covenant or agreement in this Security Instrument. . . The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date not less than 30 days from the date the notice is given to Borrower, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the Property. The notice shall further inform Borrower of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of Borrower to acceleration and sale.”

Bonavita Mortgage, ¶ 22.

On April 4, 2023, Defendants filed a complaint in the Massachusetts Land Court pursuant to the Servicemembers Relief Act together with a default/right to cure notice dated August 11, 2022. At some time between August 11, 2022, and March 1, 2024, Plaintiffs cured the default. On December 24, 2024, Defendants filed a complaint in the Massachusetts Land Court pursuant to the Servicemembers Relief Act attaching a default/right to cure notice dated April 8, 2024 (the “Notice”). On or about July 7, 2024, the mortgage was accelerated and, on or about June 3, 2023, Defendants foreclosed the Bonavita Mortgage and conducted a foreclosure sale of the subject property.

DISCUSSION

I. Standard of Review.

In considering a motion to dismiss under rule 12(b)(6), this court accepts as true the facts alleged in the complaint as well as any favorable inferences that reasonably can be drawn from them. See Lanier v. President and Fellows of Harvard College, 490 Mass. 37, 43 (2022). Factual

allegations are sufficient to survive a motion to dismiss under rule 12(b)(6) if they “plausibly suggest” and are “not merely consistent with” an entitlement to relief. See Iannacchino, 451 Mass. at 636, quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007). “While a complaint attacked by a ... motion to dismiss does not need detailed factual allegations ... a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions...” (quotation omitted). Id., quoting Bell Atl. Corp., 550 U.S. at 545. If a defendant’s entitlement to an affirmative defense is evident from the allegations of the complaint alone, the issue may be decided by means of a motion to dismiss. See Fleming v. National Union Fire Ins. Co., 445 Mass. 381, 389-390 (2005), quoting Gutierrez v. Massachusetts Bay Transp. Auth., 437 Mass. 396, 404 (2002); Ryan v. Holie Donut, Inc., 82 Mass. App. Ct. 633, 635 (2012) (“the presence of allegations or information constituting a conclusive affirmative defense can spell the demise of a complaint”).

II. Analysis.

“Once a borrower has defaulted on a mortgage, G.L. c. 183, § 21, authorizes the mortgagee to foreclose and sell the premises, provided it ‘first compl[ies] with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of the power of sale.’” Federal National Mortgage Association v. Marroquin, 477 Mass. 82, 89 (2017), quoting Pinti v. Emigrant, 472 Mass. 226, 232 (2015), quoting G.L. c. 183, § 21. “[T]he terms of the mortgage with which strict compliance is required – both as a matter of common law under [the Supreme Judicial Court]’s decisions and under § 21 – include not only the provisions in paragraph 22 relating to the foreclosure sale itself, but also the provisions requiring and prescribing the preforeclosure notice of default” (quotation omitted). Pinti, 472 Mass. at 236. “Massachusetts law under Pinti, 472 Mass. at 235, 240, requires that any notice given pursuant to paragraph 22 of

the GSE Uniform Mortgage, . . . must be accurate and not deceptive.” Thompson v. JPMorgan Chase Bank, N.A., 486 Mass. 286, 293 (2020) (Thompson III). Massachusetts “adhere[s] to the familiar rule that one who sells under a power [of sale] must follow strictly its terms; the failure to do so results in no valid execution of the power, and the sale is wholly void” (quotations omitted). Pinti, 472 Mass. at 232-233, quoting U.S. National Bank Ass’n v. Ibanez, 458 Mass. 637, 646 (2011), quoting Moore v. Dick, 187 Mass. 207 211 (1905).

Plaintiffs claim that Defendants were not authorized to foreclose and sell the subject property because the Notice failed to strictly comply with paragraph 22 of the Mortgage by:

- (1) Stating, on the second page of the Notice, in the fourth bullet point: “you can still avoid foreclosure by paying the total past due amount before a foreclosure sale takes place”;
- (2) Stating, on the third page, “Failure to cure the default on or before the date specified may result in acceleration of the sums secured by the Security Instrument sale of the property and/or foreclosure by judicial proceeding and sale of the property” (emphasis added); and
- (3) Stating, on page one, that Plaintiffs could cure “on or before 07/07/2024, which is 90 days from the date of this notice” (emphasis added).

Defendants argue that the complaint fails to state a claim upon which relief may be granted because the language of the Notice strictly complied with paragraph 22 of the Mortgage. The court will examine each allegedly noncompliant portion of the Notice to determine whether Plaintiffs have stated a claim upon which relief may be granted.

A. Whether the Notice language — “*you can still avoid foreclosure by paying the total past due amount before a foreclosure sale takes place*” — strictly complied with paragraph 22 of the Mortgage.

Paragraph 22 of the Mortgage states that the notice required by the paragraph “shall . . . inform the Borrower of the right to reinstate after acceleration.” Mortgage, ¶ 22. Paragraph 19 of the Mortgage specifies the time period during which a borrower may reinstate. See Mortgage, ¶ 19; Thompson, 486 Mass. at 293. Paragraph 19 states: “If Borrower meets certain conditions,

Borrower shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the Property pursuant to any power of sale contained in this Security Instrument . . .” The Mortgage thus provided that Plaintiffs had only until “five days before sale of the Property” to reinstate the Mortgage, whereas the Notice stated that Plaintiffs could reinstate at any time before the foreclosure sale took place.³

Defendants argue that the Notice was not inaccurate because paragraph 12 of the Mortgage allowed Defendants to extend the deadline for the reinstatement payment. See Thompson, 486 Mass. at 293 (“paragraph 12 of the plaintiffs’ mortgage gives [mortgagee] the contractual ability to extend the deadline for payment”). They further argue that, had Plaintiffs tendered payment within five days of the date of foreclosure sale, Defendants would have been required to accept it, with the effect that the Notice here, like that in Thompson III, was not inaccurate or deceptive. See id. at 294 (holding that notice stating that homeowners could “still avoid foreclosure by paying the total past-due amount before a foreclosure sale takes place” was not inaccurate or deceptive because mortgagee “not only had a contractual option to accept a reinstatement payment at any point prior to foreclosure, but also was required to do so”). Plaintiffs contend, on the other hand, that had they tendered payment within five days of the foreclosure sale, Defendants could have refused to accept the payment, as the First Circuit, in Thompson v. JPMorgan Chase Bank, N.A.,

³ The parties agree that the holding in Thompson III does not apply here. In Thompson III, the Supreme Judicial Court concluded that an identical statement in a notice strictly complied with paragraph 22 of the plaintiffs’ mortgage because the plaintiffs in that case were entitled to a notice under G.L. c. 244, § 35A, “specifying that, even after acceleration, homeowners have a legal right to ‘avoid foreclosure by paying the total past due amount before a foreclosure sale takes place.’” Thompson, 486 Mass. at 294, quoting 209 Code Mass. Regs. § 56.04. Because the plaintiffs were entitled to a § 35A notice, the mortgagee “was required to” “accept a reinstatement payment at any point prior to foreclosure” and the notice was, therefore, accurate. Thompson, 488 Mass. at 294. Here, Plaintiffs were not entitled to a § 35A notice because they previously cured a default within five years of the Notice. See G.L. c. 244, § 35A(a) (“The right to cure a default of a required payment shall be granted once during any 5-year period, regardless of the mortgage holder”); Carini v. Bristol County Savings Bank, 103 Mass. App. Ct. 904, 906 (2024), quoting Bank of NY Mellon v. Morin, 96 Mass. App. Ct. 503, 508 (2019) (“Where, as here, borrowers have already received a § 35A notice and right to cure within the specified time frame, they are ‘not entitled to another § 35A notice and right to cure’ within the same period”).

915 F.3d 801 (2019) (Thompson I) opined that the mortgagee could have done, rendering the notice inaccurate and deceptive. The parties have not briefed the issue of whether Defendants would have been required to accept a reinstatement payment within 5 days of the foreclosure and the court does not reach it. Defendants' motion to dismiss the complaint is denied to the extent it alleges that the statement on the second page of the Notice, in the fourth bullet point that "you can still avoid foreclosure by paying the total past due amount before a foreclosure sale takes place" failed to strictly comply with paragraph 22 of the Mortgage, without prejudice to a subsequent motion by Defendants, if any, establishing that Defendants would have been required to accept a reinstatement payment tendered within 5 days of the foreclosure.

B. Whether the Notice language — *"Failure to cure the default on or before the date specified may result in acceleration of the sums secured by the Security Instrument sale of the property and/or foreclosure by judicial proceeding and sale of the property"* (emphasis added) — strictly complied with paragraph 22 of the mortgage.

Relying on Aubee v. Selene Finance LP, 56 F.4th 1 (2022) (1st Cir. 2022) (applying Rhode Island law), Plaintiffs claim that the language "and/or foreclosure by judicial proceeding" is deceptive in that it could lull a mortgagor into waiting to assert the non-existence of a default until the mortgagee institutes a judicial proceeding, which the mortgagee may or may not do since Massachusetts (as does Rhode Island) allows non-judicial foreclosures. Thus, a mortgagor might wait to assert its defense for a judicial proceeding that never occurs. See id. at 7-8. The language in the Notice, however, is not the same as the language found to be deceptive in Aubee. In that case, before the language required by paragraph 22 -- that the mortgagor had "the right to bring a court action to assert the non-existence of a default or any other defense to acceleration" -- the mortgagee added that the mortgagor had "the right to assert in the foreclosure proceeding the non-

existence of a default as required and/or” (emphasis added). The resulting notice read, with portions not required by paragraph 22 underlined:

“You have the right to reinstate after acceleration and the right to assert in the foreclosure proceeding the non-existence of a default and/or the right to bring a court action to assert the non-existence of a default or any other defense to acceleration, foreclosure and/or sale of the property.”

Id. at 3. The First Circuit concluded that the added language was deceptive because it could be read as stating that there would be a proceeding in which the mortgagor could assert the non-existence of a default even if the mortgagor did not bring a court action. *Id.* at 8. Here, the use of “and/or” did not imply that there would be a judicial proceeding even if the mortgagors did not bring one. Rather, it indicated that the mortgagees could: (1) institute non-judicial foreclosure and institute judicial foreclosure; (2) institute non-judicial foreclosure but not institute judicial foreclosure; or (3) not institute non-judicial foreclosure but institute judicial foreclosure. Further, the Notice states further down, unequivocally, in compliance with paragraph 22, “You have the right to bring a court action to assert the non-existence of a default or any other defense to acceleration and sale of the property.” Accordingly, to the extent the complaint alleges that the Notice fails to strictly comply with paragraph 22 of the Mortgage by stating, on the third page, that “Failure to cure the default on or before the date specified may result in acceleration of the sums secured by the Security Instrument sale of the property and/or foreclosure by judicial proceeding and sale of the property[.]” it fails to state a claim upon which relief may be granted.

C. Whether Notice language — “*You must pay the past due amount of \$5,537.52 on or before 07/07/2024, which is 90 days from the date of this notice*” (emphasis added) — strictly complied with paragraph 22 of the Mortgage.

Paragraph 22(c) states: “The notice shall specify: . . . (c) a date not less than 30 days from the date the notice is given to Borrower, by which the default must be cured . . .” Paragraph 15 states: “Any notice to Borrower in connection with this Security Instrument shall be deemed to

have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." The Notice was sent by First Class mail (see Notice, p. 1) on April 10, 2024. See USPS Tracking, attached as part of Exhibit 2 to Defendants' Memorandum in Support of Their Motion to Dismiss the Complaint. According to ¶ 15, then, the Notice was "given" to Plaintiffs on April 10, 2024. In compliance with paragraph 22, the Notice specifies July 7, 2024 (thirty or more days after April 10, 2024) as the date by which the Borrower may cure the default.

Plaintiffs argue that, although July 7, 2024, is not less than 30 days from April 10, 2024 (the date the Notice was "given" to Plaintiffs), the statement that "You must pay the past due amount of \$5,537.52 on or before 07/07/2024, which is 90 days from the date of this notice" (emphasis added), is deceptive because July 7, 2024, is not 90 days from April 10, 2024 (the date the notice was "given" to Plaintiffs). The court does not agree that this language renders the notice inaccurate or deceptive. In compliance with paragraph 22, the Notice sets a date more than 30 days from the date the Notice was given by which Plaintiffs may reinstate the Mortgage. Further, as the Notice was dated April 8, 2024, it was not inaccurate to state that July 7, 2024 would be "90 days from the date of this notice." Accordingly, to the extent complaint alleges that the Notice failed to strictly comply with paragraph 22 of the Mortgage by stating, on page 1 that "You must pay the past due amount of \$5,537.52 on or before 07/07/2024, which is 90 days from the date of this notice" (emphasis added), it fails to state a claim upon which relief may be granted.

ORDER

For the foregoing reasons, Defendants' Motion to Dismiss the Complaint (#5) is **DENIED** in part and **ALLOWED** in part as set forth above.

Amy L. Karangekis
Amy L. Karangekis
Justice of the Superior Court

DATE: January 15, 2026