

**Boston Redevelopment Authority d/b/a Boston Planning and  
Development Agency v. Boston Private Bank and Trust Company, and  
Janet Blake, Trustee of 21 Warren Street Realty Trust**

Suffolk Superior Court Action No. 1884CV01578-BLS1

**Decision and Order Regarding Defendants’ Motions to Dismiss (Docket Entry Nos. 19.0 and 20.0), and Plaintiff’s Motion for Leave to File Second Amended Verified Complaint (Docket Entry No. 23.0):**

This action arises out of the foreclosure of a condominium unit in Charlestown, Massachusetts (the “Property”) by defendant Boston Private Bank and Trust Company (“Boston Private Bank” or the “Bank”). The pleadings allege that non-party Elizabeth Gastevich (“Ms. Gastevich”) purchased the Property on February 28, 2014, and simultaneously executed a first mortgage on the Property in favor of Boston Private Bank, her mortgage lender. Because Ms. Gastevich acquired the Property under an affordable housing program administered by plaintiff Boston Redevelopment Authority d/b/a Boston Planning and Development Agency (“BRA”), the property deed issued to Ms. Gastevich included a “Deed Rider Covenant for Affordable Housing” (the “Covenant”). The Covenant gives the BRA the right and option to purchase the Property from the Property owner upon receipt of notice of any form (including notice by newspaper publication) of an impending foreclosure against the Property. The Covenant, however, also grants the following rights to mortgagees of the Property over and above those possessed by the BRA:

Other provisions of this Covenant notwithstanding, a mortgagee may hold a mortgage or security interest in the Premises and may acquire title to the Premises by foreclosure or instrument in lieu of foreclosure; upon either such acquisition, the covenants, restrictions and options contained in this Covenant shall terminate and have no further effect ....

Other provision of this Covenant notwithstanding, this Covenant shall be subordinate in all respects to any mortgage or security interest ....

Covenant, ¶ 11.<sup>1</sup>

Ms. Gastevich died on November 18, 2015, and her estate subsequently failed to make the required mortgage payments on the Property. On January 18, 2017, Boston Private Bank notified the BRA that it intended to commence foreclosure proceedings. The BRA

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<sup>1</sup> A true copy of the Covenant is appended to the BRA’s Amended Verified Complaint (“Complaint”) as (Docket Entry No. 10) as Exhibit 1.

received the foreclosure notice, but made no effort to purchase the Property so as to protect the Covenant.

A public foreclosure auction of the Property was held on December 6, 2017, at which it purportedly was announced that the Property “was being conveyed subject to the Covenant...” Complaint, ¶ 23. The high bidder at the public auction was non-party Mikhail Starikov (“Mr. Starikov”). Mr. Starikov and Boston Private Bank thereupon entered into a written agreement that set forth the terms of the sale of the Property (the “Memorandum of Sale”). Mr. Starikov, however, never actually purchased the Property. Rather, he defaulted on the Memorandum of Sale, purportedly because he did not wish to acquire the Property while it remained subject to the BRA Covenant.

Following Mr. Starikov’s default, Boston Private Bank did not conduct another public foreclosure auction. Instead, it deeded the Property to itself on January 18, 2018, which act, according to Boston Private Bank, terminated the Covenant. See Covenant, ¶ 11, *supra*. Approximately two weeks later, the Bank conveyed the Property to defendant Janet Blake (“Ms. Blake” or, collectively with the BRA, “Defendants”), Trustee of 21 Realty Trust, free and clear of the Covenant, for the same price that Mr. Mikhail, the highest bidder, had agreed to pay at the December 2017 foreclosure auction. The BRA contends that Ms. Blake works with Mr. Starikov and effectively acted as his straw in purchasing the Property.

The BRA commenced this action in May 2018 seeking, most importantly, an order voiding the sale of the Property to Ms. Blake and reinstating the Covenant. See, e.g., Complaint, Prayers I and II. The BRA’s Complaint contains eight counts. Half of the counts (alleging violation of power of sale (Count I); breach of contract (Count II); breach of the implied covenant of good faith and fair dealing (Count III); violation of G.L. c. 244, § 35B (Count IV)) are asserted only against Boston Private Bank, while the remaining half (alleging violation of G.L. c. 184, § 32 (Count V); unjust enrichment (Count VI); and for declaratory judgments under G.L. c. 240, §§ 6, 10 (Count VII), and G.L. c. 231A, § 1 (Count VIII)) are asserted against both Defendants.

The case came before the Court most recently on Boston Private Bank and Ms. Blake’s motions to dismiss pursuant to Mass. R. Civ. 12(b)(6), and on the BRA’s motion for leave to further amend its Complaint pursuant to Mass. R. Civ. 15(a). The gist of Defendants’ motions to dismiss is that the BRA, having received prior notice of Boston Private Bank’s plans to foreclose on the Property and having declined to exercise its option to purchase the Property in response, is legally precluded from “resurrect[ing] the validly-terminated Covenant.” Memorandum in Support of Boston Private Bank’s Motion to Dismiss at 1. The BRA opposes Defendants motions to dismiss, arguing, in part, that Boston Private Bank breached its power of sale and violated its common law duty to protect the Covenant in the course of any foreclosure proceeding. See *Sandler v. Silk*, 292 Mass.

493, 496 (1935) (“[A] mortgagee in executing a power of sale contained in a mortgage is bound to exercise good faith and put forth reasonable diligence.... This duty and obligation as to good faith and reasonable care extends for the benefit and is available for the protection not only of the mortgagor but of those claiming in his right, including those holding junior encumbrances or liens. The mortgagee is a trustee for the benefit of all persons interested.”) (citations omitted).

By means of its motion to amend, the BRA seeks to add two additional defendants (*i.e.*, Mr. Starikov and Fred Starikov) and two additional claims (*i.e.*, civil conspiracy and intentional interference with contractual relations) to this action. Defendants oppose the BRA’s motion to amend.

The Court conducted a hearing on Defendants’ motions to dismiss and the BRA’s motion to amend on October 3, 2018. Upon consideration of the written submissions of the parties and the oral arguments of counsel, Defendants’ motions to dismiss will be **DENIED IN PART** and **ALLOWED IN PART**, and the BRA’s motion to amend will be **ALLOWED**, for the reasons discussed below.<sup>2</sup>

### **Defendants’ Motions to Dismiss**

#### **A. Violation of Power of Sale (Count I)**

Plaintiff alleges that Boston Private Bank breached the power of sale under G.L. c. 183, § 21 and G.L. c. 244, § 14, primarily because the Bank conveyed the Property to itself without a public auction. Defendants seek dismissal of this claim on the grounds that: (1) the BRA is not a party to the Mortgage and, thus, lacks standing to enforce the Mortgage; (2) the recorded “Affidavit of Compliance with Mortgage Notice of Default Requirements” that Boston Private Bank filed after conveying the Property to itself constitutes un rebutted, *prima facie* evidence that the Bank validly exercised its power of sale; and (3) the BRA failed to make factual allegations plausibly suggesting that the Bank violated the statutory power of sale. The Court concludes that these arguments fail for at least two reasons.

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<sup>2</sup> As noted above, Defendants primarily seek dismissal of the BRA’s Complaint under Mass. R. Civ. 12(b)(6). Defendants also have moved for dismissal, however, under Mass. R. Civ. P. 12(b)(7) based upon the BRA’s alleged failure to join certain indispensable parties, namely, Ms. Gastevich’s estate and/or her heirs. Boston Private Bank, in particular, argues that because the BRA “is seeking to purchase the Property for approximately \$150,000 less than the price which the [P]roperty was sold at the foreclosure auction[,] [t]he relief that [Plaintiff] seeks necessarily affects whatever rights the Gastevich estate and/or heirs may have with respect to those surplus proceeds.” Reply Memorandum in Support of Boston Private Bank Bank and Trust Company’s Motion to Dismiss Complaint at 2. Defendants, however, have not cited to any authority indicating that the issues involved in this action render Ms. Gastevich estate and/or her heirs necessary parties, and the Court has found none. Accordingly, the Court declines to grant Defendants’ motions to dismiss under Rule 12(b)(7) at this time.

First, the BRA has standing to challenge Boston Private Bank's exercise of the power of sale because a mortgagee owes a duty of good faith and reasonable care not only to the mortgagor, but also to "those holding junior encumbrances or liens." *Sandler*, 292 Mass. at 496. In this case, the BRA is a junior holder of an "encumbrance." See, e.g., *Triangle Center, Inc. v. Dep't of Public Works*, 386 Mass. 858, 866 (1982) (defining "encumbrance" as "[a]ny right to, or interest in, land which may subsist in another to diminution of its value, but consistent with the passing of the fee.") (quoting Black's Law Dictionary 473 (5th ed. 1979)). Boston Private Bank thus owed the BRA a duty of good faith and reasonable care in executing its power of sale. *Sandler*, 292 Mass. at 496. It was, in effect, "a trustee for the benefit of all persons interested" in the Property, and it was bound to exercise its rights "conscientiously and with due regard to [the BRA's] interests." *Id.* at 496-497. If, as has been alleged, Boston Private Bank agreed or conspired with Ms. Blake and/or Mr. Starikov to take title to the Property in its own name solely for the purpose of eradicating the Covenant, then the Bank may be liable to the BRA for violating its duty of good faith and reasonable care. *Id.* at 496. A violation of the duty of good faith and reasonable care can, in turn, invalidate an otherwise lawful sale conducted pursuant to a power of sale. *Id.* ("Failure in these particulars will invalidate the sale even though there be literal compliance with the terms of the power."). Whether such a violation occurred in the circumstance of this case is not a question that this Court can resolve on a motion to dismiss. See *Nader v. Citron*, 372 Mass. 96, 98 (1977) (In deciding motion to dismiss under Rule 12, "the allegations of the complaint, as well as such inferences as may be drawn therefrom in the [claimant's] favor, are to be taken as true.").

Second, as to the argument that the recorded affidavit is *prima facie* evidence that Boston Private Bank validly exercised the power of sale, the BRA's factual allegations are sufficient to rebut this *prima facie* evidence at the motion to dismiss stage. See *id.* See also *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008) (In order to survive motion to dismiss under Rule 12(b)(6), complaint must include "[f]actual allegations [sufficient] ... to raise a right to relief above the speculative level ... [based] on the assumption that all the allegations in the complaint are true (even if doubtful in fact)....") (internal quotation marks and citation omitted). Here, accepting the allegations in the BRA's Complaint as true and drawing every reasonable inference in the BRA's favor, there is at least a plausible basis for the Court to conclude that Boston Private Bank's foreclosure process was unlawfully tainted by the Bank's decision to convey the Property to itself after the highest bidder, Mr. Starikov, defaulted, rather than giving the second highest bidder an opportunity to purchase the Property or selling the Property at another public auction. See, e.g., *146 Dundas Corp. v. Chemical Bank*, 400 Mass. 588, 594 (1987) ("in mortgage foreclosure sales, if the highest bidder fails to pay, the trustee of the property may declare that the next highest bidder may purchase the property, may resell the property promptly, or may readvertise the sale for another day."). See also *States*

*Res. Corp. v. Architecture Team, Inc.*, 433 F.3d 73, 82 (2005) (“Generally, Massachusetts law requires sale of foreclosure property by public auction.... Courts have explained that efforts to ‘resell the property promptly’ must take place at the public auction, not through a private sale which is not advertised to the public.”). For these reasons, Boston Private Bank’s motion to dismiss Count I must be rejected.

B. Breach of Contract (Count II) and Breach of the Implied Covenant of Good Faith and Fair Dealing (Count III)

At the motion hearing conducted on October 3, 2018, the BRA agreed to the dismissal of its claim against Boston Private Bank for breach of contract. Without a claim for breach of contract, the BRA’s claim for breach of the implied covenant of good faith and fair dealing also must be dismissed. Massachusetts law does not recognize an independent claim for breach of the implied covenant of good faith and fair dealing separate and apart from a claim for breach of the underlying contract. See *Mill-Bern Assocs., Inc. v. Dallas Semiconductor Corp.*, 2002 WL 1340853, at \*9 (Mass. Super. June 13, 2002) (Fabricant, J.), *aff’d*, 60 Mass. App. Ct. 1106 (2003) (“The implied covenant does not give rise to a cause of action independent of the underlying contract; rather, a claim for breach of the implied covenant is, in substance, a claim of breach of contract, albeit breach not of any express covenant, but rather of the covenant that is implied by law in all contracts, whether written or oral.”).<sup>3</sup> For this reason, Boston Private Bank’s motion to dismiss Counts II and III is allowed.

C. Violation of G.L. c. 244, § 35B (Count IV)

The BRA further alleges that Boston Private Bank did not take reasonable steps to avoid foreclosure of the Property and thereby violated G.L. c. 244, § 35B. This claim rests on a misinterpretation of G.L. c. 244, § 35B, which was enacted by the Legislature “to provide additional notice and modification protection to *homeowners* facing foreclosure.” *Enfeld v. Rockland Trust Company*, 87 Mass. App. Ct. 1103, 2015 WL 522658, at \* 1 (Jan. 30, 2015) (Rule 1:28), citing St. 2012, c. 194, preamble (emphasis added). The BRA obviously is not a “homeowner” and, thus, lacks standing to invoke the protections afforded to such owners under Section 35B. See, e.g., *School Comm. of Hudson v. Board of Educ.*, 448 Mass. 565, 579 (2007) (“To have standing ... the plaintiffs’ interests must come within the zone of interests arguably protected by [the statute].... [I]t is not enough that the plaintiff[s] be injured by some act or omission of the defendant; the

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<sup>3</sup> To the extent the BRA argues that it can maintain a claim for breach of the implied covenant of good faith and fair dealing based on Boston Private Bank’s alleged breach of its separate duty of good faith and reasonable care, the argument is without merit. The duty of good faith and reasonable care discussed in *Sandler, supra*, is not contractual in nature and, therefore, cannot serve as a basis for an implied covenant claim. See *S.M. v. M.P.*, 91 Mass. App. Ct. 775, 784 (2017) (“a party breaches the covenant of good faith and fair dealing when the party exceeds *its contractual discretion* or uses its discretionary power in a pretextual manner”) (emphasis added).

defendant must additionally have violated some duty owed to the plaintiff[s].”) (internal quotation marks and citation omitted). For this reason, Boston Private Bank’s motion to dismiss Count IV is allowed.

D. Violation of G.L. c. 184, § 32 (Count V)

The BRA alleges that both Defendants violated G.L. c. 184, § 32, by failing to comply with the affordable housing restrictions set forth in the Covenant. Paragraph 2 of Section 32 provides, in part, that “affordable housing restrictions are interests in land [that] may be acquired by any governmental body or such charitable corporation or trust which has power to acquire interest in the land” and that “may be enforced by [an] injunction or other proceeding...” G.L. c. 184, § 32, ¶ 2. Defendants seek to dismiss this claim on the grounds that the Covenant on the Property terminated by its own terms when Boston Private Bank, as mortgagee, “acquire[d] title to the Premises by foreclosure”. See Covenant, ¶ 11. As previously noted, however, the BRA has adequately pled a claim that the Bank violated its duty of good faith and reasonable care by exercising its power of sale in a manner that was specifically designed to extinguish the Covenant on the Property. See discussion re Count I, *supra*. The Court regards Count V of the BRA’s Complaint alleging a violation of G.L. c. 184, § 32, as the statutory embodiment of the BRA’s viable claim under Count I. For this reason, Defendants’ motions to dismiss Count V must be rejected.<sup>4</sup>

E. Unjust Enrichment (Count VI)

Under Massachusetts law, “a person who has been unjustly enriched at the expense of another is required to make restitution to the other.” *Salomon v. Terra*, 394 Mass. 857, 859 (1985) (internal quotation marks and citation omitted). The elements of a viable claim for unjust enrichment are: “(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge of the benefit by the defendant; and (3) the acceptance or retention of the benefit by the defendant under circumstances which make

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<sup>4</sup> Ms. Blake separately argues that Count V should be dismissed because the BRA purportedly has not demonstrated that G.L. c. 184, § 32, encompasses the Covenant at issue here. Memorandum of Law in Support of Janet Blake, Trustee of 21 Warrant Street Realty Trust’s Motion to Dismiss at 10-11. In support of this argument, she cites language in Section 32, which provides that affordable housing restrictions are enforceable regardless of privity of contract or estate as long as they are approved by the “director of housing and community development,” G.L. c. 184, § 32, ¶ 1, and she points to the absence of any allegation or proof in the BRA’s Complaint that the Covenant received such an approval. *Id.* at 11. No argument has been made in this case, however, that the Covenant is unenforceable on account of any lack of “privity of contract or estate.” Thus, the BRA’s failure to plead that the Covenant was duly approved is neither surprising, nor fatal to its claim under G.L. c. 184, § 32. Cf. *United Rentals (N. Am.), Inc. v. TGBD, LLC*, 2014 WL 1878818, at \*1 (2014) (allowing motion to dismiss based on “key facts”) (Leibensperger, J.); *Shea v. Fed. Nat. Mortgage Ass’n.*, 2013 WL 7018646, at \*2 (Mass. Super. July 3, 2013) (Cosgrove, J.) (noting that court considers only “allegations of material fact” on motion to dismiss).

such acceptance or retention inequitable.” *Sweeney v. DeLuca*, 2006 WL 936688, at \*8 (Mass. Super. Mar. 16, 2006), citing 12 Williston on Contracts § 1479 (3d ed.1957).

Defendants argue that they necessarily received no “benefit” as a result of Boston Private Bank’s sale of the Property to Ms. Blake and, therefore, the BRA’s claim for unjust enrichment cannot prevail as a matter of law. The Court disagrees. The BRA has alleged, and the Court must accept as true for present purposes, that both Boston Private Bank and Ms. Blake “[have] been unjustly enriched by acquiring title” to the Property in violation of the terms of the affordable housing Covenant. Complaint, ¶¶ 73 and 75. See also *Iannacchino*, 451 Mass. at 636. These allegations are at least “plausible” in the sense that Boston Private Bank may have enjoyed a higher sale price for the Property (and a commensurately lower risk of a mortgage loan deficiency) because the Property purportedly has been stripped of the Covenant, and Ms. Blake may be able to obtain a higher resale price for the Property in the future if the Property is deemed to have been stripped of the Covenant. Drawing all reasonable inferences in favor of the BRA, the Court is persuaded that the foregoing allegations are sufficient to support a viable claim for unjust enrichment. For this reason, Defendants’ motions to dismiss Count VI must be rejected.

F. Declaratory Judgment under G.L. c. 240, §§ 6,10 (Count VII)

In Count VII of its Complaint, the BRA requests a judicial declaration under G.L. c. 240, § 6, the statute governing actions to quiet title, to the effect that: (1) the Property remains subject to the Covenant; and (2) the BRA retains the right to purchase the Property as set forth in the Covenant. Defendants seek to dismiss Count VII, arguing that the BRA does not have standing to assert a claim to quiet title to the Property. The Court agrees. “Long-standing Massachusetts jurisprudence holds that [a] bill will lie to remove a cloud on title only if legal title and actual possession are united in plaintiff.” *Barrasso v. New Century Mortg. Corp.*, 91 Mass. App. Ct. 42, 49 n.6 (2017) (internal quotation marks and citation omitted). See also *Altobelli v. Montesi*, 300 Mass. 396, 398 (1938) (“A plaintiff, in order to maintain a bill to quiet title, must show that he has a record title which is injuriously affected.”). It is undisputed in this proceeding that the BRA neither holds legal title to the Property, nor has current possession of it. At best, the BRA possesses a disputed right to exercise an option to purchase the Property. The Court regards such a right, even if valid, to be too attenuated to give the BRA standing to press a claim to quiet title to the Property. See *McCartin Leisure Indus., Inc. v. Baker*, 376 Mass. 62, 66 (1978) (“While it is true that a plaintiff seeking to quiet title must possess sufficient legal interest in the property so as to avoid dismissal for lack of standing, a claim of rightful legal ownership satisfies these requirements.”). For this reason, Defendants’ motions to dismiss Count VII are allowed.

G. Declaratory Judgment under G.L. c. 231A, § 1 (Count VIII)

In Count VIII of its Complaint, the BRA seeks essentially the same judicial declaration that it requests in Count VII, except that, for purposes of this count, the BRA cites the Superior Court's general power under G.L. c. 231A, § 1, to "make binding declarations of right, duty, status and other legal relations sought thereby ... in any case in which an actual controversy has arisen...." G.L. c. 231A, § 1. The Court agrees with the BRA that an actual controversy exists with respect to the continued existence and enforceability of the Covenant as it pertains to the Property. For this reason, Defendants' motions to dismiss Count VIII must be rejected.

**BRA's Motion to Amend**

The BRA has requested leave to amend its Complaint in this action a second time to add Mr. Starikov and one of his alleged accomplices, Fred Starikov, as defendants, and to assert two additional claims for civil conspiracy and intentional interference with contractual relations. Defendants argue that leave to amend should be denied because any amendment would be "futile."

Rule 15 of the Massachusetts Rules of Civil Procedure provides that leave to amend a pleading "shall be freely given when justice so requires." Mass. R. Civ. P. 15(a). The Massachusetts Supreme Judicial Court further has held that, while "[t]he decision whether to grant a motion to amend is within the discretion of the judge, ... leave should be granted unless there are good reasons for denying the motion." *Mathis v. Massachusetts Elec. Co.*, 409 Mass. 256, 264 (1991).

This Court sees no good reason to deny the BRA's motion to amend in the present case, particularly when the case is less than six months old and discovery only is beginning. Whether any of the BRA's proposed additional claims eventually will prove to be futile is not a determination that this Court can make at present. Any new claims that Defendants contend are not legally viable can be addressed, at the appropriate time, by way of a further motion to dismiss or potentially a motion for summary judgment.

For the foregoing reasons, Defendants' motions to dismiss (Docket Entry Nos. 19.0 and 20.0) are **ALLOWED** as to Counts II, III, IV, and VII of the BRA's Amended Verified Complaint, and **DENIED** as to Counts I, V, VI, and VIII. The BRA's motion for leave to amend its Complaint a second time (Docket Entry Nos. 23.0) is **ALLOWED**.

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Brian A. Davis  
Associate Justice of the Superior Court

Date: November 6, 2018