COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS:

HOUSING COURT DEPARTMENT
CITY OF BOSTON DIVISION
SUMMARY PROCESS
NO. 11H84SP004364

FEDERAL NATIONAL MORTGAGE ASSOCIATION,
Plaintiff

v

JUANA VIDAL,
Defendant

MEMORANDUM OF DECISION ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a summary process action in which plaintiff Federal National Mortgage Association ("FNMA") is seeking to recover possession of a residential dwelling from defendant Juana Vidal ("Vidal") for nonpayment of rent.[1] Vidal filed an answer and counterclaims.

This matter is before the Court on Vidal's **Motion to Dismiss, or in the alternative, for Summary Judgment**. FNMA filed a written opposition to the motion. Since the parties have presented evidence outside of the pleadings, I shall consider Vidal's motion as one for summary judgment.

After reviewing the summary judgment record and considering the arguments of the respective parties, I conclude that there exist disputed issues of fact pertaining to Vidal's status as a "bona fide tenant" that must be determined by a jury at trial.

The standard for review on summary judgment "is whether, viewing the evidence in the light most favorable to the non-moving party, all material facts have been established and the moving party is entitled to a judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991). See Mass. R. Civ. P. 56 (c). The moving party must demonstrate with admissible evidence, including deposition testimony, answers to interrogatories, admissions,

[1] With the assent of all parties, the complaint was amended to correct a scrivener's error. The defendant is Juana Vidal, not Juan Vidal.

documents, and affidavits, that there are no genuine issues as to any material facts, and that the moving party is entitled to a judgment as a matter of law. *Community National Bank v. Dawes*, 369 Mass. 550, 553-56 (1976). All evidentiary inferences must be resolved in favor of the non-moving party. See *Simplex Techs, Inc. v. Liberty Mut. Ins. Co.*, 429 Mass. 196, 197 (1999).

Vidal claims that she is a "bona fide tenant" within the meaning of the federal Protecting Tenants at Foreclosure Act of 2009 ("PTFA"), Pub.L. 111-22 (2009), and that as a matter of federal supremacy (United States Constitution, Art. VI, Cl. 2)) the shorter state law mandated 14-day tenancy termination notice requirement for cases involving nonpayment of rent set forth in G.L. c. 186, § 12 must give way to the longer 90-day tenancy termination notice requirement for post-foreclosure tenancies mandated by Congress when it enacted PTFA, Section 702(a)(1). Vidal argues that FNMA's claim for possession must be dismissed because it did not serve her with the federally mandated 90-day termination notice. FNMA argues that Vidal is not a "bona fide tenant" within the meaning of PTFA because she cannot prove "receipt of rent" by any landlord (pre or post foreclosure) in accordance with Section 702(b)(3). Based upon this premise, FNMA argues that it was not obligated to provide Vidal with the 90-day tenancy termination set forth in PTFA. Instead, FNMA argues that it complied with the just cause termination provisions set forth in G.L. c. 186A, and that it served Vidal with a 14-day termination notice in accordance with G.L. c. 186, § 12.

The undisputed facts as best I can glean from the cursory pre-printed affidavit submitted by Vidal and from the pleadings are as follows:

Sometime in 2011 FNMA acquired the residential property at 44-46 Haverford Street, #44 Unit 2, in the Jamaica Plain section of Boston ("Unit 2"). FNMA either purchased the property at a foreclosure auction or the former owner's mortgagee transferred the property to FNMA after the foreclosure auction. Under either scenario there appears to be no dispute that FNMA is an "immediate successor in interest" under PTFA (Section 702(a)) and is a "foreclosing owner" under G.L. c. 186A, §1(a). Vidal states in her affidavit that she was residing at Unit 2 at the time of the foreclosure and has continued to reside there. She alleges that she was a tenant-at-will of the prior owner, but does not state what the agreed upon monthly rent had been and whether she had ever paid rent to the prior owner or to FNMA. FNMA states that on September 12, 2011, it served Vidal with a 14-day notice to quit for nonpayment of rent. Vidal denies that she received a notice to quit from FNMA.

Vidal argues that she is entitled to summary judgment on FNMA's claim for possession because, although there may be a dispute as to whether FNMA served her with a 14-day notice to quit for nonpayment of rent, it is undisputed that FNMA never serve her with a 90-day termination notice it was obligated to give in accordance with the notice provision of PTFA.

Section 702(a)(2) of PTFA provides that where a residential property has changed ownership as the result of a foreclosure, the immediate successor in interest (here FNMA) can terminate the tenancy of a "bona fide tenant" only after providing that tenant with at least a 90 day notice to vacate. The federal statute does not distinguish between a tenancy terminated with or without cause. Under Section 702(b) of PTFA a "bona fide lease or tenancy" (making the tenant a "bona fide tenant" entitled to the protection of the statute) is a lease or tenancy between the tenant and mortgagor that was created prior to foreclosure, was in existence at the time of foreclosure and where 1) the tenant is not the child, spouse or parent of the former mortgagor, 2) the lease or tenancy was the result of an arms-length transaction between the tenant and the former mortgagor, and 3) the lease or tenancy "requires the receipt of rent that is not substantially less than fair market rent for the [rental unit]." Vidal, as the party claiming "bona fide tenant" status, has the burden of proof on each of the three elements set forth in the statute.

FNMA argues that Vidal is not a "bona fide tenant" as that term is used in PTFA because she cannot prove that either the former mortgagor or FNMA actually received rent from Vidal. FNMA's interpretation of the "bona fide tenant" provision of PTFA is incorrect. Subpart (3) read in its entirety does not require proof that money actually changed hands (though proof that the former mortgagor received rent payments from Vidal would be one factor the court could consider in deciding whether a pre-foreclosure tenancy existed and whether the tenancy was the product of an arms-length transaction). Rather, Subpart (3) requires proof that the pre-foreclosure rent that the tenant was obligated to pay (and that the former mortgagor was entitled to receive) was not substantially less than the fair market rent for a similar apartment in the same neighborhood at the time of the foreclosure.

In enacting PTFA Congress attempted to reduce the risk of immediate eviction faced by tenants living in foreclosed properties. The Department of Housing and Urban Development ("HUD") summarized the intent of Congress as follows:

> "With the unprecedented number of foreclosures occurring across the country, it became increasingly evident that not only were homeowners the victims of the downturn in the economy, but tenants residing in residential properties

> were also victims of the foreclosure crisis. All too often, tenants were caught unaware that the residential property in which they reside was being foreclosed and were given little notice of the need to vacate the property. The objective of these new tenant protections is to ensure that tenants receive appropriate notice of foreclosure and are not abruptly displaced."

See, Federal Register, Vol. 74, No. 120, June 24, 2009. While Congress evidenced a clear intent to establish a minimum federal notice requirement for post-foreclosure tenancy terminations ("at least 90 days before the effective date of such notice"), it did not expressly preempt all state laws governing residential tenancy terminations. Section 702(a) of PTFA provides that "nothing in this section shall affect the requirements . . . of any State or local law that provides longer time periods or other additional protections for tenants." Therefore, while the state termination notice provision (G.L. c. 186, §§§ 11, 12 and 13) must give way as a matter of federal supremacy to the more stringent termination notice requirements set forth in PTFA, a post-foreclosure tenant is still entitled to the additional protections set forth in G.L. c. 186A (just cause for eviction requirements).[2]

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[2] A federal statute preempts state law where (a) Congress expressly preempts state law in the language of the statute [see, *Jones v. Rath Packing Co.*, 423 U.S. 519 (1977)], or (b) Congressional intent to preempt state law can be presumed from the comprehensive nature of the federal law [see, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947)], or (c) an actual conflict exists between federal and state law [see, *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987)]. The state tenancy termination notice requirements must give way to the more protective federal tenancy termination notice provision under the third prong of preemption analysis that holds that federal law prevails where there is an actual conflict with state law.

An actual conflict exists where (1) compliance with the federal and state law is physically impossible, and (2) the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Hines v. Davidowitz*, 312 U.S. 52 (1942). Here, compliance with both the federal and state tenancy termination notice requirements is impossible. Allowing FNMA to commence an eviction action against Vidal (if she qualifies as a "bona fide tenant") after serving here with the shorter state law notice would stand as an obstacle to the accomplishment of the protection that Congress intended to afford post-foreclosure "bona fide tenants." It is not for the state trial court to question the wisdom of Congress's decision to require that a 90-day notice be given as a precondition for terminating all tenancies in properties occupied by "bona fide tenants" as defined by PTFA, even those tenancies were the tenant is alleged to have failed to pay rent.

Federal law and state law affecting residential housing can co-exist except where the state law actually conflicts with the goals and purposes of the federal law. See, *Kargman v. Sullivan*, 552 F.2d 2 (1st Cir. 1977) (local rent control regulation did not conflict with HUD regulation); *City of Boston v. Harris*, 619 F.2d 87 (1st Cir. 1980) (local rent control regulation did conflict with revised HUD regulation); *Cruz Management Co., Inc. v. Wideman*, 417 Mass. 771 (1994) (state common law remedies for Section 8 tenants whose landlords fail to remedy conditions of disrepair do not conflict with the Section 8 statute because the common law remedies complemented and enhanced the federal purpose of providing safe and sanitary housing); and *Attorney General v. Brown*, 400 Mass. 826 (1987) (goals of the Section 8 program would not be undermined by enforcement of state anti-discrimination statute). The additional protections afforded post-foreclosure "bona fide tenants" as a matter of state law under G.L. c. 186A do not conflict with Congress's objectives as set forth in PTFA.

I rule that there exist disputed issues of fact that must be decided at trial. Specifically, Vidal must prove with credible admissible evidence (and not just conclusory statements) that she is a "bona fide tenant" entitled to the statutory notice protection of PTFA. Vidal must prove that a) she is not the former mortgagor's child, spouse or parent, b) her lease or tenancy with the former mortgagor was the product of an arms-length transaction, and c) under the terms of her lease or tenancy with the former mortgagor the agreed upon rent that the former mortgagor was entitled to receive was not substantially less than the fair market rent for a similar apartment in the same neighborhood at the time of the foreclosure. If Vidal proves that she is a "bona fide tenant" under the provisions of PTFA then FNMA can recover possession only with proof that 1) it served Vidal with at least a 90-day notice to vacate as required by PTFA, 2) the vacate notice otherwise complied with the procedural and substantive provisions of state law, and 3) it had cause to terminate Vidal's tenancy (such as non-payment of rent) or other just cause in accordance with the provisions of G.L. c. 186A.[3]

Conclusion

For these reasons, Vidal's **Motion to Dismiss, or in the alternative, for Summary Judgment** is **DENIED**. The clerk shall schedule this case for trial.

SO ORDERED.

JEFFREY M. WINIK
FIRST JUSTICE

February 17, 2012

cc: David J. Rhein, Esquire
Donald F. DeMayo, Esquire
Guillermo Garza, Assistant Clerk Magistrate

[3] To qualify for "bona fide tenant" status under G.L. c. 186A a tenant must prove that 1) she is not the mortgagor, or a child, spouse or parent of the mortgagor, and 2) her lease or tenancy was the result of an arms-length transaction. Unlike PTFA, to qualify as a "bona fide tenant" as a matter of state law (Chapter 186A), a tenant does not have the burden to prove as a separate element that the lease or tenancy required receipt of rent that is not substantially less than fair market rent for a similar apartment in the neighborhood (though the court could consider that factor, along with others, in evaluating whether the lease or tenancy was the product of an arms-length transaction as a matter of state law).