19-P-1126 Appeals Court

HSBC BANK USA, N.A., trustee,[1] vs. TOMMY L. MORRIS & another.[2]

No. 19-P-1126.

Plymouth. October 29, 2020. - April 7, 2021.

Present: Vuono, Sullivan, & Englander, JJ.

Summary Process. Mortgage, Foreclosure. Massachusetts Predatory Home Loan Practices Act. Practice, Civil, Summary process, Counterclaim and cross-claim, Statute of limitations. Limitations, Statute of.

Summary Process. Complaint filed in the Southeast Division of the Housing Court Department dated October 9, 2017.

After transfer to the Plymouth County Division of the Housing Court Department, the case was heard by Diana H. Horan, J., on a motion for summary judgment.

Tommy L. Morris, pro se (Mary L. Morris, pro se, also present).
Christopher J. Williamson for the plaintiff.

[1] Of the Fremont Home Loan Trust 2005-E, Mortgage Backed Certificates, Series 2005-E.

[2] Mary L. Morris.

VUONO, J. The defendants, Tommy L. and Mary L. Morris (Morrises), appeal from a summary judgment entered in favor of the plaintiff, HSBC Bank USA, N.A., as trustee of the Fremont Home Loan Trust 2005-E, Mortgage Backed Certificates, Series 2005-E (HSBC), in a summary process eviction action brought by HSBC following a foreclosure sale. The Morrises raise a variety of arguments with respect to the predatory nature of the mortgage loan and with respect to the foreclosure proceedings.[3] The primary issue we address concerns the Morrises' allegation that HSBC violated G. L. c. 183C, the Predatory Home Loan Practices Act (PHLPA or act), which the Morrises' answer designated as a defense. We conclude that, in the circumstances presented here, the alleged violation of the PHLPA should have been pleaded as a counterclaim, not a defense, but that, regardless, the Morrises could not assert a violation of the PHLPA in response to this postforeclosure summary process action. We further conclude that there were no errors in the foreclosure proceedings. Consequently, we affirm the judgment

[3] In their answer to the complaint and their opposition to HSBC's motion for summary judgment, the Morrises also argued that their eviction would violate a Brockton ordinance that prohibits postforeclosure evictions, except for just cause, unless a binding purchase and sale agreement has been executed for a bona fide third party. However, they did not raise this argument in their principal brief. Therefore, this issue is waived. See Boxford v. Massachusetts Highway Dep't, 458 Mass. 596, 605 n.21 (2010).

but do so on grounds different in some respects from those relied on by the motion judge.

Background. We summarize the undisputed facts in the summary judgment record.[4] On October 27, 2005, the Morrises purchased a home with the proceeds from two loans obtained from Fremont Investment & Loan (Fremont). This matter concerns the primary loan, which was an interest-only loan for the first two years, at which point it turned into an adjustable rate loan. By September 2008, the Morrises' monthly payments on the loan had increased substantially, and they realized that they could no longer afford the loan. On the advice of counsel, the Morrises stopped making payments. The loan was secured by a mortgage that named Mortgage Electronic Registration Systems, Inc., as the lender, "acting solely as a nominee for Lender and Lender's successors and assigns." The mortgage was subsequently assigned to HSBC.

Meanwhile, in 2007, the Massachusetts Attorney General brought a lawsuit against Fremont claiming that Fremont engaged in unfair or deceptive acts or practices in originating and servicing certain home mortgage loans between 2004 and 2007.

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[4] "Summary judgment is appropriate where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law." Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 332 (2016). "We review a decision on a motion for summary judgment de novo." Id.

See Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 734-735 (2008). Some of the Attorney General's allegations pertained to adjustable rate loans -- the very type of loan held by the Morrises -- and the "payment shock" that resulted when borrowers' low introductory monthly payments began to increase. Id. at 740 n.14. In 2009, Fremont agreed to pay ten million dollars to settle the lawsuit. It appears that the Morrises received a check for approximately $2,000 from the Attorney General's office as part of the Fremont settlement.

In the years that followed, the Morrises remained in default on the loan, and HSBC ultimately began taking steps to foreclose the mortgage. On or about April 15, 2016, the Morrises' loan servicer sent the Morrises a right to cure letter, which was followed more than ninety days later by an acceleration notice. See G. L. c. 244, § 35A. The notice stated that the "[m]ortgage [l]oan," which was defined as both the note and the mortgage, had been accelerated. HSBC then filed a complaint to determine the military status of the Morrises pursuant to the Servicemembers Civil Relief Act. See 50 U.S.C. §§ 3901 et seq. On or about June 20, 2017, HSBC sent the Morrises a notice of the foreclosure sale. See G. L. c. 244, § 14. On July 21, 2017, a foreclosure sale was held, and HSBC purchased the property. On September 18, 2017, the Morrises were served with a notice to quit, but they continued

to occupy the property. HSBC then filed this summary process eviction action followed by a motion for summary judgment, which was granted after a hearing by a judge of the Housing Court. The Morrises appealed from the judgment.

Discussion. 1. Predatory Home Loan Practices Act. The PHLPA was enacted in 2004 as a comprehensive measure to target trends associated with predatory lending. See A. Lambiaso, Comprehensive Bill Targeting Predatory Lending Gains Momentum, State House News Service, Mar. 15, 2004. See also St. 2004, c. 268, § 6. The PHLPA prohibits lenders from making "'high-cost home mortgage loan[s]' unless certain statutory criteria are met." Drakopoulos v. U.S. Bank Nat'l Ass'n, 465 Mass. 775, 782-783 & n.13 (2013), quoting G. L. c. 183C, §§ 3, 4. A "[h]igh cost home mortgage loan" is defined as "a consumer credit transaction that is secured by the borrower's principal dwelling, other than a reverse mortgage transaction, a home mortgage loan" that has an annual percentage rate or points and fees that exceed specified limits.[5] G. L. c. 183C, § 2.

[5] A home mortgage loan is a high-cost home mortgage loan if (1) the "annual percentage rate at consummation will exceed by more than [eight] percentage points for first-lien loans, or by more than [nine] percentage points for subordinate-lien loans, the yield on United States Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the extension of credit is received by the lender; and when calculating the annual percentage rate for adjustable rate loans, the lender shall use the interest rate

In keeping with the purpose of the act, the PHLPA contains a number of provisions to protect borrowers, including a private right of action that allows a borrower to "bring a civil action for injunctive relief or damages in a court of competent jurisdiction for any violation of [the PHLPA]." G. L. c. 183C, § 18 (b). The PHLPA also allows a borrower, acting in an individual capacity, to "assert claims that the borrower could assert against a lender of the home loan against any subsequent holder or assignee of the home loan" in two circumstances. G. L. c. 183C, § 15 (b). First, under § 15 (b) (1), "[a] borrower may bring an original action for a violation of [the PHLPA] in connection with the loan within [five] years of the closing of a high-cost home mortgage loan." Second, under § 15 (b) (2), a borrower may assert violations of the PHLPA defensively, as follows: "[a] borrower may, at any time during the term of a high-cost home mortgage loan, employ any defense, claim, counterclaim, including a claim for a violation of [the PHLPA], after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or

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that would be effective once the introductory rate has expired" or (2) "[e]xcluding either a conventional prepayment penalty or up to [two] bona fide discount points, the total points and fees exceed the greater of [five] per cent of the total loan amount or $400; the $400 figure shall be adjusted annually by the commissioner of banks on January 1 by the annual percentage change in the Consumer Price Index that was reported on the preceding June 1." G. L. c. 183C, § 2.

the debt arising from the home loan has been accelerated or the home loan has become [sixty] days in default, or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan."

The question raised here is whether the Morrises' counterclaim that HSBC violated the PHLPA was timely.[6] The answer to this question does not depend on the merits of the counterclaim.[7] Rather, the answer depends on how we interpret the act's limitations.

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[6] On appeal, HSBC also argues that summary judgment properly entered because the Morrises failed to allege any facts in support of the conclusion that the loan was a high-cost home mortgage loan. Although we do not answer this question, we note that while the Morrises' answer designated violation of the PHLPA as a defense, here the alleged violation of the PHLPA is more properly treated as a counterclaim, as it is an independent cause of action. We thus treat it as a counterclaim. See Mass. R. Civ. P. 8 (c), 365 Mass. 749 (1974) (allowing court to treat improperly designated defense as counterclaim, if justice requires). Viewed as a counterclaim, HSBC would have borne the burden of demonstrating that the Morrises had no reasonable expectation of proving violation of the PHLPA. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991) (describing standard that applies when party moves for summary judgment on claim on which other party bears burden of proof at trial). In any event, where we affirm on alternative grounds, we need not resolve the procedural issues raised by the manner in which the PHLPA claim was pleaded.

[7] Although we cannot determine from the record before us whether the Morrises' loans qualified as "high-cost home mortgage loans" as defined by the act, the loans were certainly suspect. The problems with loans obtained from Fremont are well documented. See Fremont Inv. & Loan, 452 Mass. at 734-735.

As with any question of statutory interpretation, we look first to the language of the act. See City Elec. Supply Co. v. Arch Ins. Co., 481 Mass. 784, 788 (2019). HSBC maintains, as it did below, that it is entitled to judgment as a matter of law because more than five years had passed between the time the Morrises closed on the loan and the time they brought their counterclaim for violation of the PHLPA and, therefore, the five-year statute of limitations in § 15 (b) (1) bars their counterclaim. But the Morrises did not allege violation of the PHLPA under § 15 (b) (1); they alleged violation of the PHLPA defensively under § 15 (b) (2) in response to an action brought by HSBC. Section 15 (b) (2), unlike § 15 (b) (1), does not contain a five-year statute of limitations. Because we will not read words into a statute that are not there, we conclude that summary judgment could not have been allowed on the basis that the Morrises' claim was barred by a five-year statute of limitations. See Anderson St. Assocs. v. Boston, 442 Mass. 812, 817 (2004) (rejecting argument that would have required court to read words into statute that were not there).

However, while the five-year statute of limitations in § 15 (b) (1) does not apply to the Morrises' counterclaim brought under § 15 (b) (2), the latter section contains a different limitation that renders the Morrises' counterclaim untimely. Section 15 (b) (2) provides that a borrower may

employ a defense, claim, or counterclaim "during the term of a high-cost home mortgage loan" (emphasis added). A foreclosure sale, however, following acceleration of the note and the mortgage, concludes the term of a mortgage loan. The property is sold and the mortgage is extinguished, as is the equity of redemption. See Bevilacqua v. Rodriguez, 460 Mass. 762, 775 (2011); Gold Star Homes, LLC v. Darbouze, 89 Mass. App. Ct. 374, 382 (2016). See also Santiago v. Alba Mgt., Inc., 77 Mass. App. Ct. 46, 51 (2010). Once a foreclosure sale occurs, the proceeds from the sale are used to satisfy the debt, and any deficiency may be collected through a deficiency action, assuming preforeclosure notice was provided to the borrower. See G. L. c. 244, § 17B. The Morrises' counterclaim, which was brought after the foreclosure sale, was not brought during the term of the mortgage loan and was thus untimely.[8]

[8] We have looked to other States -- Illinois, 815 Ill. Comp. Stat. § 137/135, Indiana, Ind. Code § 24-9-5-1, New Jersey, N.J. Stat. Ann. § 46:10B-27, New Mexico, N.M. Stat. Ann. § 58-21A-11, and Rhode Island, R.I. Gen. Laws § 34-25.2-7 -- that have similar statutes, which include provisions that allow borrowers to bring defenses, claims, and counterclaims "during the term" of the loan. With one exception, it does not appear that courts in those States have yet addressed whether, pursuant to those provisions, borrowers may bring defenses, claims, and counterclaims during postforeclosure summary process eviction actions. In one case, Lutzky vs. Deutsche Bank Nat'l Trust Co., U.S. Dist. Ct., No. 09-03886 (D.N.J. Jan. 27, 2009), a United States District Court judge addressed almost identical language in New Jersey's Home Ownership Security Act and concluded that the plaintiffs' claim was not timely because they "failed to bring their claim any time during the term of the loan since the

Our conclusion that the words "during the term of a high-cost home mortgage loan" prevent the Morrises from asserting violation of the PHLPA in this postforeclosure summary process action is consistent with additional language in § 15 (b) (2) that sets forth the specific circumstances in which a borrower may employ a defense, claim, or counterclaim, as all of those circumstances occur prior to a foreclosure sale. See Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 496 (2011) ("When a statute lists elements in a series, the rules of statutory construction guide us to construe general phrases as restricted to elements similar to specific elements listed"). Those circumstances are as follows: "after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become [sixty] days in default, or in any action to enjoin foreclosure or preserve or

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loan was terminated with the foreclosure judgment . . . and the foreclosure sale." Lutzky is instructive, but not controlling. We note that, unlike Massachusetts, New Jersey is a judicial foreclosure State in which a borrower has the opportunity to raise claims and defenses when a lender seeks judicial authorization to foreclose. While the same mechanism does not exist in Massachusetts, a Massachusetts borrower may raise a PHLPA claim affirmatively, or to enjoin foreclosure, or as a defense to any other action (e.g., a suit on the note) brought while the note is in existence. Because borrowers in Massachusetts have ample opportunity to raise PHLPA claims preforeclosure, the distinction between judicial and nonjudicial foreclosure States is not a reason to interpret the limitation "during the term" of a loan in § 15 (b) (2) any differently.

obtain possession of the home that secures the loan." G. L. c. 183C, § 15 (b) (2). While, at first blush, the final phrase regarding any action "to preserve or obtain possession of the home that secures the loan" may seem to include postforeclosure summary process eviction actions, the concluding words make clear that the home must still secure the loan when the defense, claim, or counterclaim is raised. Because a foreclosed home no longer secures the underlying loan, the final phrase must refer to any defense, claim, or counterclaim employed when a lender is attempting to or has taken preforeclosure possession. See, e.g., G. L. c. 244, § 1 (lender may take preforeclosure possession by "open and peaceable entry," which borrower may then oppose). Where § 15 (b) (2) sets forth the specific circumstances in which a borrower may employ a defense, claim, or counterclaim -- and all of those circumstances occur prior to a foreclosure sale -- we conclude that the Legislature did not intend for § 15 (b) (2) to extend to postforeclosure summary process eviction actions.[9]

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[9] The Morrises raise other arguments with respect to the predatory nature of the loan, including unconscionability, fraud, unclean hands, and violation of G. L. c. 93A. The Morrises did not raise unconscionability, fraud, or unclean hands as affirmative defenses below, however, and those defenses are thus waived. While the Morrises did advance a counterclaim for violation of G. L. c. 93A, and in support of that counterclaim argued on summary judgment that the loan was "structurally unfair, unconscionable, and predatory" at origination, summary judgment in favor of HSBC on that

In reaching our conclusion, we have not ignored the broad remedial purposes of the PHLPA as our dissenting colleague suggests.[10] As we have noted, § 15 (b) (1) sets forth a statute of limitations (five years) that is one year longer than the four-year statute of limitations for violations of G. L. c. 93A. Section 15 (b) (2) further expands the time in which a borrower may assert violations of the PHLPA defensively, allowing a borrower to assert such violations during the term of, for example, a thirty-year mortgage, so long as the mortgage has not yet been foreclosed and the home still "secures the loan." This

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counterclaim was appropriate because G. L. c. 93A contains a four-year statute of limitations. By the time of this action in 2017, the four-year statute of limitations had run on the Morrises' c. 93A counterclaim, which arose out of acts that occurred at origination in 2005 and were known to the Morrises no later than sometime in 2008, when they received legal advice to stop paying the loan.

[10] Nor is our conclusion inconsistent with the Supreme Judicial Court's decision in Bank of Am., N.A. v. Rosa, 466 Mass. 613 (2013), as the dissent contends. In Rosa, the court held that former homeowner-borrowers may raise certain defenses and counterclaims that challenge the "title of a postforeclosure summary process plaintiff" as derived through a foreclosure sale, and that the "Housing Court has authority to award damages in conjunction with such counterclaims." Id. at 626. Nothing in Rosa, however, allows former homeowner-borrowers to raise defenses and counterclaims that would otherwise be untimely. As noted, supra, our discussion is limited to whether the Morrises' counterclaim for violation of the PHLPA was timely under § 15 (b) (2). We do not address whether violation of the PHLPA is substantively the type of claim that may be raised in a postforeclosure summary process action if raised timely under § 15 (b) (1).

is an especially strong consumer protection provision that has no corollary under G. L. c. 93A.[11] Nothing in our analysis affects these protections or conflicts with "the expressed intent of the Legislature to provide comprehensive protection to homeowners subject to predatory lending schemes."[12] See dissent post at .

2. Foreclosure proceedings. The Morrises also argue that HSBC did not establish (1) the right to foreclose or (2) a duly executed power of sale. See G. L. c. 239, § 1 (person entitled to land may recover possession thereof "if a mortgage of land has been foreclosed by a sale under a power therein contained"). The Morrises argue that, as a result of these purported deficiencies, HSBC lacked standing[13] and the court lacked subject matter jurisdiction over the summary process eviction action.

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[11] We therefore disagree with the dissent that our interpretation of the PHLPA creates an anomalous result between borrowers who have PHLPA claims and those who have G. L. c. 93A claims.

[12] In addition, we note that another provision in the PHLPA would often prevent borrowers from asserting a PHLPA violation in postforeclosure summary process actions regardless of the limitation in § 15 (b) (2) that a claim or defense must be brought during the term of the high-cost home mortgage loan. Although the PHLPA allows a borrower to assert violations of the act against a subsequent holder or assignee of the home loan, the act does not allow a borrower to assert violations of the act against a nonlender purchaser, i.e., a third party bona fide purchaser, who buys the property at a foreclosure sale.

[13] The Morrises alternatively argue that HSBC lacked standing because the entity known as "HSBC Bank USA, N.A., as

First, the Morrises contend that HSBC did not establish the right to foreclose where (1) HSBC never produced the original note and never established the chain of ownership of the note and (2) the assignment of the mortgage to HSBC purportedly failed to comply with a requirement in a pooling and servicing agreement that assignments occur by a certain date. Our case law, however, does not require a foreclosing lender to produce the original note or establish the chain of ownership of the note. See Sullivan v. Kondaur Capital Corp., 85 Mass. App. Ct. 202, 210 (2014) ("all that is required [with respect to the note] is that [the foreclosing lender] be able to demonstrate either that it holds the underlying note or acts as an authorized agent for the note holder"). Regarding the assignment of the mortgage to HSBC, a borrower's standing to challenge an assignment is limited to defects rending the assignment void, as opposed to voidable. See Bank of N.Y. Mellon Corp. v. Wain, 85 Mass. App. Ct. 498, 502 (2014). An assignment is void where the assignment does not comply with the

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trustee of Fremont Home Loan Trust 2005-E, Mortgage Backed Certificates, Series 2005-E," is an unregistered foreign corporation. This argument falters on the facts. HSBC Bank USA, N.A., and the Fremont Home Loan Trust 2005-E, Mortgage Backed Certificates, Series 2005-E, are two separate entities, although the former is the trustee of the latter. Where the Morrises do not argue that HSBC Bank USA, N.A., is an unregistered foreign corporation or that there was anything improper about it bringing this summary process eviction action as trustee, we do not address the argument further.

requirements of G. L. c. 183, § 54B, but an assignment is merely voidable where there was a latent defect in the assignment process. See Giannasca v. Deutsche Bank Nat'l Trust Co., 95 Mass. App. Ct. 775, 778 (2019); Bank of N.Y. Mellon Corp., supra. Here, the Morrises do not argue that the assignment failed to comply with the requirements of G. L. c. 183, § 54B. Instead, they argue the sort of latent defect that would, at most, render the assignment voidable. See Bank of N.Y. Mellon Corp., supra. Any such defect is a matter between the assignor and the assignee; the Morrises do not have standing to challenge it. See id.

Second, the Morrises argue that HSBC did not establish a duly executed power of sale. The Morrises contend that the affidavit of sale submitted by HSBC was deficient because it did not state the affiant's basis of knowledge regarding the auction sale. The affidavit of sale, however, largely tracked the model statutory form contained in G. L. c. 183, Appendix Form 12. As we previously have noted, "[t]he statutory form 'shall be sufficient,' even if it is altered to suit the particular circumstances." Deutsche Bank Nat'l Trust Co. v. Gabriel, 81 Mass. App. Ct. 564, 568 (2012), quoting G. L. c. 183, § 8. Here, the alterations regarding the auction sale were not materially different from those used in Gabriel, supra at 569 n.15. Accordingly, the affidavit was sufficient.

Judgment affirmed.

ENGLANDER, J. (concurring). I fully agree with and join the majority opinion, which persuasively sets forth why, under the plain language of § 15 (b) (2) of G. L. c. 183C, the Predatory Home Loan Practices Act (PHLPA or statute), the Morrises' claims may not be asserted postforeclosure. I write separately to make three additional points.

First, the dissent's emphasis on the purported "intent" of the PHLPA, including its "comprehensive protection[s]," post at , and "robust remedies," post at , is not particularly helpful to deciding the question before us, which, as the majority points out, is merely a question of when a borrower may assert those PHLPA rights. The statute answers that question in plain language -- within five years of the loan closing for affirmative claims, and at any time "during the term of [the] . . . mortgage loan," when raised as a defense or counterclaim against the lender or any subsequent holder or assignee. G. L. c. 183C, § 15 (b) (1), (2). See Worcester v. College Hill Props., LLC, 465 Mass. 134, 138 (2013) ("Where the language of a statute is clear and unambiguous, it is conclusive as to legislative intent" [citation omitted]). The statute thus provides for a borrower to assert a PHLPA claim for many years after a loan is made -- for decades, potentially, as the facts of this case indicate. The dissent's suggestion that we have "drastically limit[ed]," post at , the PHLPA's available

remedies by holding that the remedies are not also available postforeclosure is, I suggest, manifestly overstated.[1]

Second, the dissent is incorrect in relying on Bank of Am., N.A. v. Rosa, 466 Mass. 613 (2013) (Rosa), to suggest that a variety of defenses are generally available to a postforeclosure defendant. The only defenses that Rosa allows postforeclosure are those that "challenge the title" of a postforeclosure summary process plaintiff, id. at 626; Rosa quite clearly does not allow the assertion of any and all claims that the former borrower may have had against the lender.[2] The PHLPA defenses and counterclaims do not challenge the title of the foreclosing entity, and in fact claims under § 15 (b) of the statute are expressly limited to monetary relief -- "to amounts required to reduce or extinguish the borrower's liability under the high-

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[1] Nothing herein should be taken as defending the loan itself, which was a one hundred percent loan to value loan broken into two parts, presumably for secondary market purposes. The Morrises put in no equity, and it is not difficult to believe that they were misled by Fremont back in 2006. That, however, is not the question before us.

[2] The dissent purports to list several defenses that are available to a defendant in a postforeclosure summary process action -- for example, "certain G. L. c. 93A claims," post at -- but the list is misleading. Rosa makes clear that such defenses are only available to the extent they challenge the plaintiff's title. See, e.g., Rosa, 466 Mass. at 625 ("If the c. 93A claim is grounded in the validity of the title of the summary process plaintiff, a fundamental aspect of its right to possession, . . . the claim would fall within the limited jurisdiction of the housing court").

cost home mortgage loan plus amounts required to recover costs, including reasonable attorneys' fees." G. L. c. 183C, § 15 (b).[3]

Third, there is very little to commend the dissent's position as a matter of policy. Foreclosure is a point in time where the outcome, for property rights purposes, should provide a measure of finality and certainty. The ownership of the property is established, and the equity of redemption extinguished. Actions to recover possession thereafter should be streamlined, with the exception noted of defenses that challenge the foreclosing entity's title, and allowing PHLPA claims to be asserted thereafter will unnecessarily muddy those waters and introduce additional delay. Where there is ample opportunity to assert PHLPA claims in advance of foreclosure, it is difficult to see what public policy would be furthered by allowing a borrower to wait to assert them until afterwards.

For these reasons as well, I join and concur with the majority opinion.

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[3] The dissent takes issue with this statement of law, but the dissent is incorrect. A § 15 (b) defense or counterclaim raised before foreclosure could, at least in theory, eliminate the borrower's debt. But once a foreclosure occurs the borrower's property right -- the equity of redemption -- is extinguished. See Housman v. LBM Fin., LLC, 80 Mass. App. Ct. 213, 220 (2011). The plain language of § 15 (b), which limits its remedy to monetary relief, does not allow a remedy that could somehow restore that property right, postforeclosure.

SULLIVAN, J. (dissenting). I agree with the majority's well-reasoned opinion, save its conclusion that predatory loan claims and defenses may not be raised in a postforeclosure summary process action. I therefore respectfully dissent.

The Predatory Home Loan Practices Act (PHLPA or act), G. L. c. 183C, provides that a borrower may, "at any time during the term of a high-cost home mortgage loan, employ any defense, claim, counterclaim, including a claim for a violation of this chapter, after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become [sixty] days in default, or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan" (emphasis added). G. L. c. 183C, § 15 (b) (2) (§ 15 [b] [2]). The majority reads the emphasized portions of the act to mean that a predatory loan defense may only be raised while the loan is in effect, because the loan is terminated once foreclosure has taken place. I disagree for three reasons.

1. Statutory construction. First, as a matter of statutory construction, the language of the act as a whole reflects the expressed intent of the Legislature to provide comprehensive protection to homeowners subject to predatory lending schemes. The Legislature did so by providing strong and

effective remedies as a deterrent measure, including providing the full array of claims and defenses to homeowners in postforeclosure summary process proceedings.

"[A] statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated" (quotations and citation omitted). Worcester v. College Hill Props., LLC, 465 Mass. 134, 139 (2013). The PHLPA defines high-cost loans, requires a lender to have a reasonable belief that the borrower has the ability to repay the loan, limits fees and prepayment penalties, and as is most pertinent here, increases the penalties and provides additional remedies for violations of the act. Among these are a private right of action for homeowners, G. L. c. 93A liability for violations of the act, and a panoply of equitable remedies, including reformation or rescission of the loan, an order barring the lender from collecting on the loan, and other injunctive relief, all designed to discourage and prevent predatory lending. See G. L. c. 183C, § 18.[1]

[1] To be specific, in addition to a private right of action and remedies under G. L. c. 93A, the act also accords

The majority's construction of § 15 (b) (2), placing exclusive emphasis on the words "during the term," fails to give due regard to "all [the] words" of the act. Worcester, 465 Mass. at 139, quoting Harvard Crimson, Inc. v. President & Fellows of Harvard College, 445 Mass. 745, 749 (2006) ("Courts must ascertain the intent of a statute from all its parts and from the subject matter to which it relates, and must interpret the statute so as to render the legislation effective, consonant with sound reason and common sense"). Interpreting the words "during the term" to apply only to preforeclosure litigation reads out of § 15 (b) (2) the language permitting the assertion

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significant regulatory authority to the Division of Banks, and contains strong equitable remedies, including the right to an injunction rescinding the home mortgage loan or barring the lender from collecting under the loan, an injunction to bar "other lender action under the mortgage or deed of trust securing any home mortgage loan," "an order or injunction reforming the terms of the home mortgage loan to conform to [the act]," "an order or injunction enjoining a lender from engaging in any prohibited conduct," and any other relief "as the court may consider just and equitable." G. L. c. 183C, §§ 18, 19.

The majority posits that the deterrent purpose of the PHLPA is served by the fact that it extends the statute of limitations under G. L. c. 93A to the maximum term of the loan so long as foreclosure has not taken place. I express no opinion as to when the statute of limitations begins to accrue in a c. 93A action brought in conjunction with a PHLPA claim. However, the most powerful remedy granted by the PHLPA is not necessarily c. 93A, but the ability to reform or rescind the loan under § 15 (b) or § 18, and to award money damages sufficient to establish the borrower's right to possession and to defeat the lender's claim to title after a nonjudicial foreclosure. See note 4, infra. It is those remedies that preserve the homeowner's right to remain in the home.

of claims, counterclaims, and defenses "in any action to . . . obtain possession of the home that secures the loan."[2] See Tyler v. Michaels Stores, Inc., 464 Mass. 492, 495 (2013) ("the actual words chosen by the Legislature are critical to the task of statutory interpretation"). The home does not lose its character as the collateral that secures the loan after foreclosure has taken place. The words "any action" and "obtain possession" should be read to mean that predatory loan counterclaims and defenses are available in a postforeclosure summary process action, because the lender has no right to possession until the foreclosure sale is deemed lawful, and the lender's right to possession also has been established.

Moreover, there is no discernable basis in the act for so drastically limiting the defenses and counterclaims of those who have been the victims of predatory lending schemes, while all other homeowners are permitted to assert counterclaims and defenses challenging the lender's title and right to possession in a postforeclosure summary process action. See Federal Nat'l

[2] This language may as easily be read to refer to the original term of the loan as set forth in the note. Alternatively, "[i]f a liberal, even if not literally exact, interpretation of certain words is necessary to accomplish the purpose indicated by the words as a whole, such interpretation is to be adopted rather than one which will defeat that purpose" (citation omitted). Sullivan v. Chief Justice for Admin. & Mgt. of the Trial Court, 448 Mass. 15, 24 (2006).

Mtge. Ass'n v. Rego, 474 Mass. 329, 340 (2016) (Rego); Bank of Am., N.A. v. Rosa, 466 Mass. 613 (2013) (Rosa). In fact, § 15 (c) expressly states that "[t]his section shall be effective notwithstanding any other provision of law" and that "nothing in this section shall be construed to limit the substantive rights, remedies or procedural rights available to a borrower against any lender, assignee or holder under any other law."[3] Thus, the act expressly eschews any construction that would treat counterclaims and defenses under the PHLPA differently from the many other defenses available to a homeowner facing postforeclosure summary process. See Worcester, 465 Mass. at 138 ("Where the language of a statute is

[3] By way of further example of the breadth of the PHLPA, the Supreme Judicial Court has held that the concept of unfairness embodied in the act is sufficiently broad to encompass practices not explicitly prohibited by the act. "That the Legislature chose in the act to focus specifically on home loan mortgages with different terms and features from Fremont's is not dispositive; the question is whether the act may be read to establish a concept of unfairness that may apply in similar contexts. As stated by the single justice of the Appeals Court, the [motion] judge appropriately could and did 'look to Chapter 183C as an established, statutory expression of public policy that it is unfair for a lender to make a home mortgage loan secured by the borrower's principal residence in circumstances where the lender does not reasonably believe that the borrower will be able to make the scheduled payments and avoid foreclosure.'" Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 749 (2008).

clear and unambiguous, it is conclusive as to legislative intent" [citation omitted]).

The legislative history of the PHLPA lends further support. The deterrent effect of robust remedies was particularly important in the legislative calculus. This is evident not only from the structure and plain meaning of the act, but from the statements of its proponents. As the bill neared passage, then Senate President Robert Travaglini noted, "These measures will help working families from being victimized and give them new clout by increasing penalties." A. Lambiaso, Comprehensive Bill Targeting Predatory Lending Gains Momentum, State House News Service, March 15, 2004. See 81 Spooner Rd. LLC v. Brookline, 452 Mass. 109, 115 (2008) (looking to "the legislative history . . . and the history of the times" as interpretive aids).

Finally, the Legislature's intent also may be divined from the act's title, the "Predatory Home Loan Practices Act." G. L. c. 183C, § 1. See Tyler, 464 Mass. at 496. "Predatory" is derived from the Latin praedator, meaning plunderer, and in modern parlance is understood to mean "disposed or showing a disposition to injure or exploit others for one's own gain." Webster's Third New International Dictionary 1785 (1993). See Commonwealth v. Samuel S., 476 Mass. 497, 501 (2017) (looking to dictionary definition to interpret plain meaning of statute). The title evinces the act's central purpose to curtail the

exploitation of those who were subject to predatory loans by imposing significant consequences on abusive lending practices.

2. Massachusetts cases. Second, our jurisprudence militates against an interpretation of the PHLPA that would curb remedies under the act in summary process actions. "Challenging a plaintiff's entitlement to possession has long been considered a valid defense to a summary process action for eviction where the property was purchased at a foreclosure sale." Bank of N.Y. v. Bailey, 460 Mass. 327, 333 (2011), citing New England Mut. Life Ins. Co. v. Wing, 191 Mass. 192, 195 (1906). The Housing Court has jurisdiction to hear such claims and defenses, see Bank of N.Y., supra, including not just defenses to possession, but "defenses and counterclaims that challenge the title of a postforeclosure summary process plaintiff, which previously only could have been the subject of an independent equity action in the Superior Court," Rosa, 466 Mass. at 626. Accordingly, defenses and counterclaims challenging the foreclosing entity's right to title, right to possession, certain G. L. c. 93A claims, certain habitability claims under G. L. c. 185C, § 3, and claims of discrimination under G. L. c. 151B, are all cognizable as defenses to or counterclaims in a postforeclosure summary process case. See Rego, 474 Mass. at 338-339; Rosa, supra at 620, 623. The PHLPA likewise authorizes rescission of the loan or other injunctive relief, as well as monetary

damages, and declares that a violation of the act is also a violation of G. L. c. 93A. See G. L. c. 183C, § 18.[4]

The majority's narrower reading of the PHLPA creates the anomalous result that victims of predatory loan schemes (many of whom are pro se) who default more than five years after the closing of the loan, see G. L. c. 183C, § 15 (b) (1), may be

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[4] The concurrence, ante at - (Englander, J., concurring) relies on the following language in the introductory paragraph of G. L. c. 183C, § 15 (b), to posit that a borrower's remedies are limited to monetary relief alone, and that the only defenses to a postforeclosure summary process action are those that challenge title:

> "Limited to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan plus amounts required to cover costs, including reasonable attorney's fees, a borrower acting only in an individual capacity may assert claims that the borrower could assert against a lender of the home loan against any subsequent holder or assignee of the home loan."

I disagree for four interrelated reasons. First, construing § 15 (b) to permit only monetary remedies is contrary to the language in § 15 (b), which contemplates the authority of the court to reduce or extinguish the loan, and is contrary to the broad grant of equitable remedies in § 18. See note 1, supra. Second, payment of the debt permits a challenge to title as well as to possession. If the borrower's liability is reduced or extinguished (as by, for example, rescission or reformation under § 15 [b] or § 18), the debt is paid. "[T]he defense of payment challenges the title of the summary process plaintiff and its right to possession." Rosa, 466 Mass. at 621. Third, the borrower in a postforeclosure summary process action may challenge both title and possession. See id. at 620 ("Although an equitable defense may not result in 'affirmative relief,' e.g., setting aside the foreclosure sale, it may defeat the summary process action"). Fourth, the purpose of the PHLPA is not to provide finality in lending, but to protect homeowners.

evicted from their homes without any judicial process, while other homeowners, who have not been sold predatory loans, retain their right to challenge the legality of possession or title, to equitable relief, and to G. L. c. 93A remedies in a postforeclosure summary process action. This construction of the PHLPA requires us to conclude that the Legislature included these equitable and legal claims and defenses when it created the Housing Court, see Rosa, 466 Mass. at 620, 623, only to take them away from the most vulnerable at the very point in time these remedies would be most needed and are most likely to be used. "The construction of a statute which leads to a determination that a piece of legislation is ineffective will not be adopted if the statutory language 'is fairly susceptible to a construction that would lead to a logical and sensible result.'" Adamowicz v. Ipswich, 395 Mass. 757, 760 (1985), quoting Lexington v. Bedford, 378 Mass. 562, 570 (1979).

3. Other authority. Third, for its analysis of the meaning of the words "during the term of the loan," the majority draws on a similar analysis in Lutzky vs. Deutsche Bank Nat'l Trust Co., U.S. Dist. Ct., No. 09-03886 (D.N.J. January 27, 2009). See ante, note 8.[5] Lutzky is both inapt and inapplicable

[5] The Federal decision, which is not binding as a matter of New Jersey law, states, "Additionally, Plaintiffs failed to bring their claim any time during the term of the loan since the loan was terminated with the foreclosure judgment in 2003 and

in a nonjudicial foreclosure jurisdiction such as Massachusetts. Lutzky interpreted a statute which, in the most critical respect, is different from our own. The New Jersey statute does not contain the phrase "or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan," the key language present in the Massachusetts PHLPA, a material distinction sufficient on its own to distinguish the cases.[6] Notably, Lutzky involved a mortgage that was "terminated with the foreclosure judgment." Judicial foreclosure is the norm in New Jersey, a fact which may account for the omitted

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the foreclosure sale in September 2008 and this action was no[t] filed until July 2009. Hence, Plaintiffs' [New Jersey Home Ownership Security Act] claim is dismissed as untimely." Lutzky vs. Deutsche Bank Nat'l Trust Co., U.S. Dist. Ct., No. 09-03886 (D.N.J. Jan. 27, 2009).

[6] In pertinent part, the New Jersey statute provides:

> "Notwithstanding any other law to the contrary, but limited to amounts required to reduce or extinguish the borrower's liability under the home loan plus amounts required to recover costs including reasonable attorney's fees, a borrower acting only in an individual capacity may assert against the creditor or any subsequent holder or assignee of the home loan . . . at any time during the term of a high-cost home loan after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated or the debt arising from the home loan has been accelerated or the home loan has become [sixty] days in default, any defense, claim or counterclaim" (emphasis added).

N.J. Stat. Ann. § 46:10B-27(c)(2).

language in the New Jersey statute.[7] The homeowners in Lutzky had their day in court.

The same is not true of homeowners in Massachusetts for whom nonjudicial foreclosure is the norm. The phrase "or in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan" in § 15 (b) (2) of the PHLPA reflects the reality that, in a nonjudicial foreclosure State, defenses and counterclaims will most likely arise in the eviction action, not a judicial foreclosure proceeding, and that if the remedies are to be effective, they must be available at that juncture. No such concern was present in Lutzky.

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[7] New Jersey has a judicial foreclosure statute, the Fair Foreclosure Act, and an Anti-Eviction Act, both of which apply to foreclosing lenders. See N.J. Stat. Ann. § 2A:50-56; N.J. Stat. Ann. § 2A:18-61.1 to 61.12; M. C. Weinstein, Mortgages with Forms, §§ 21.1 & 21.2A (West 2d ed. 2000 & Supp. Oct. 2020) (Weinstein on Mortgages). See also N.J. Stat. Ann. § 2A:39-1. Although self-help possession is permitted, "mortgagees are reluctant to take possession before foreclosure." Weinstein on Mortgages, supra at § 21.1. See id. at § 21.4. See also Chase Manhattan Bank v. Josephson, 135 N.J. 209, 225, (1994) ("To gain possession, the mortgagee must obtain an order for possession from the Superior Court, either in an action for possession pursuant to [N.J. Stat. Ann. §] 2A:35-1 or as part of the action to foreclose the mortgage"). "[In] light of the Chase holding and the legislative policy expressed in it, few mortgagees, if any, will take a chance on removing a protected residential tenant without legal process, or otherwise demanding possession from a protected residential tenant without an order or judgment for possession." Weinstein on Mortgages, supra at § 21.4.

Conclusion. "Where possible, a statute should not be interpreted to render it ineffective." Tyler, 464 Mass. at 506. The purpose of the PHLPA is to arrest and remediate predatory lending. The majority's construction of the PHLPA undermines these objectives by singling out homeowners who have been subject to predatory loan practices and rendering them powerless to challenge the validity of a nonjudicial foreclosure in a summary process action undertaken more than five years after the loan was made. For these reasons, I respectfully dissent.