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19-P-1342 Appeals Court

WELLS FARGO BANK, NATIONAL ASSOCIATION, trustee,[1] vs. RONALD A. MONDI.

No. 19-P-1342.

Essex. June 4, 2020. - August 26, 2020.

Present: Desmond, Sacks, & Shin, JJ.

Summary Process, Appeal. Practice, Civil, Appeal, Enlargement of time, Waiver. Notice, Of judgment, Timeliness. Rules of Civil Procedure. Rules of Appellate Procedure. Uniform Summary Process Rules.

Summary Process. Complaint filed in the Northeast Division of the Housing Court Department dated April 2, 2018.

A motion to enlarge the time in which to file a notice of appeal was heard by Fairlie A. Dalton, J.

Lucas B. McArdle for the defendant.
Kevin Manganaro (Marissa I. Delinks also present) for the plaintiff.

SACKS, J. The defendant in this postforeclosure summary process action, asserting that he never received notice of the

[1] Of the MASTR Asset Backed Securities Trust 2005-OPT1 Mortgage Pass-Through Certificates, Series 2005-OPT1.

entry of judgment against him, appeals from a Housing Court judge's order denying his motion to enlarge the time for filing a notice of appeal. He asserts that the judge abused her discretion in denying the motion. He further argues, for the first time on appeal, that the strict application in these circumstances of the summary process statute's ten-day appeal period, G. L. c. 239, § 5 (a), violates his procedural due process rights. We conclude that the judge correctly ruled that she had no discretion to enlarge the statutory appeal period. We emphasize, however, that a motion under Mass. R. Civ. P. 60 (b) (1) or (6), 365 Mass. 828 (1974), may provide a remedy to litigants in the defendant's position, although the defendant has not pursued it here. For that and other reasons, we decline to reach the newly-raised constitutional claim.

Background. The defendant, Ronald Mondi, owned a home in Wilmington, on which the plaintiff Wells Fargo Bank, N.A., as trustee (bank), assertedly held a mortgage.[2] Mondi defaulted on the mortgage, and after holding a foreclosure auction at which it was the highest bidder, the bank acquired the property. In April 2018, the bank filed a summary process action against Mondi. On November 9, 2018, the judge heard argument on the

[2] Mondi owned the home with his wife, who also appeared on the mortgage and was a defendant in the summary process action. Because she did not appeal, we refer herein only to Mondi.

parties' cross motions for summary judgment. On April 2, 2019, the judge's decision and order were docketed, allowing the bank's motion, denying Mondi's motion, and ordering judgment for the bank. On April 4, 2019, judgment entered for the bank.

The face of the judgment stated that it was "[e]ntered and notice sent on April 4, 2019." Attached to the judgment was a sheet of paper bearing the notation "CC:" and then listing the names and addresses of the bank's counsel, but not Mondi's counsel. An essentially identical sheet was attached to the April 2, 2019, decision and order. The docket itself contains no notation that notice was sent. Cf. Mass. R. Civ. P. 77 (d), as appearing in 476 Mass. 1402 (2017) (rule 77 [d]) (requiring clerk, when giving notice of entry of judgment or order, to "make a note in the docket" of notice being given, whether by mail or electronic means).[3]

Applying the ten-day appeal period of the summary process appeal statute, G. L. c. 239, § 5 (a), and taking into account that the tenth day after entry of judgment was a Sunday and the following day was a legal holiday (Patriots' Day), the last day to file a notice of appeal was April 16, 2019. One week after that date, on April 23, Mondi filed a notice of appeal from the

[3] We discuss infra the applicability of rule 77 (d) to summary process proceedings.

judgment, along with a motion to enlarge the time for filing the notice.

The motion asserted that Mondi had not received the judge's April 2 decision and order, had learned about the decision and order and the April 4 judgment only through a "random docket check" by counsel, and that, had he received notice, he would have timely appealed. The motion was supported by the affidavit of an attorney in counsel's office, which detailed the office's procedures for handling incoming mail, stated that the office had never received the April 2 decision and order, and asserted that counsel had learned about the decision and order only through a "random docket check." The affidavit did not, however, refer to the judgment or state whether counsel had received it. A further filing in support of the motion stated that counsel "made a diligence check of the [d]ocket . . . from time to time." At a hearing on the motion, counsel stated that he had done so in this case because he had heard nothing since the summary judgment hearing five months earlier, which the judge agreed was a "long" time compared to the usual period for ruling on such motions in summary process cases.

The judge then denied the motion to enlarge the time for filing the notice of appeal. Although she made no findings of fact regarding whether the clerk had sent notice of the judgment or whether counsel had received it, she accepted the assertion

that Mondi would have timely appealed the judgment had he known of it by April 16, the last day of the appeal period. She nevertheless ruled that she had no authority to grant any enlargement. Mondi timely appealed the order denying the motion.

Discussion. 1. Statutory appeal period. The judge correctly ruled that she had no authority to enlarge the appeal period. A party seeking to appeal a judgment in a summary process action "shall file a notice of appeal with the court within 10 days after the entry of the judgment." G. L. c. 239, § 5 (a). This ten-day period "is fixed by statute and is jurisdictional." Jones v. Manns, 33 Mass. App. Ct. 485, 489 (1992). "We have required strict adherence to the short period for claiming an appeal prescribed by G. L. c. 239, § 5." Kobayashi v. Orion Ventures, Inc., 42 Mass. App. Ct. 492, 504-505 (1997). Such a "statutory appeal period . . . cannot be overridden by a contrary rule of court when the manner and time for effective filing of an appeal are delineated in the statute." Friedman v. Board of Registration in Med., 414 Mass. 663, 665 (1993). Nor may a statutory appeal period be overridden or enlarged by a judge acting pursuant to a court rule or general equitable principles. See Senior Hous. Props. Trust v. HealthSouth Corp., 447 Mass. 259, 271 (2006) ("where there is an irreconcilable conflict between a court rule and a

statute, the rule generally must yield to the statute"); T.F. v. B.L., 442 Mass. 522, 533 (2004) ("It is a maxim that equity follows the law as declared by a statute," and "[the] grant of equitable powers does not permit a court to disregard statutory requirements" [citations omitted]).

2. Relief under appellate rules. In perhaps the majority of cases, the time for filing a notice of appeal is set by a court rule such as Mass. R. A. P. 4 (a) (1), as appearing in 481 Mass. 1606 (2019), and other provisions of the rules allow for enlargement of that time. Thus, "[u]pon a showing of excusable neglect, the lower court may extend the time for filing the notice of appeal or notice of cross appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this rule" (emphasis added). Mass. R. A. P. 4 (c). Similarly, the appellate court or a single justice thereof may "enlarge the time prescribed by these rules" (emphasis added) for filing a notice of appeal, subject to certain limitations.[4] Mass. R. A. P. 14 (b), as appearing in 481 Mass. 1626 (2019).

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[4] Rule 14 (b) provides in full:

> "The appellate court or a single justice of the appellate court in which the appeal will be, or is, docketed for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but neither the appellate court

But our courts have ruled in numerous contexts that, where an appeal period is set by statute, a court lacks the authority to enlarge it. See Commonwealth v. Claudio, 96 Mass. App. Ct. 787, 793-794 (2020), and cases cited. As we ruled long ago in another summary process case, "the power to extend the time for filing an appeal [cannot] be found in Mass.R.A.P. 4 . . . which by its own terms is applicable only to periods of time established by that rule." Liberty Mobilehome Sales, Inc. v. Bernard, 6 Mass. App. Ct. 914, 914 (1978). See U.S. Bank Trust, N.A. v. Johnson, 96 Mass. App. Ct. 291, 294 (2019) (ten-day summary process appeal period "ineligible for enlargement").[5]

3. Absence of notice required by rules. The foregoing principles are not altered by court rules requiring that the clerk send notice of the entry of an order or judgment to the parties. One such rule is civil rule 77 (d). It provides, with

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> nor a single justice may enlarge the time for filing a notice of appeal beyond 1 year from the date of entry of the judgment or order sought to be reviewed, or, in a criminal case, from the date of the verdict or finding of guilt or the date of imposition of sentence, whichever date is later."

Mass. R. A. P. 14 (b), as appearing in 481 Mass. 1626 (2019).

[5] The running of the summary process appeal period is tolled by the timely filing of one of the motions listed in Mass. R. A. P. 4 (a) (2), and a new appeal period commences upon the entry of the order disposing of the last such motion. See Youghal, LLC v. Entwistle, 484 Mass. 1019, 1020-1021 (2020).

an exception not relevant here, that "the clerk shall immediately upon the entry of an order or judgment serve upon each party who is not in default for failure to appear a notice of the entry" -- but then goes on to say, "Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4 of the Massachusetts Rules of Appellate Procedure or Rule 4 of the District/Municipal Courts Rules for Appellate Division Appeal, and except as relevant to a motion for relief from judgment under Rule 60(b)(6) of these rules."[6] See Locke v. Slater, 387 Mass. 682, 685-686 (1982) (holding that, under then-Rule 77 [d] of the Rules of the District Court, time for requesting review by way of report of judgment began to run when judgment entered, and clerk's failure to send required notice of entry of judgment until after time for requesting report had expired conferred no authority on trial judge to enlarge time for doing so). See also Brown v. Quinn, 406 Mass. 641, 644 (1990) ("It is the

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[6] The portion of the exception in rule 77 (d) concerning a motion for relief from judgment is based at least in part on Chavoor v. Lewis, 383 Mass. 801 (1981). There the court affirmed a judge's authority under rule 60 (b) (6) to vacate a judgment of dismissal, almost two years after its entry, where plaintiff's counsel did not receive notice of a call of the list or of the entry of the judgment. Id. at 802, 805-807. See Reporter's Notes to 1983 amendment to Mass. R. Civ. P. 77, Massachusetts Rules of Court, at 105 (Thomson Reuters 2019).

obligation of counsel, not of the clerk, to monitor the progress of their cases").

The analogous summary process rule provides in its entirety: "Notice of judgment shall be sent to all parties forthwith upon entry of judgment." Rule 10 (e) of the Uniform Summary Process Rules (2004). Although this rule does not contain an explicit disclaimer of the effect of lack of notice such as the one in rule 77 (d), such a disclaimer appears to apply by the operation of Summary Process Rule 1, which states that "[p]rocedures in [summary process] actions that are not prescribed by these rules shall be governed by the Massachusetts Rules of Civil Procedure insofar as the latter are not inconsistent with these rules, with applicable statutory law or with the jurisdiction of the particular court in which they would be applied." Rule 1 of the Uniform Summary Process Rules (1980).[7] In short, the failure of a clerk to send notice of the

[7] The commentary to Rule 1 of the Uniform Summary Process Rules (1980) states:

> "[T]hese rules . . . address[] specifically the basic procedural steps in summary process actions [and] adopt[] by reference the Massachusetts Rules of Civil Procedure to cover any unusual procedural questions that may arise . . . ."

entry of judgment does not by itself authorize a judge to enlarge the time for appealing that judgment.[8]

4. Relief under rule 60 (b). Nor would relief ordinarily be available under Mass. R. Civ. P. 60 (b). Based on the disclaimer language in rule 77 (d), and in accordance with decisions interpreting the analogous Federal rules, we have previously held that, "as a general rule, a motion for relief from judgment under rule 60(b) may not be used to revive appellate rights after the expiration of the extended time limit specified in appellate rule 4(a)," even where the failure to file a timely notice of appeal was "due to the clerk's failure to notify the parties of the entry of judgment" as required by

[8] The Reporter's Notes to rule 77 recognize that such a failure may support an enlargement where authorized by another rule:

> "Although under Rule 77(d) lack of notice does not authorize the court to relieve a party for failure to appeal within the time allowed, Appellate Rule 4 provides that upon a showing of excusable neglect the court may extend the time for appeal. A failure to learn of the entry of judgment could, in appropriate circumstances, so qualify. Denial of a motion to extend the time for appeal, where failure to appeal in a timely manner was due to a clerk's failure to give notice, has been held to constitute an abuse of discretion. See Commercial Credit Corp. v. United States, 175 F.2d 905 (8th Cir. 1949)."

1973 Reporter's Notes to Mass. R. Civ. P. 77, Massachusetts Rules of Court, at 105 (Thomson Reuters 2019). Here, however, as we have discussed, our appellate rules do not allow enlargement of an appeal period set by statute.

rule 77 (d). Abbott v. John Hancock Mut. Life Ins. Co., 18 Mass. App. Ct. 508, 512-513 (1984).

If this general rule governed here, then litigants in Mondi's position might be without an effective remedy. But in Abbott, we considered "an exception to the general rule recognized in the Federal cases: namely, where the appellant has in fact consulted the docket entries but has nevertheless failed to learn of the judgment or other order appealed from due to clerical mishap." Abbott, 18 Mass. App. Ct. at 513. Where the appellant acted promptly upon discovering the error, and the opponent was not prejudiced, the Federal cases referenced in Abbott upheld trial court decisions "vacating the entry of the judgment or order on a motion under rule 60(b)(1) or (6) and reentering it so as to revive appellate rights."[9] Id. at 514. We decided to follow those cases and thus upheld a Superior Court judge's exercise of discretion, "under rule 60(b)(1) or

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[9] Federal case law in this area was superseded in 1991 by an amendment to Fed. R. A. P. 4, adding a subdivision (a)(6) that allowed Federal district courts to "reopen the time to file an appeal" under circumstances where notice of the judgment or order under Fed. R. Civ. P. 77(d) is not received within twenty-one days after entry, timeliness criteria are met, and no party would be prejudiced. See Advisory Committee notes to 1991 amendment to Fed. R. A. P. 4. The provision was further amended in 1998, 2005, and 2009. See Nowak v. Immigration & Naturalization Serv., 94 F.3d 390, 391-392 (7th Cir. 1996) (pre-1991 Federal case law rendered "obsolete" by adoption of Fed. R. A. P. [4][a][6]).

(6)," to vacate and then reenter orders denying motions for a new trial, thus starting new appeal periods for the underlying judgment.[10] Id. at 510-511, 515. In doing so, we emphasized that "the authority to enter such an order exists only in extraordinary circumstances and, in particular, depends on: (1) absence of [r]ule 77(d) notice; (2) lack of prejudice to [appellee]; (3) prompt filing of a motion after actual notice; and (4) due diligence, or reason for lack thereof, by counsel in attempting to be informed of the date of the decision" (quotation and citation omitted).[11] Id. at 515-516. Abbott represents an early application of "the evolving rule that a procedural tangle having its origin in a failure by the court to observe the mandates of rules[] will generally be resolved in favor of preserving rights of appeal where this result is

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[10] Abbott arose and was argued before the January 1, 1984 effective date of the amendment to rule 77 (d) recognizing that lack of notice under that rule could be "relevant to a motion for relief from judgment under Rule 60(b)(6)." See note 6, supra. Abbott does not discuss whether that amendment supported the court's conclusion regarding the availability of relief under rule 60 (b) (6).

[11] Notably, in each of the Federal cases reviewed in Abbott, relief was held to be justified in part by "mistakes by the court, going beyond a mere failure by the clerk to notify the attorneys of the entry of judgment (or other order)." Abbott, 18 Mass. App. Ct. at 514. We note that, in addition, the criteria for relief adopted in Abbott went beyond the commission of multiple mistakes by the trial court; for example, Abbott's fourth criterion focuses on counsel's due diligence, or the reasons for lack thereof. Id. at 516.

technically possible and does not work unfair prejudice to other parties." Krupp v. Gulf Oil Corp., 29 Mass. App. Ct. 116, 121 (1990).

5. The case before us. Although it is possible that relief under Abbott might have been available to Mondi here, we do not decide that question, for two reasons. First, Mondi did not seek such relief from the judge, whose discretionary ruling on such a request would be entitled to our deference. The Abbott issue first arose at the oral argument of this appeal.

Second, Mondi did not make a record sufficient to support such a request. Counsel's affidavit did not state that he never received timely notice of the entry of the judgment itself, or that the clerk failed to send such notice. Nor did counsel describe in any detail what diligent efforts he undertook to keep abreast of developments in the case.[12] See Roberson v. Boston, 19 Mass. App. Ct. 595, 598 (1985) (reversing allowance of rule 60 [b] motion based on nonreceipt of notice of entry of default judgment, and suggesting that supporting affidavits in

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[12] Counsel argued at the motion hearing that "[i]t's not easy to check the docket every single week when I have . . . dozens of clients in these same situations, so I hope that that is taken into consideration." What constitutes due diligence may depend on, among other things, the nature and typical timeline for the category of case in question -- matters on which a trial court judge's views will be entitled to deference -- as well as the nature and length of the applicable appeal period.

such cases should "set out clearly and specifically all the relevant facts"). See also BJ's Wholesale Club, Inc. v. City Council of Fitchburg, 52 Mass. App. Ct. 585, 588–589 (2001). Counsel's due diligence in attempting to learn whether judgment has entered "is a determination that can be made only after analyzing all the facts of a particular case." Stevens v. ITT Sys., Inc., 868 F.2d 1040, 1042 (9th Cir. 1989). See Spika v. Lombard, 763 F.2d 282, 285-286 (7th Cir. 1985), cert. denied, 474 U.S. 1056 (1986) (reviewing Federal decisions on due diligence in this context). Nor are we best situated to evaluate, in the first instance, issues of prejudice to the bank and of the timeliness of any request for relief.[13]

For similar reasons, we decline to reach Mondi's claim that the judge's denial of his motion to enlarge the statutory appeal period, in circumstances where he received no notice of the judgment, violated his procedural due process rights. First, Mondi did not raise the claim in the Housing Court, and thus it is waived. See Albert v. Municipal Court of Boston, 388 Mass. 491, 493-494 (1983). Second, Mondi has not established that he received no notice of the judgment. Finally, Mondi acknowledged at oral argument that the "safety valve" mechanism recognized in

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[13] On timeliness, see Chavoor, 383 Mass. at 805-807 (rule 60 [b] [6] motion to vacate judgment could be brought more than one year after entry of original judgment).

Abbott would avoid the procedural due process violation that he claims.

Conclusion. If in fact Mondi never received notice of the entry of judgment, and particularly if the clerk never sent such notice, the result here is regrettable. Nevertheless, we are constrained to reach this result by both the summary process appeal statute and by the pertinent rules of civil and appellate procedure. The order denying Mondi's motion to enlarge the time for filing a notice of appeal is affirmed.

So ordered.