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COMMONWEALTH OF MASSACHUSETTS
NORTHEAST HOUSING COURT

FANNIE MAE

Plaintiff

- v.- No. 12-SP-1039

RYAN P. CARVALHO et al

Defendant

RULINGS AND ORDER

After hearing in this post-foreclosure summary process case, the motion by the plaintiff [Doc.#31, 40, 43, 44] for summary judgment is allowed in part and denied in part and the cross motion by the defendants [Doc.#42, 45] is allowed.

I allow the plaintiff's motion to dismiss as a matter of law the defendants' landlord-tenant law defenses and counterclaims [Doc.#14; Doc.#31A Exh.H] except insofar as they are interposed to setoff the plaintiff's claim for use and occupancy rent. The reason is that there was never any landlord tenant relationship between the plaintiff or its predecessor and the defendants. See my decisions in Wells Fargo Bank v.Amero, N.E.Hsg.Ct. No. 12-SP-0870 (May 21, 2012, and August 31, 2012) (as a matter of substantive law, without a leasehold or rental relationship between the parties, there is no warranty or covenant or contractual or quasi-contractual duty to repair as might support a defective housing "conditions" claim or defense under the habitability, quiet enjoyment, rent withholding, or other landlord tenant laws). See also, Deutsche Bank v. Gabriel, 81 Mass.App. 564, 570-573, 965 N.E.2d 875, 880-882 (2012) (as a matter of procedural law, "conditions" claims and defenses by former mortgagors are not available under Gen.L. c.239 §8A). On the present state of the record the defendants' predatory lending and HAMP-based Chapter 93A and disability-based reasonable accommodation claims shall remain pending.

I allow the defendants' motion to dismiss the plaintiff's claim for possession that is based on a foreclosure. The reason is that the foreclosure did not comply with the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A, and therefore did not comply with the terms of the Mortgage (¶22 which invokes the Statutory Power of Sale and "Applicable Law") and Gen.L. c.183 §21 ("first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale").

1. Non-compliance

The mortgagee was required by the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A(b), to "not accelerate maturity of the ... mortgage obligation or otherwise enforce the mortgage because of a default ... until at least 90 days after the date a written notice is given by the mortgagee to the mortgagor." The notice was required by Gen.L. c.244 §35A(c)(4) to include "the name and address of the mortgagee, or anyone holding thereunder" and by Gen.L. c.244 §35A(c)(5) to include "the name of any current and former mortgage broker or mortgage loan originator for such mortgage or note securing the residential property."

The 90 days notice of default by "Wells Fargo Home Mortgage" dated June 17, 2010, [Doc.#24 Exh.2, 3; Doc.#42A Exh.KRC-3, TBV-1; Doc.#45A] stated "The current mortgagee is Wells Fargo Bank, N.A." However, a triable issue of fact exists in this case whether Fannie Mae and not Wells Fargo Bank then owned the mortgage.

Part of the defendants' evidence that Fannie Mae and not Wells Fargo Bank owned the mortgage consists of findings in the "troubling" case of JP Morgan Chase Bank, N.A. v. Butler, 40 Misc.3d 1205(A), 2013 WL 3359283, 2013 N.Y. Slip Op. 51050(U) (Kings Co. Sup.Ct., Schack, J., July 5, 2013), as to "numerous misrepresentations" and "continued subterfuge" about ownership of the mortgage and note, stating that "Fannie Mae is the 'Wizard of Oz,' operating behind the curtain, and the real owner of the subject ... note and mortgage"; that "Fannie Mae evaded its responsibility to be the real plaintiff in interest in the instant action or other foreclosure proceedings"; by "Fannie Mae's roadmap of how to inveigle and deceive a court"; that "Fannie Mae's Servicing Guide, with its deceptive practices to fool courts, does not supercede New York law"; and that the Guide which authorized "an automatic cashless Fannie Mae transaction" in "bad faith" evidenced a "fraud upon the court" and "unclean hands" by Fannie Mae, its servicer bank, and various counsel.

If in fact the notice of default dated June 17, 2010, under Gen.L. c.244 §35A identifying "Wells Fargo Bank, N.A." as the "current mortgagee" (or the Notice of Mortgage Foreclosure Sale dated September 29, 2011, under Gen.L. c.244 §14 identifying "Wells Fargo Bank, N.A." as the "Present holder of mortgage" [Doc.#31A Exh.B,C; Doc.#40A Exh.B]) misidentified the mortgage holder at the time of the notices or sale, such defect would unquestionably void the sale. See, the seminal "strict compliance" case of Roche v. Farnsworth, 106 Mass. (10 Browne) 509 (1871) (a power of sale must be executed in strict compliance with its terms and bare literal compliance is not enough; a mortgage sale was void where the notice of sale identified the original mortgagor and mortgagee but not the assignee and mortgage holder at the time of the notice and sale).

Regardless, the notice of default was otherwise defective. The notice dated June 17, 2010, was silent as to the existence of any mortgage broker although the Mortgage itself dated June 11, 2008, clearly stated "No Mortgage Broker was Involved with this Mortgage." The notice stated "The name of the person that originated your loan is N/A" although the Mortgage clearly identified "Wells Fargo Bank, N.A." as the original mortgagee. These defects and omissions rendered the foreclosure sale on November 30, 2011, [Doc.#31A Exh.D; Doc.#40A Exh.C] and the assignment of bid

[Doc.#31A Exh.E; Doc.#40A Exh.D] and foreclosure deed dated December 5, 2011, [Doc.#31A Exh.D; Doc.#40A Exh.C] invalid and ineffectual.

See, Eaton v. Federal National Mortgage Ass'n, 462 Mass. 569, 579-581, 969 N.E.2d 1118, 1127-1128 (2012) ("one who sells under a power [of sale] must follow strictly [statutory] terms"); Bank of New York v. Bailey, 460 Mass. 327, 332, 951 N.E.2d 331, 335 (2011) ("the judge may consider the former homeowner's defense that the plaintiff's title is invalid because the foreclosure was not conducted strictly according to the statute"); U.S. Bank v. Ibanez, 458 Mass. 637, 646-647, 655, 941 N.E.2d 40, 49-50, 55-56 (2011) ("Recognizing the substantial power that the statutory scheme affords to a mortgage holder to foreclose without immediate judicial oversight, we adhere to the familiar rule that 'one who sells under a power [of sale] must follow strictly its terms. If he fails to do so there is no valid execution of the power, and the sale is wholly void.'"; "[the] power of sale contained in mortgage 'must be executed in strict compliance with its terms'"; "what is surprising about these cases is not the statement of principles articulated by the court regarding title law and the law of foreclosure in Massachusetts, but rather the utter carelessness with which the plaintiff banks documented the titles to their assets. There is no dispute that the mortgagors of the properties in question had defaulted on their obligations, and that the mortgaged properties were subject to foreclosure. Before commencing such an action, however, the holder of an assigned mortgage needs to take care to ensure that his legal paperwork is in order. Although there was no apparent actual unfairness here to the mortgagors, that is not the point. Foreclosure is a powerful act with significant consequences, and Massachusetts law has always required that it proceed strictly in accord with the statutes that govern it. As the opinion of the court notes, such strict compliance is necessary because Massachusetts both is a title theory State and allows for extrajudicial foreclosure.")

See my rulings beginning with EMC Mortgage LLC v. Rivera, N.E.Hsg.Ct. No. 11-SP-3842 (October 3, 2012) through FNMA v. Danh, N.E.Hsg.Ct. No. 12-SP-1753 (April 26, 2013) and other cases cited, applying a "strict compliance" rather than a "substantial compliance" standard to notices of default under Gen.L. c.244 §35A.

Accord, Bravo-Buenrostro v. OneWest Bank, 2011 WL 10818677 (Suffolk Superior Ct. Fahey, J., May 31, 2011); Ross v. Deutsche Bank, 933 F.Supp.2d 225, 232-233 (D.Mass., Young, J., March 27, 2013); Deutsche Bank v. Wheeler, Bos.Hsg.Ct. No. 12-H84-SP-001576 (Muirhead, J., August 10, 2012); FHLMC v. O'Connor, Wor.Hsg.Ct. No. 12-SP-3164 (Horan, J., February 20, 2013); Greenwich Investors v. Rangel, Western Hsg.Ct. No. 12-SP-2975 (Fields, J., April 2, 2013); Freedom Credit Union v. D'Agostino, West.Hsg.Ct. No. 12-SP-4371 (Crampton-Kamukals, J., June 17, 2013); Deutsche Bank v. Gloss, Wor.Hsg.Ct. No. 12-SP-4206 (Sullivan, J., August 13, 2013); FNMA v. Lamoureux, West.Hsg.Ct. No. 11-SP-3713 (Fein, J., August 27, 2013).

But see, contra, Randle v. GMAC, 2010 WL 3984714 (Land Ct., Piper, J., October 12, 2010); Deutsche Bank v. Jepson, 2012 WL 605598 (Land Ct., Piper, J., February 24, 2012); Conti v. Wells Fargo Bank, 2012 WL 2094375 (Land Ct., Sands, J., June 11, 2012); Bank of New York v. Smith, Quincy Dst.Ct. No. 1256-SU-0893 (Coven, J., January 22, 2013, rev'g December 11, 2012);

Courtney v. U.S. Bank, 922 F.Supp.2d 171, 173 (D.Mass. Gorton, J., February 6, 2013); Payne v. U.S. Bank, 2013 WL 1282235 (D.Mass., O'Toole, J., March 28, 2013), 2013 WL 5757858 (D.Mass., O'Toole, J., October 24, 2013); Aurora v. Murphy, S.E.Hsg.Ct. No. 12-SP-0521 (Chaplin, J., July 31, 2012); U.S. Bank v. Goncalves, S.E.Hsg.Ct. No. 11-H84-SP-2822 (Edwards, J., October 3, 2012); HSBC v. Brown, Bos.Hsg.Ct. No. 12-H84-SP-003218 (Winik, J., July 16, 2013), applying a "substantial compliance" standard.

I note that even applying a "substantial compliance" rather than a "strict compliance" standard, the defects in the notice of default in this case are such that it would not pass muster. The failure of the notice to include the statutorily required information -- information that was readily available from the very face of the Mortgage -- renders the notice, upon which Fannie Mae relies to support the Wells Fargo Bank foreclosure, upon which Fannie Mae relies to support its claim of good title and right to possession, void and ineffectual.

I also note that Gen.L. c.244 §35A(e) and (f) requires public disclosure of the information that is required by §35A(c) to be included in the private notice that is required by §35A(b) to be given to the mortgagor, by filing copies of the notice both in any Land Court foreclosure proceeding and also with the Commissioner of Banks. See also, Gen.L. c.244 §14A (foreclosure database maintained by Commissioner of Banks, whose annual report is available to the public upon request). There is a meaningful distinction between the purposes of "notice" and "disclosure" in the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A. See, Sovereign Bank v. Sturgis, 863 F.Supp.2d 75, 104 fn.18 (D.Mass., Woodlock, J., 2012). The law in this case requires both private "notice" and public "disclosure." A foreclosing entity's public disclosure obligations are not satisfied by public filings of notice documents that contain incorrect or incomplete information.

The plaintiff argues that the Supreme Judicial Court in U.S. Bank v. Ibanez, 458 Mass. 637, 646, 941 N.E.2d 40, 49 (2011), included Gen.L. c.244 §§11–17C but did not include Gen.L. c.244 §35A in its mention of the statutory provisions that must be complied with under the power of sale set out in Gen.L. c.183 §21, and on this basis argues that the Supreme Judicial Court did not include an obligation to comply with Gen.L. c.244 §35A as part of exercising rights to foreclose under a power of sale. I do not agree.

The plaintiff relies on the decision in Sovereign Bank v. Sturgis, 863 F.Supp.2d 75 (D.Mass., Woodlock, J., March 22, 2012), which at 102 accepted that argument (and which at 103 accepted a similar argument with respect to the itemized accounting of foreclosure sale proceeds that is required by Gen.L. c.183 §27), and also on the decision rendered the following week in Sloane v. JP Morgan Chase Bank, 2012 WL 7806163 (D.Mass., O'Toole, J., March 27, 2012), which similarly ruled that "[under Ibanez, "Gen.L. c.244 §35A] is a more general provision relating principally to an opportunity for a residential real property mortgagor to cure a default" and that "[unlike Gen.L. c.244 §§11–17C] It does not regulate the statutory power of sale."

(A year later, in Ross v. Deutsche Bank, 933 F.Supp.2d 225, 232-233 (D.Mass., Young, J., March 27, 2013), another judge of the same court declined to follow the Sturgis and Sloane rulings, and held instead, "Because the notice requirement [of Gen.L. c.244 §35A] is part of the Massachusetts statutory scheme regulating foreclosure, mortgagees seeking to foreclose must comply strictly with the notice requirement.")

Gen.L. c.244 §35A was not at all involved in the Ibanez case (or in any other earlier or subsequent case), and Gen.L. c.244 §35A, added by St.2007 Ch.206, effective on May 1, 2008, was not in effect when the Supreme Judicial Court established its "strict compliance" doctrine. See, Roche v. Farnsworth, 106 Mass. (10 Browne) 509 (1871) (a power of sale must be executed in strict compliance with its terms and bare literal compliance is not enough; a mortgage sale was void where the notice of sale identified the original mortgagor and mortgagee but not the assignee and mortgage holder at the time of the notice and sale); Moore v. Dick, 187 Mass. 207, 72 N.E. 967 (1905) (foreclosure sale was wholly void where the notice of sale was published in a daily newspaper and not in the weekly newspaper designated in the power of sale; one who sells under a power must follow strictly its terms. If he fails to do so, there is no valid execution of the power, and the sale is wholly void. The manner in which the notice of the proposed sale shall be given is one of the important terms of the power, and a strict compliance with it is essential to the valid exercise of the power. It follows that the sale was not valid. The case stands as though there had been no attempt to foreclose, and the right of redemption is still outstanding.). Other sections of the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244, had been enacted and were in effect much earlier. For example, the notice and recording requirements of Gen.L. c.244 §14 and §15 were enacted by St.1857 Ch.229, and Gen.L. c.183 §21, setting forth the "first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale" requirements, was enacted by St.1912 Ch.502 Sec.6.

I note that, as to statutory structure, the Legislature placed Gen.L. c.244 §35A in the same Massachusetts Foreclosure and Redemption of Mortgages Law, Chapter 244, that contains §§11–17C. I also note that, after Ibanez, and after the Sturgis and Sloane rulings, the Supreme Judicial Court stated in Eaton v. Federal National Mortgage Ass'n, 462 Mass. 569, 571, 969 N.E.2d 1118, 1121 (June 22, 2012), "A foreclosure sale conducted pursuant to a power of sale in a mortgage must comply with *all applicable statutory provisions,* including in particular G.L. c.183 §21 and G.L. c.244 §14." (*italics* added).

The precise issue of the effect of noncompliance with the notice requirements of §35A has never been ruled upon (or even considered) by the Supreme Judicial Court, and I think that any inference that the Ibanez Court impliedly ruled that noncompliance with the statutory requirements of Gen.L. c.244 §35A does not affect the validity of foreclosure is unwarranted.

2. Preemption

The plaintiff Fannie Mae argues that, notwithstanding any noncompliance with the requirements of state law, its title by foreclosure is valid by operation of federal law, because its assignor Wells Fargo Bank, N.A. is a National Bank, and *all of* the state law provisions of the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A, are preempted under the Supremacy Clause by the federal banking laws, specifically the National Bank Act (NBA), 12 U.S.C. §§1 et seq., and the Office of the Comptroller of the Currency ("OCC") regulation promulgated thereunder, 12 C.F.R. §34.4.

The gist of the plaintiff's preemption argument is that, although there is no federal law of foreclosure, and although the federal regulations and the federally prescribed mortgage provisions invoke state law, the Massachusetts state law requirements for foreclosures are preempted by federal law. I do not agree. FN1/ FN2/

(1) Case Law

The plaintiff relies heavily on the decision in Sovereign Bank v. Sturgis, 863 F.Supp.2d 75, 90-92, 102-103 (D.Mass., Woodlock, J., March 22, 2012), which held that *all of* the Massachusetts law, Gen.L. c.244 §35A, is "definitively preempted" by the Home Owners' Loan Act ("HOLA"), 12 U.S.C. §§1461 et seq. and the Office of Thrift Supervision ("OTS") regulation, 12 C.F.R. §560.2(b)(4), and on the decision rendered the following week in Sloane v. JP Morgan Chase Bank, 2012 WL 7806163 (D.Mass., O'Toole, J., March 27, 2012), which held that *all of* the Massachusetts law, Gen.L. c.244 §35A, is "expressly preempted" by the National Bank Act ("NBA"), 12 U.S.C. §§1 et seq. and the Office of the Comptroller of the Currency ("OCC") regulation, 12 C.F.R. §34.4(a)(4).

The Sturgis case is distinguishable on its facts, because that case was not about foreclosure itself but rather about claims and defenses that were interposed by the borrowers to the mortgagee's action to collect a deficiency that was due on notes after foreclosure. Also, the issues of preemption that were involved in the Sturgis case were issues of preemption arising under the Home Owners' Loan Act of 1933 (HOLA), 12 U.S.C. §§1461 et seq., and the rules and regulations promulgated thereunder by the Office of Thrift Supervision ("OTS"). The HOLA law does not apply in this case because that law applies only to Federal Savings and Loan Associations ("Thrifts") and does not apply to National Banks. See, Ross v. Deutsche Bank, 933 F.Supp.2d 225, 232-233 (D.Mass., Young, J., 2013). But see, Copeland-Turner v. Wells Fargo Bank, 800 F.Supp.2d 1132, 1143 fn.6 and cases cited (D.Ore. 2011) (preemption under the NBA and OCC regulations would be the same as preemption under the HOLA and OTS regulations).

The Sloane case cannot be so distinguished because it was about foreclosure, and it involved the OCC regulation, 12 C.F.R. §34.4(a)(4), promulgated under the National Bank Act (NBA), 12 U.S.C. §§1 et seq. But it is somewhat different from this case because it involved a claim of "express" rather than ("entire" or "full") "field" preemption that is argued here.

I respectfully disagree with the reasoning and conclusions reached in the Sturgis and Sloane case decisions, neither of which identified any particular *"conflict"* between state and federal law, but which held instead that *all of* the state Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A, was "definitively" or "expressly" preempted, apparently under the doctrines of "express" or "field" preemption, and that *none of* the state mortgage foreclosure law could be constitutionally applied to nationally chartered banking institutions (or their successors). I am persuaded instead that *all of* the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A, and specifically the requirements as to the contents of the notices of default and of cure rights that are involved in this case, are not so preempted.

My reasoning is informed, generally, by Wyeth v. Levine, 555 U.S. 555, 565 fn.3, 575 (2009), that there is a broad-based "presumption against preemption" and by California Fed. Sav. & Loan Assn. v. Guerra, 479 U.S. 272, 280-281 (1987), and cases therein cited, for the traditional black letter rules that "preemption is not to be lightly presumed"; that the "sole task" of the courts is to "ascertain the intent of Congress"; and that, under the Supremacy Clause, federal law may supersede state law in one of three ways -- either by *"express"* statutory terms, or by a "scheme of federal regulation" that is "sufficiently comprehensive" that it can be inferred that Congress "left no room" and intended that the federal law would "occupy the full or entire *"field"* displacing all supplementary state regulation, or where there is a *"conflict"* between state and federal law such that compliance with both is a physical *"impossibility"* or that the state law stands as an *"obstacle"* to the accomplishment and execution of the full purposes and objectives of Congress."

For the reasons that follow I conclude that none of the three theories or types of preemption -- *"express"* preemption, Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977), *"field"* preemption, Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), or *"conflict"* preemption, either because of physical *"impossibility,"* Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963), or because the state law stands as an *"obstacle"* to the accomplishment and execution of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941) -- here applies.

In sum, there is no "express" preemption by Congress (or OTC or OCC) of state foreclosure law, and there is no federal legislation or regulation that occupies the "field" of residential mortgage foreclosures. On the contrary, the federal regulations and the federally prescribed mortgage instruments expressly look to and depend on the field of state foreclosure law. It is no more "impossible" for federal lending institutions to comply with the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244 §35A, than it is for state chartered banks to do so, and the Massachusetts law poses no "obstacle" to the federal institutions' business of banking.

(2) OCC Regulation §34.4

The plaintiff invokes as authority for its argument of federal preemption the OCC regulation, 12 C.F.R. §34.4, issued in 2004 FN3/ by OCC under its general rule-making and supervisory authority under the National Bank Act (NBA), 12 U.S.C. §§1 et seq.

The OCC "Applicability of state law" regulation, 12 C.F.R. §34.4, provides:

"(a) Except where made applicable by federal law, state laws that *obstruct, impair, or condition* a national bank's ability to fully exercise its federally authorized real estate lending powers do not apply to national banks. Specifically, a national bank may make real estate loans under 12 USC 371 and §34.3, without regard to state law *limitations* concerning: (*italics* added)
(1) Licensing, registration (except for purposes of service of process), filings, or reports by creditors;
(2) The ability of a creditor to require or obtain private mortgage insurance, insurance for other collateral, or other credit enhancements or risk mitigants, in furtherance of safe and sound banking practices;
(3) Loan-to-value ratios;
(4) The *terms of credit,* including *schedule for repayment* of principal and interest, amortization of loans, balance, payments due, minimum payments, or *term to maturity* of the loan, including the *circumstances under which a loan may be called due* and payable upon the passage of time or a specified event external to the loan; (*italics* added)
(5) The aggregate amount of funds that may be loaned upon the security of real estate;
(6) Escrow accounts, impound accounts, and similar accounts;
(7) Security property, including leaseholds;
(8) Access to, and use of, credit reports;
(9) Disclosure and advertising, including laws requiring specific statements, information, or other content to be included in credit application forms, credit solicitations, billing statements, credit contracts, or other credit-related documents;
(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, *mortgages;* (*italics* added)
(11) Disbursements and repayments;
(12) Rates of interest on loans;
(13) Due-on-sale clauses except to the extent provided in 12 USC 1701j-3 and 12 CFR part 591; and
(14) Covenants and restrictions that must be contained in a lease to qualify the leasehold as acceptable security for a real estate loan.

The plaintiff argues otherwise, but the state law here in question, Gen.L. c.244 §35A, does not *"obstruct, impair, or condition* a national bank's ability to fully exercise its federally authorized real estate lending powers." Nor does the state law purport to, or in fact impose *"limitations* concerning" any of the fourteen items listed in the OCC regulation, 12 C.F.R. §34.4(a).

The plaintiff argues that Gen.L. c.244 §35A unlawfully imposes *"limitations"* upon "(4) The *terms of credit,* including *schedule for repayment* of principal and interest, amortization of loans, balance, payments due, minimum payments, or *term to maturity* of the loan, including the *circumstances under which a loan may be called due* and payable upon the passage of time or a specified event external to the loan." But the state law does no such thing.

The *"terms of credit"* of loans are not affected, for the simple reason that the state law has nothing to do with the origination of any loan. For the same reason, the *"schedule for repayment"* and the *"term to maturity"* of loans are not affected. Nor can it be fairly said that the state law affects the *"circumstances under which a loan may be called due"* as the state law regulates only the state law procedural requirements for foreclosure of loans that are in default, and in no way defines or alters the "circumstances" which constitute a default that are contractually defined at the time of origination of the loan.

The plaintiff makes no argument that Gen.L. c.244 §35A is preempted under any of the other thirteen items listed in 12 C.F.R. §34.4(a). Specifically, the plaintiff does not argue that Gen.L. c.244 §35A either purports to or in fact imposes *"limitations"* regarding the "(10) Processing, origination, servicing, sale or purchase of, or investment or participation in, *mortgages."*

In the interest of completeness, I state my opinion that the state law here in question does no such thing. I acknowledge that, in addition to Sovereign Bank v. Sturgis, 863 F.Supp.2d 75, 92, 100 (D.Mass., Woodlock, J., 2012), under an identical OTS regulation, 12 C.F.R. §560.2(b)(10), at least two courts have held that a wrongful foreclosure claim is so preempted. See, Copeland-Turner v. Wells Fargo Bank, 800 F.Supp.2d 1132, 1141, 1142 (D.Ore. 2011); Nguyen v. Wells Fargo Bank, 749 F.Supp.2d 1022, 1031-1033 (N.D.Cal. 2010). At least one court has held that similar claims are not so preempted. See, In Re Ocwen Loan Servicing, 491 F.3d 638, 642, 645 (7th Cir., Posner, J., 2007).

The OCC regulation, 12 C.F.R. §34.4(b), provides:

> (b) State laws on the following subjects are *not inconsistent with the real estate lending powers of national banks* and apply to national banks to the extent that they *only incidentally affect the exercise of national banks' real estate lending powers:* (*italics* added)
> *(1) Contracts;* (*italics* added)
> (2) Torts;
> (3) Criminal law;
> (4) Homestead laws specified in 12 USC 1462a(f);

(5) Rights to collect debts; (*italics* added)
(6) Acquisition and transfer of real property; (*italics* added)
(7) Taxation;
(8) Zoning; and
(9) Any other law the effect of which the OCC determines to be *incidental to the real estate lending operations* of national banks or *otherwise consistent* with the powers and purposes set out in §34.3(a). (*italics* added)

The state foreclosure procedures law that is here in question arguably might be typed as a law on the subject of "*(1) Contracts*" or "*(5) Rights to collect debts*" or "*(6) Acquisition and transfer of real property.*" But whether it is or not, the law is "*not inconsistent with the real estate lending powers of national banks*" and it does not and could not possibly do more than "*only incidentally affect the exercise of national banks' real estate lending powers.*" Otherwise put, the law does not and could not possibly have an effect more than only "*incidental to the real estate lending operations* of national banks" and it is "*otherwise consistent* with the powers and purposes set out in [the OCC regulation]."

(3) Mortgage, Applicable Law, Statutory Power of Sale

Because there is no federal mortgage foreclosure law, the federally prescribed Mortgage in this case [Doc.#31A Exh.A; Doc.#40A Exh.A], which is altogether consistent with the OCC regulation, does not rely on any federal statute or regulation for its enforcement, but instead necessarily looks to state law.

The Mortgage, ¶22 (Acceleration; Remedies), as well as ¶19 (Borrower's Right to Reinstate After Acceleration), and ¶16 (Governing Law...), and seven other provisions, ¶10 (Mortgage Insurance), ¶11 (Assignment...), ¶14 (Loan Charges), ¶15 (Notices), ¶18 (Transfer of the Property or a Beneficial Interest in Borrower), ¶20 (Sale of Note; Change of Loan Servicer; Notice of Grievance), ¶23 (Release), refers repeatedly to "Applicable Law."

The Mortgage DEFINITIONS provides: "(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions." FN4/

The notion of "Applicable Law" is expansive, and is obviously intended to include within its scope all applicable state (and territorial and local) laws, that vary from locale to locale, and which can be expected to change from time to time, in their substantive terms, conditions, and requirements. It is significant that the authors of the "Applicable Law" definition did not choose to limit its expansiveness, or fix the definition as to geographic locale, or as to in time (as might easily have been done by use of the phrase "as currently in effect" or similar confining language).

The Mortgage ¶22 invokes a specific provision of state law: "If the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the STATUTORY POWER OF SALE and any other remedies permitted by Applicable Law."

Gen.L. c.183 §21 ("Statutory power of sale" in mortgage) provides: "Section 21. The following "power" shall be known as the "Statutory Power of Sale", and may be incorporated in any mortgage by reference: (POWER.) *But upon any default* in the performance or observance of the foregoing or other condition, *the mortgagee or* his executors, administrators, *successors or assigns may sell the mortgaged premises* ... by public auction on or near the premises ... *first complying with the terms of the mortgage and with the statutes relating to the foreclosure of mortgages by the exercise of a power of sale,* and may convey the same by proper deed or deeds to the purchaser or purchasers absolutely and in fee simple; and such sale shall forever bar the mortgagor and all persons claiming under him from all right and interest in the mortgaged premises, whether at law or in equity." (*italics* added).

(4) Infrastructure of State Law

It is clear enough that the procedural notice requirements of Gen.L. c.244 §35A ("Foreclosure and Redemption of Mortgages") and Gen.L. c.183 §21 ("Statutory power of sale") are anticipated, depended upon, and indeed required by, both the OCC "Applicability of state law" regulation, 12 C.F.R. §34.4, and the federally prescribed Mortgage §22, because those state mortgage foreclosure laws form a part of the traditional state law legal infrastructure that makes it possible and practicable for nationally chartered banking institutions to exercise their permissible federal banking business and lending powers.

Indeed, the federal regulatory authorities acknowledge:

> "[OTS regulations] preserve the traditional infrastructure of basic state laws that undergird commercial transactions" OTS 61 Fed.Reg. 50951 at 50966 (September 30, 1996)

> "states retain some power to regulate national banks in areas such as contracts, debt collection, acquisition and transfer of property, and taxation, zoning, criminal, and tort law. Application of these laws to national banks and their implementation by state authorities typically does not affect the content or extent of the Federally-authorized business of banking conducted by national banks, but rather establishes the legal infrastructure that surrounds and supports the ability of national banks—and others—to do business. In other words, these state laws provide a framework for a national bank's ability to exercise powers granted under Federal law; they do not obstruct or condition a national bank's exercise of those powers." OCC 69 Fed.Reg. 1895 at 1896 (January 13, 2004).

"State laws that are not preempted ... [i]n general ... would be laws that do not attempt to regulate the manner or content of national banks' real estate lending, but that instead form the legal infrastructure that makes it practicable to exercise a permissible federal power" OCC Preemption Final Rule (March, 2004) 2004 WL 2360325 at *15.

"these types of laws typically do not regulate the manner or content of the business of banking authorized for national banks, but rather establish the legal infrastructure that makes practicable the conduct of that business." OCC Preemption Final Rule (March, 2004) 2004 WL 2360325 at *17.

As the Sturgis court acknowledged, at 101, "There is no 'uniform federal scheme of regulation' regarding foreclosure, and there is no 'duplication' between federal and state laws in this area. Without state law, there would be no foreclosure law whatsoever. This is not a matter of particular rates or fees left to the lenders' discretion; rather, an entire area of law would be devoid of content for federal savings associations if HOLA were found to preempt state law regulating foreclosures. Foreclosure law is a part of 'the traditional infrastructure of basic state laws that undergird commercial transactions' that OTS wanted to preserve."

See, Justice Scalia, writing for the majority in BFP v. Resolution Trust Corp., 511 U.S. 531, 541-542 (1994), and then for the majority in Cuomo v. Clearing House Ass'n, 557 U.S. 519, 531, 532-533, 534-535 (2009), and Justice Stevens, writing in dissent in Watters v. Wachovia Bank, 550 U.S. 1, 22-44 (2007), and then for the majority in Wyeth v. Levine, 555 U.S. 555, 573 (2009), all as described in my decision rendered today in Wells Fargo Bank v. O'Neill, N.E.Hsg.Ct. No. 11-SP-1317 (November 18, 2013).

This case is not like the case of Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141 (1982), where the divided Supreme Court held that a federal regulation permitting national banks to include in their mortgage contracts a debt-accelerating "due-on-sale" clause preempted a California state law forbidding such clauses. Nor is this like the case of Barnett Bank v. Nelson, 517 U.S. 25 (1996), where the unanimous Court held that a federal statute granting national banks in small towns the authority to sell insurance preempted a Florida state law that generally prohibited certain banks from selling most kinds of insurance.

Instead, this is more like the case of Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707 (1985), where the unanimous Court held that local health and safety ordinances governing the collection of blood plasma from paid donors was not preempted by federal Food and Drug Administration regulations. And this case is much more like the case of Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009). where the divided Court held that an OCC regulation was a reasonable interpretation of the National Bank Act (under full Chevron FN5/ standards) to the extent that it prohibited a state from exercising preempted supervisory or "visitorial powers"-- but that the regulation was unreasonable to the extent that it prohibited the state's attorney general from bringing an action against a national bank to enforce the New York state's fair lending laws.

3. Conclusion

This case does not involve the mortgagor's statutory right to cure, or the mortgagee's statutory obligation to give 90 days written notice. The plaintiff obviously has no quarrel either with the right to cure itself, or with the requirement of written notice, or with the 90 days period of time after default that is required for both nationally-chartered and state-chartered mortgagees or assignees to give notice of default and of cure rights under the Massachusetts Foreclosure and Redemption of Mortgages Law, Gen.L. c.244§35A(b). In this case, the mortgage servicer "Wells Fargo Home Mortgage" gave a full 90 days notice dated June 17, 2010 [Doc.#24 Exh.2, 3; Doc.#42A Exh.KRC-3, TBV-1; Doc.#45A]. FN6/

All that is here involved are the state law requirements as to the *contents* of the notice, and the requirement that the contents of the notice be *complete* and *accurate.* The relatively new requirements of Gen.L. c.244 §35A (enacted by St.2007 Ch.206) are but a modest addition to the longstanding notice and affidavit requirements of Gen.L. c.244 §§14 and 15 (both enacted by St.1857 Ch.229). There is no reason to suppose that the traditional "strict compliance" standard should not be applied to the new requirements, and it is not shown in this case that the state law requirements offend any federal law.

ORDER

The motion by the plaintiff [Doc.#31, 40, 43, 44] for summary judgment is allowed in part and denied in part and the cross motion by the defendants [Doc.#42, 45] is allowed in accordance with the foregoing rulings.

David D. Kerman
Associate Justice

Dated: November 18, 2013

Footnotes

FN1/ I assume without deciding that the federal preemption argument is available to Fannie Mae although only Fannie Mae's predecessor Wells Fargo Bank, N.A. and not Fannie Mae itself is a National Bank. See, Copeland-Turner v. Wells Fargo Bank, 800 F.Supp.2d 1132, 1142-1144 (D.Ore. 2011) ("although Wells Fargo itself is not subject to HOLA and OTS regulations, this action is nonetheless governed by HOLA because Plaintiff's loan originated with a federal savings bank and was therefore subject to the requirements set forth in HOLA and OTS regulations"); Nguyen v. Wells Fargo Bank, 749 F.Supp.2d 1022, 1031-1033 (N.D.Cal. 2010) and cases cited (preemption applied to post-origination wrongful foreclosure and other claims even though Wells Fargo was no longer a federal savings bank); In Re Ocwen Loan Servicing, 491 F.3d 638, 642 (7th Cir., Posner, J., 2007) ("Ocwen has given up its federal thrift charter; but this does not affect its defense that when it committed the acts for which the plaintiffs are suing any state-law claims based on those acts were preempted.") But see, Ross v. Deutsche Bank, 933 F.Supp.2d 225, 232-233 (D.Mass., Young, J., 2013) (Because Deutsche Bank neither originated the loan, funded the loan at inception, nor purchased the loans as part of any real estate lending program comprehended by the OCC regulation, the Massachusetts right-to-cure law is not preempted under the NBA.); Gerber v. Wells Fargo Bank, 2012 WL 413997 at *3-4 (D.Ariz. February 9, 2012) (rejecting argument that HOLA preemption "sticks" to any loan originating with a federal savings bank).

I assume that no waiver of the preemption argument occurred due to the fact that in this case Wells Fargo Home Mortgage gave its borrower a 90 days notice of default although the Mortgage ¶22 required notice of only 30 days, or because Wells Fargo has "historically complied" with Gen.L. c.244 §35A in other cases. I do note, however, that these facts tend to show that Wells Fargo, which is the National Bank in this case, may hold a view about preemption that differs from that of its assignee Fannie Mae, which is not a National Bank.

I assume that the preemption argument was not waived by the Consent Judgment entered into by Wells Fargo in U.S. v. Bank of America, et al, (D.D.C. Civil Action No. 12-0361 (April 4, 2012), https://d9klfgibkcque.cloudfront.net/consent_judgment-WellsFargo-4-11-12.pdf, which stated "Nothing in this Consent Judgment shall relieve Defendant of its obligation to comply with applicable state and federal law."

FN2/ The National Bank Act (NBA), 12 U.S.C. §§1 et seq., has been amended, by the Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub.L. 111–203, 124 Stat. 1376 (July 21, 2010).

The Dodd–Frank Act, 12 U.S.C. §25b, applicable to national banks and subsidiaries, and 12 U.S.C. §1465, applicable to federal savings associations, significantly diminishes the extent to which the federal banking laws and implementing OCC regulations may preempt state law, by limiting "express" preemption to statutes other than the federal banking laws, by eliminating "field" preemption, and by confining preemption to specific "conflicts" between state and federal law. The Act provides that state consumer financial laws are preempted only if the state law would have a

discriminatory effect on national banks in comparison with state banks, §25b(b)(1)(A), or if the state law prevents or significantly interferes with the exercise of national bank powers, §25b(b)(1)(B), or if the state law is preempted by another federal statute, §25b(b)(1)(C). The Act emphasizes that preemption is to be determined only on a case-by-case basis, §25b(b)(3), that federal banking law does not occupy the field in any area of state law, §25b(b)(4), that court review of agency preemption determinations must assess the thoroughness, validity of reasoning, consistency, and other factors which the court finds persuasive and relevant to its decision, §25b(b)(5)(A), and that agency preemption regulations and orders must be supported by substantial evidence and specific findings in accordance with Barnett standards, §25b(c).

The plaintiff correctly points out that the "new" preemption standard is inapplicable in the instant case, because, as provided by 12 U.S.C. §5553, the Dodd–Frank Act shall not be construed to alter or affect the applicability of preexisting preemption law to any contract entered into on or before July 21, 2010.

FN3/ The OCC regulation, 12 C.F.R. §34.4 ("Applicability of state law"), was amended, effective on July 21, 2011, to conform with the Dodd-Frank Act. The amendment deleted the §34.4(a) "obstruct, impair, or condition" provision, deleted the §34.4(b) "only incidentally affect" provision, deleted the §34.4(b)(9) "OCC determines to be incidental to the real estate lending operations" provision, and added references to the Barnett case. Also, the amended OCC regulation, 12 C.F.R. §160.2 ("Applicability of law"), effective on July 21, 2011, to conform with the Dodd-Frank Act, now provides that state law applies to federal savings associations "to the same extent and in the same manner that those laws apply to national banks." In accordance with 12 U.S.C. §5553, the Dodd-Frank Act amended OCC regulations do not apply to or "alter or affect [the applicability of prior federal law]" to the contract in this case.

FN4/ The "Applicable Law" provisions appear to be derived from the "Uniform Mortgage Instrument" developed by the Federal Home Loan Mortgage Corporation and the Federal National Mortgage Association. See, Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 146 fn.2, 148 fn.5 (1982) (discussing ¶17 and ¶15 of the Uniform Mortgage Instrument). See, "Massachusetts--Single Family--Fannie Mae/Freddie Mac–Uniform Instrument--form 3022 1/01" at https://www.fanniemae.com/singlefamily/security-instruments and http://www.freddiemac.com/uniform/unifsecurity.html.

It is of course true that the "Applicable Law" provisions are not intended to elevate state law over federal law. See, Fidelity Fed. Sav. & Loan Assn. v. de la Cuesta, 458 U.S. 141, 150-151 fn.8, 158 fn.12 (1982). The "Applicable Law" provisions do not do so in this case, however, because, unlike de la Cuesta, for example, where a state law forbidding the use of a due-on-sale acceleration clause was preempted by a federal law that expressly permitted the use of such a clause, here there is no federal law of mortgage foreclosure procedures that would conflict with and thus preempt the Massachusetts state law.

I agree with the Sturgis court at 99, 100, 102, 102-103, 103, 104, that a state law that is preempted by a federal law is not included as "Applicable Law" in the Mortgage. I do not agree, however, that the state law is preempted.

FN5/ Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

FN6/ This case also does not involve the recent enactments: amending §35A (St.2010 Ch.258, effective August 7, 2010) which requires a good faith effort to negotiate a commercially reasonable alternative to foreclosure, which may include a loan modification, short sale, or deed-in-lieu of foreclosure; adding §35B (St.2012 Ch.194 effective January 1, 2012) which requires reasonable steps and a good faith effort to avoid foreclosure, including a right to pursue a modified mortgage loan; and adding §35C(h) (St.2012 Ch.194 January 1, 2012) which prohibits restrictions on an offer to purchase by a tax exempt entity limiting ownership or occupancy by the borrower.

I note that courts have divided as to whether a similar California law which requires lenders to "explore options for the borrower to avoid foreclosure" is preempted. See, Tamburri v. Suntrust Mortgage, Inc., 875 F.Supp.2d 1009 (N.D.Cal. 2012) (not preempted); Skov v. U.S. Bank, 207 Cal.App.4th 690, 143 Cal.Rptr.3d 694 (Ct.App. 6th Dst. 2012) (not preempted; contrary cases cited at fn.9); Mabry v. Superior Court (Aurora), 185 Cal.App.4th 208, 110 Cal.Rptr.3d 201 (Ct.App. 4th Dst. 2010) (not preempted); Maynard v. Wells Fargo Bank, 2012 WL 4898021 (S.D.Cal. October 15, 2012) (preempted); Taguinod v. World Savings Bank, 755 F.Supp.2d 1064 (C.D.Cal. 2010) (preempted). See also, Gerber v. Wells Fargo Bank, 2012 WL 413997 at *4-9 (D.Ariz. February 9, 2012) (Arizona Consumer Fraud Act not preempted); Smith v. BAC, 769 F.Supp.2d 1033 (S.D.W.Va. 2011) (West Virginia Consumer Credit and Protection Act not preempted)