SJC-12859

BANK OF NEW YORK MELLON[1] vs. ALTON KING, JR. & another.[2]

Suffolk. March 2, 2020. - June 17, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Summary Process, Appeal. Practice, Civil, Summary process, Appeal, Bond.

Summary Process. Complaint filed in the Western Division of the Housing Court Department on January 14, 2019.

The case was heard by Robert G. Fields, J., on a motion for summary judgment, and a motion to waive an appeal bond was also heard by him.

An appeal from the entry of summary judgment and an order setting an appeal bond was heard in the Appeals Court by Peter W. Sacks, J., and the case was reported by him to the Appeals Court. The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Carl E. Fumarola (Christine Kingston also present) for the plaintiff.

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[1] Formerly known as the Bank of New York, as trustee on behalf of the registered holders of Alternative Loan Trust 2006-J7, Mortgage Pass-Through Certificates, Series 2006-J7.

[2] Terri Mayes-King.

Lucas McArdle for the defendants.
The following submitted briefs for amici curiae:
Jeffrey B. Loeb & Nathaniel Donoghue for Jason Scaduto.
Jane Alexandra Sugarman & Richard M.W. Bauer for South Coastal Counties Legal Services, Inc., & others.
Deirdre Dundon, pro se.
Gale Lutz-Henrickson, pro se.
Ruth Adjartey, pro se.

KAFKER, J. After foreclosing on the property of the defendant, Alton King, Jr., the Bank of New York Mellon (bank) successfully obtained judgment in a summary process action against the defendant. The defendant appealed from the decision and moved to waive the appeal bond required under G. L. c. 239, § 5. The judge waived the bond but also ordered the defendant to prospectively pay monthly use and occupancy to the bank while the appeal was pending. A single justice of the Appeals Court vacated the portion of the order requiring use and occupancy payments, concluding that such payments constituted a part of the bond, which had been waived, and that the provision in G. L. c. 239, § 5 (e), requiring a defendant to pay "all or any portion of any rent which shall become due" when his or her bond has been waived, did not apply to situations where there was no landlord-tenant relationship.

The issue before us on appeal is whether the bond required for a defendant to appeal an adverse judgment under G. L. c. 239, § 5, may be waived for a defendant who appeals from a decision in a postforeclosure summary process action, and, if

so, whether a court may still order a defendant to make use and occupancy payments to the plaintiff even where the defendant's bond has been waived. We conclude that, based on a consistent, harmonious reading of G. L. c. 239, §§ 5 and 6, that construes the language of the statutory scheme as a whole, the bond for a defendant appealing from an adverse judgment in a postforeclosure summary process action may be waived if he or she is indigent and pursuing nonfrivolous arguments on appeal. Further, we conclude that the postforeclosure defendant whose bond is waived may be ordered to pay use and occupancy to the plaintiff, based on "all or any portion" of the reasonable monthly rental value of the property. We also conclude that the $4,000 per month the defendant was ordered to pay as use and occupancy reflects a fair balancing of interests given the facts of this case.[3]

1. Background. In October 2015, Terri Mayes-King defaulted on a promissory note secured by property owned by her and the defendant in Longmeadow (property).[4] The defendant was sent notice pursuant to G. L. c. 244, §§ 35A and 35B, and

[3] We acknowledge the amicus briefs submitted by South Coastal Counties Legal Services, Inc., Greater Boston Legal Services, and Northeast Legal Aid; Jason Scaduto; Deirdre Dundon; Gale Lutz-Henrickson; and Ruth Adjartey.

[4] Mayes-King was dismissed from this case upon the agreement of the parties, and is a party in name only.

paragraph 22 of the defendant's mortgage.[5] After the defendant failed to cure the default, the bank foreclosed on the mortgage on August 24, 2018. The bank was the highest bidder at the foreclosure sale and took title to the property.

After the bank took title, it filed a postforeclosure summary process action against the defendant in the Western District of the Housing Court Department for possession of the property. The defendant filed an answer, in which he denied that he lived at the property unlawfully or owed any rent or use and occupancy to the bank. In the answer, he also asserted that the bank did not comply with paragraph 22 of the defendant's mortgage when foreclosing on the property. See Pinti v. Emigrant Mtge. Co., 472 Mass. 226, 236-237 (2015). On May 31, 2019, the bank filed a motion for summary judgment on its claim for possession, to which the defendant filed no written opposition. Instead, at a hearing on the motion, the defendant requested time to obtain legal counsel, but the Housing Court judge denied the defendant's request. The judge granted the bank's motion for summary judgment on July 5, 2019. The

[5] On June 29, 2017, the defendant was sent a letter notifying him of a ninety-day window in which he might cure his mortgage default, after failing to pay his mortgage for twenty-one months. The total past due amount as of June 2017 was $165,432.07.

defendant filed a motion for relief from judgment, which the judge denied.

The defendant then appealed from the decision of the Housing Court judge and moved to waive the appeal bond pursuant to G. L. c. 239, § 5 (e). The bank opposed the waiver of the bond and also filed a motion to set the bond. The bank supported its motion to set bond with an affidavit of a licensed real estate broker who had inspected the interior and exterior of the property. The broker averred that the property, consisting of a single-family, colonial style home with 7,540 square feet of living area, five bedrooms, five and one-half bathrooms, an indoor basketball court, an in-law style apartment, and a three-car garage, had a fair rental value of $5,000 per month.

After a hearing on the bond motions, the Housing Court judge issued an order setting appeal bond on October 31, 2019. In analyzing whether a waiver of the bond was appropriate pursuant to G. L. c. 239, §§ 5 and 6, the judge found that the defendant was indigent in accordance with G. L. c. 261, §§ 27A-27G, and had nonfrivolous defenses on appeal such that he was entitled to a waiver of the bond. Those defenses included the defendant's claims under Pinti, 472 Mass. at 236-237, that the bank did not strictly comply with the defendant's mortgage contract when giving notice of the foreclosure. The judge also

ordered that the defendant prospectively make $4,000 monthly use and occupancy payments starting November 30, 2019.[6]

The defendant then appealed from the bond order pursuant to G. L. c. 239, § 5 (f). After a hearing on December 9, 2019, a single justice of the Appeals Court concluded that the defendant could not be required to make periodic payments pending appeal when his bond had been waived, relying on and attaching to his order an opinion by a different single justice of the Appeals Court in Bank of New York Mellon vs. Dundon, Mass. App. Ct., No. 2019-J-257 (July 17, 2019). The single justice in the Dundon case reasoned:

> "[General Laws, c. 239, § 5 (e),] does not require the payment of 'monthly payments pending appeal,' but only 'rent which shall become due,' and [the statute] forbids the court from ordering any other payments. Here, the parties have no tenancy relationship and the defendant does not owe rent. [General Laws] c. 239, § 5 (e)[,] therefore forbade the Housing Court [judge] from ordering periodic payments pending appeal."

The single justice in the Dundon case further reasoned that the periodic payments sometimes required by G. L. c. 239, § 6, when the defendant is a foreclosed-on entity are a "condition of the bond," and "[b]ecause there is no bond in this case, § 6 is inapplicable."

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[6] The Housing Court judge credited the testimony of the real estate broker that the property's fair monthly rental value was $5,000, but also found that conditions of the property warranted a reduction of that amount to $4,000 per month.

The single justice in the instant case reported the correctness of his decision to a panel of the Appeals Court pursuant to Rule 2:01 of the Rules of the Appeals Court (1975) and Mass. R. Civ. P. 64 (a), as amended, 423 Mass. 1403 (1996). We transferred that appeal to this court on our own motion.

2. Discussion. a. Standard of review. The issue raised in this case is one of statutory interpretation -- namely, whether the provisions of G. L. c. 239, § 5, allowing for a waiver of the appeal bond and requiring the payment of any rent when the bond is waived, apply to postforeclosure summary process actions. "The interpretive question here is purely legal, and we review it de novo because [t]he duty of statutory interpretation rests ultimately with the courts," (quotations and citation omitted). Tirado v. Board of Appeal on Motor Vehicle Liab. Policies & Bonds, 472 Mass. 333, 337 (2015). With regard to the reasonableness of periodic payments ordered by the court, we also review de novo. G. L. c. 239, § 5 (f) ("The court receiving the request shall review the findings, the amount of bond or deposit, if any, and the amount of periodic payment required, if any, as if it were initially deciding the matter, and the court may withdraw or amend any finding or reduce or rescind any amount of bond, deposit or periodic payment when in its judgment the facts so warrant").

b. The relevant statutory provisions. At issue in the instant case is the interrelationship of various provisions of G. L. c. 239, §§ 5 and 6. Neither the bank nor the defendant read them together as an integrated whole with common purposes. In order to correctly interpret the statute, we therefore set out the various relevant provisions and explain their relationship.

Section 5 provides guidance on appeal bonds generally, explaining the requirements of appeal bonds, the conditions of those bonds, and the procedures governing them, including waiver of the bonds and the appeal of a decision denying waiver.

Section 5 (c) covers the conditions of appeal bonds demanded in cases in which the plaintiff at the time of establishment of the appeals bond seeks to recover possession of land or tenements. Section 5 (c) provides:

> "Except as provided in section 6, the defendant shall, before any appeal under this section is allowed from a judgment . . . rendered for the plaintiff for the possession of the land or tenements demanded in a case in which the plaintiff continues at the time of establishment of bond to seek to recover possession, give bond in a sum as the court orders, payable to the plaintiff, with sufficient surety or sureties approved by the court, or secured by cash or its equivalent deposited with the clerk, in a reasonable amount to be fixed by the court. . . . The bond shall also be conditioned to pay to the plaintiff, if final judgment is in plaintiff's favor, all rent accrued at the date of the bond, all intervening rent, and all damage and loss which the plaintiff may sustain by the withholding of possession of the land or tenements demanded and by any injury done thereto during the withholding, with all costs, until delivery of possession thereof to the plaintiff."

G. L. c. 239, § 5.

Section 6 provides more particular guidance for the conditions of appeal bonds in the subset of cases in § 5 that involve postforeclosure summary process actions.[7] It provides:

> "If the action is for the possession of land after foreclosure of a mortgage thereon, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his [or her] favor, of all costs and of a reasonable amount as rent of the land from the day when the mortgage was foreclosed until possession of the land is obtained by the plaintiff. If the action is for possession of land after purchase, the condition of the bond shall be for the entry of the action and payment to the plaintiff, if final judgment is in his [or her] favor, of all costs and of a reasonable amount as rent of the land from the day that the purchaser obtained title to the premises until the delivery of possession thereof to him [or her], together with all damage and loss which he [or she] may sustain by withholding of possession of the land or tenement demanded, and by any injury done thereto during such withholding with all costs. Upon final judgment for the plaintiff, all money then due to him [or her] may be recovered in an action on the bond."

G. L. c. 239, § 6.

The purpose of all these bond provisions is two-fold: to deter frivolous appeals and to provide compensation for plaintiffs for the loss of the property during the appeal. The Legislature has, however, included a waiver provision for indigent defendants. The waiver provision appears in § 5 (e):

> "A party may make a motion to waive the appeal bond provided for in this section if the party is indigent as provided in [G. L. c. 261, § 27A]. The motion shall,

[7] General Laws c. 239, § 6, also provides guidance for appeal bonds in cases seeking possession of land after purchase.

> together with a notice of appeal and any supporting affidavits, be filed within the time limits set forth in this section. The court shall waive the requirement of the bond or security if it is satisfied that the person requesting the waiver has any defense which is not frivolous and is indigent as provided in [G. L. c. 261, § 27A] . The court shall require any person for whom the bond or security provided for in [G. L. c. 239, § 5 (c),] has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver. A court shall not require the person to make any other payments or deposits. The court shall forthwith make a decision on the motion. If the motion is made, no execution shall issue until the expiration of [six] days from the court's decision on the motion or until the expiration of the time specified in this section for the taking of appeals, whichever is later."

G. L. c. 239, § 5 (e). A defendant who is "aggrieved by the denial of a motion to waive the bond or who wishes to contest the amount of periodic payments required by the court may seek review" of that decision. G. L. c. 239, § 5 (f).

We read the statutory scheme set out in §§ 5 and 6 as a whole. See Commonwealth v. Raposo, 453 Mass. 739, 745 (2009). Sections 5 (c), (e), and 6 are necessarily interconnected: § 5 in general outlines the requirements of appeal bonds, the conditions of those bonds, and the procedures governing them, including waiver of the bonds and their appeals. Section 5 (c) provides specific conditions for a subset of appeal bonds in cases where a plaintiff, at the time the appeals bond is set, seeks to recover possession of land or tenements, and § 6 further defines the conditions of bonds in postforeclosure

actions. Each provision is part of a coherent whole. The bonds referenced in §§ 5 and 6 also serve a common purpose -- to deter frivolous lawsuits and compensate plaintiffs for the loss of the possession of the property -- and the waiver of bonds under either section is thus properly understood to be subject to the same standards.

Instead of reading the provisions together, each of the parties attempts to isolate the provisions that serve their purposes and ignore those that do not. We begin with the bank's argument that § 6 appeal bonds may not be waived. The argument is essentially as follows: "Section 6 contains no waiver provision. In contrast, [§] 5(e) does contain a waiver provision. The very existence of this material difference between the two statutes is dispositive." This, of course, is oversimplified. Section 5 provides the necessary context and structure for the application of § 6. Section 6 is not a stand-alone provision. It only sets out the conditions for a particular type of appeal bond that is a subset of the cases described in § 5, and is subject to the procedures delineated in § 5. See Home Sav. Bank of Am., FSB v. Camillo, 45 Mass. App. Ct. 910, 911 (1998) ("Section 6 of c. 239 spells out what damages a bond shall protect in the case of a summary process action arising out of mortgage foreclosure. It does not cause the procedures of § 5 to be inapplicable in such cases"). See

also U.S. Bank Trust, N.A. v. Johnson, 96 Mass. App. Ct. 291, 296-297 (2019) (Johnson) (postforeclosure mortgagor was entitled to have her motion to waive appeal bond under § 5 heard).

Concluding otherwise -- that § 5 does not apply to § 6 -- would render § 6 unenforceable. As mentioned supra, § 5 provides an essential backdrop to § 6.[8] Section 6 does not create any other procedures for appeal bonds besides how to establish the conditions of those bonds. For example, § 6 has no provision allowing for the appeal from the amount of the bond, as is the case in § 5 (f), yet no one would deny that such an appeal is possible. Section 6 instead relies on the procedures established in § 5, which apply to all summary process appeals, even those following foreclosures. See Home Sav. Bank of Am., 45 Mass. App. Ct. at 911. See also Johnson, 96 Mass. App. Ct. at 294 & n.6.

Because the provisions of § 5 apply to § 6, we conclude that the procedures for waiving a bond, as established by § 5 (e), are also applicable to postforeclosure cases governed by § 6. In reaching this conclusion, we stress that § 5 applies

[8] It is § 5 (c) that requires appeal bonds in cases for the possession of the land or tenements, which includes postforeclosure summary process actions. Without the requirement of these bonds in § 5 (c), the conditions of a bond as outlined in § 6 have no meaning. See G. L. c. 239, § 5 (c) ("the defendant shall, before any appeal under this section is allowed . . . give bond in a sum as the court orders").

to many different types of appeal bonds and nothing in § 5 limits its terms to landlord-tenant relationships. More specifically, § 5 governs a litany of possession cases without any landlord-tenant relationship. See Adjartey v. Central Div. of the Hous. Court Dep't, 481 Mass. 830, 834 n.7 (2019) (enumerating eight categories of persons who may initiate summary process evictions while admitting that, for simplicity's sake, courts "often refer to Housing Court plaintiffs as 'landlords' and Housing Court defendants as 'tenants,'" but "these terms do not fully capture all of the individuals who initiate and defend against summary process evictions"). Finally, § 5 (e) does not on its face prohibit parties in a postforeclosure summary process action from seeking a waiver. We therefore readily conclude that the bond-waiver provision of § 5 applies to postforeclosure summary process appeals whose bond conditions are governed by § 6.

c. Use and occupancy upon waiver of the bond. Having concluded that an appellant in a postforeclosure summary process action may seek a waiver of the bond under § 5, we must now determine whether a postforeclosure appellant for whom the bond has been waived may be ordered to make use and occupancy payments "as rent" pending his or her appeal. We conclude that, pursuant to the statute, judges may order such parties to pay use and occupancy payments "as rent" under § 5 (e).

As discussed supra, G. L. c. 239, § 5 (e), requires the party for whom the "bond or security provided for in [§ 5 (c)] has been waived to pay in installments as the same becomes due, pending appeal, all or any portion of any rent which shall become due after the date of the waiver." Thus, parties for whom the bond has been waived must pay, at least in part, rent in lieu of a bond. The court in Kargman v. Dustin, 5 Mass. App. Ct. 101 (1977), emphasized the historical importance of this approach:

> "The requirement that rent becoming due pending resolution of an appeal be paid in lieu of bond as a condition of appeal remained in effect with minor changes for more than a hundred years. In 1969, G. L. c. 239, § 5[,] was amended to permit the waiver of the bond requirement in the case of a tenant with insufficient funds. St. 1969, c. 366. Two years later, however, the Legislature added the present final sentence to § 5 which permits a judge, who has waived security, to require a tenant to pay 'all or any portion of any rent which shall become due' . . . as a condition of remaining in possession of the premises pending appeal. That addition would indicate that the Legislature, after providing for the waiver of bond in hardship cases, decided to redress an imbalance in summary process appeals to permit a judge, in the exercise of his [or her] sound discretion, to order payment of an appropriate portion of the rent as security."

Id. at 109-110. We agree with the reasoning of the court in Kargman and conclude that, under the statute, rent balances the interests of plaintiffs and defendants in summary process cases when defendants remain in possession. Such rent is paid in two different scenarios: either in lieu of a waived bond, or as part of a bond that is not waived. Compare G. L. c. 239,

§§ 5 (c) (requiring bond to be conditioned to pay to plaintiff "all rent accrued at the date of the bond [and] all intervening rent") and 6 (requiring appeal bonds in postforeclosure actions to include "a reasonable amount as rent of the land"), with G. L. c. 239, § 5 (e) (requiring payment of "all or any portion of any rent which shall become due" when bond is waived). Thus, the rent a court may require a party to pay under § 5 (e) is distinct from the bond required by § 5 (c) or 6, in that it is paid in lieu of that bond. Regardless, however, both provisions are designed to compensate the plaintiff for the loss of possession of the land or tenements.

The question then is whether the Legislature intended "rent" in § 5 (e) to refer only to situations where there is a classic landlord-tenant relationship requiring the payment of rent, as the defendant contends, such that no payments are owed by the defendant here, who had no rental agreement with the bank, or whether the Legislature instead intended the term "rent" in this context more broadly to encompass use and occupancy payments, which would include payments owed by defendants in possession to purchasers of foreclosed properties like the bank in this case. For the reasons that follow, our interpretation of the statute supports the latter conclusion.

First, § 5 (e) refers to "any rent," which embraces a broad interpretation of the word. See Ali v. Federal Bur. of Prisons,

552 U.S. 214, 219 (2008)("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind'" [citation omitted]); Hollum v. Contributory Retirement Appeal Bd., 53 Mass. App. Ct. 220, 223 (2001) ("The word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive" [citation omitted]). When the Legislature referred to the amounts required to be paid under § 6 "as rent," it clearly intended these amounts to fall within the meaning of "any rent" under § 5 (e). We have interpreted the Legislature's use of the same terminology in closely related provisions to reflect their intention that the words are meant to be the same. See Commonwealth v. Felt, 466 Mass. 316, 321 n.7 (2013), quoting Commonwealth v. Wynton W., 459 Mass. 745, 747 (2011) ("Where the Legislature uses the same words in several sections which concern the same subject matter, the words 'must be presumed to have been used with the same meaning in each section'"). See also Adjartey, 481 Mass. at 836, citing G. L. c. 239, §§ 5-6 (interpreting to "rent" portion of both § 5 and § 6 appeal bonds as "a sum of money for the use and occupancy of the premises while the appeal is pending").

Further, as discussed supra, G. L. c. 239, § 5, governs appeals in divers cases not limited to traditional landlord-tenant relationships. Adjartey, 481 Mass. at 834 n.7. Thus, the term "rent" in § 5 (e) must be read expansively to apply to

other situations besides appeals in landlord-tenant summary process cases where rental agreements remain in place. Otherwise, we conclude, the Legislature would have explicitly limited the application of § 5 (e) to such landlord-tenant relationships. It did not do so.[9]

This conclusion also avoids an absurd interpretation of §§ 5 and 6. See Commonwealth v. Peterson, 476 Mass. 163, 167 (2017). As discussed supra, we conclude today that a § 6 defendant may have his or her appeal bond waived, but "[o]nly by resort to § 5 (e) [is the defendant] relieved of that statutory requirement." Novastar Mtge. Inc. v. Saffran, 83 Mass. App. Ct. 1119 (2013). We therefore cannot, in the same breath, hold that, "[h]aving had the benefit of the § 5 (e) procedure . . . the burdensome portion of that provision (requiring installment

[9] We reject the defendant's argument that the Legislature, by explicitly referencing in § 5 (e) "bond[s] or securit[ies] provided for in" § 5 (c), "explicitly referenced the [§]5 (c) bond as the only bond that was subject to the continuing installment of rents that shall become due," and therefore excludes bonds whose conditions are set pursuant to § 6. This misreads the statute: as discussed supra, § 5 (c) establishes the various requirements for appeal bonds in cases in which defendants remain in possession of land or tenements. Without those requirements, the conditions of the bond in the appeal of a postforeclosure summary process action established in § 6 would be unenforceable, as § 6 is not a stand-alone provision. Therefore, all bonds in this context -- even those whose conditions are set pursuant to § 6 -- are "bond[s] or securit[ies] provided for" in § 5 (c) for purposes of the waiver provision in § 5 (e).

payments for use and occupancy after the date of bond waiver, pending appeal) [is] inapplicable." Id.

The balancing of interests that the Legislature required in the landlord-tenant context also is clearly applicable to postforeclosure cases covered by § 6. As this court stated recently: "The Legislature has recognized that 'time lost in regaining [real property] from a party in illegal possession can represent an irreplaceable loss to the owner.'" Davis v. Comerford, 483 Mass. 164, 180 (2019) (Comerford), quoting Commentary to Rule 1 of the Uniform Rules of Summary Process (1980). See Kargman, 5 Mass. App. Ct. at 110 (legislative requirement to pay rent upon waiver of bond "redress[ed] an imbalance in summary process appeals"). Indeed, these ongoing payments may be even more vital given the greater complexity and higher stakes and thus lengthier litigation involved in postforeclosure summary process actions. See, e.g., Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 331-332 (2016); U.S. Bank Nat'l Ass'n v. Schumacher, 467 Mass. 421, 423-425 (2014). As the amici point out, for subsequent purchasers of such property who are not banks, the burdens may be even greater. Finally, just as there are due process implications when a tenant remains in possession without paying rent, see Lindsey v. Normet, 405 U.S. 56, 67 n.13 (1972), so too are there due process implications when a tenant at sufferance in the

postforeclosure context remains in possession without paying use and occupancy. See Comerford, supra at 170 & n.14.

The defendant attempts to counter all of these reasons with the difference between "as rent" and "any rent," contending that "'[a]s rent' is not rent" and § 5 (e) only applies to a conventional leasehold arrangement requiring the payment of rent. We disagree. If this distinction has any significance whatsoever, it reflects careful drafting by the Legislature to respect the technical difference between a tenancy at sufferance and a tenancy at will. Although § 5 clearly applies to both types of arrangements, the Legislature may have referred to the amounts required to be paid pursuant to § 6 "as rent" to be respectful of the distinction between tenants at sufferance and tenants at will, while still requiring such payments to be made pursuant to § 5 (e). As a tenant at sufferance is a more disfavored status than a tenant at will, and the payment of "rent" itself suggests a tenancy at will, the Legislature may have added the word "as" before rent to make clear that use and occupancy payments under § 6 are more precisely defined as the equivalent of rent rather than rent itself. By describing the use and occupancy payments required by § 6 "as rent," the Legislature thus respects the technical distinctions between tenants at will and tenants at sufferance, and between rent and

use and occupancy payments, but still provides for the payment of use and occupancy under § 5 (e), which covers "any rent."[10]

[10] A tenancy at sufferance exists when a mortgagor remains in possession of a premises on which the mortgagee has foreclosed, a legal principle long established by our case law, and is meant to refer to the requirement that the tenant at sufferance pay use and occupancy, as discussed infra. See Cunningham v. Davis, 175 Mass. 213, 222 (1900) ("After the entry to foreclose, the mortgagor and those claiming under him became tenants at sufferance of the mortgagee . . ."); Kinsley v. Ames, 2 Met. 29 (1840). See also Georgia Driz, LLC vs. Spenlinhauer, 2017 Mass. App. Div. 120 ("After a foreclosure, the mortgagor becomes a tenant at sufferance of the mortgagee"). In such cases, we have held, "[i]t is obvious that the defendant [is] a tenant at sufferance. His original entry was lawful, but after a sale and the entry of the purchaser, he had a mere naked possession, without any right or interest whatever." Kinsley, supra at 31.

By contrast, "[a] tenant at will is one who, under the terms of a written lease agreement, continues in a tenancy as long as the parties mutually agree." 49 Am. Jur. 2d, Landlord and Tenant § 119 (2d. ed. Supp. 2020). A tenancy at will is also created, however, if a landlord accepts rental payments without providing a written lease. Staples v. Collins, 321 Mass. 449, 451 (1947) ("tenancy at sufferance is readily changed into a tenancy at will," and "payment and acceptance of rent, standing alone, are prima facie proof of the creation of a tenancy at will"). Further, "[a] tenancy at will may be terminated at any time by the will of the parties" (quotations and citation omitted). Davis v. Comerford, 483 Mass. 164, 166 n.4 (2019) (Comerford). "Because tenants at will remain in possession with their landlords' consent, their possession is lawful, but it is for no fixed term, and landlords can put them out of possession at any time." 49 Am. Jur. 2d, supra. A tenant at sufferance, on the other hand, stays beyond the termination of the tenancy at will without the landlord's consent. See Comerford, supra at 169 n.12.

Although the Legislature has referred to the payments required by tenants at sufferance as rent, such payments are more properly described as use and occupancy payments. Comerford, 483 Mass. at 169 n.13 ("Although G. L. c. 186, § 3, refers to 'rent,' the term 'use and occupation' or 'use and

In evaluating what weight should to be given to these semantic differences, we also must recognize that the terms "use and occupancy" and "rent" have been closely linked in this context, and used nearly interchangeably. See G. L. c. 186, § 3 ("Tenants at sufferance in possession of land or tenements shall be liable to pay rent therefor for such time as they may occupy or detain the same"); Ghoti Estates, Inc. v. Freda's Capri Restaurant, Inc., 332 Mass. 17, 26 (1954), citing G. L. c. 186, § 3 (Ter. Ed.) ("tenant at sufferance was liable to pay for use and occupation for such time as it occupied the premises"). See also Comerford, 483 Mass. at 169 & n.13 (discussing interchangeable use of "rent" and "use and occupancy"). Therefore, contrary to the defendant's argument, we conclude that the Legislature intended "any rent" in § 5 (e) to encompass the payment of use and occupancy "as rent" in § 6. See Anderson v. National Union Fire Ins. Co. of Pittsburgh PA, 476 Mass. 377, 381–382 (2017) ("All the words of a statute are to be given

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occupancy' is typically used because a landlord's acceptance of 'rent' from a tenant at sufferance otherwise might indicate that the parties wished to create a tenancy at will"). See Staples, 321 Mass. at 451 (distinguishing "mere use and occupation for which a tenant at sufferance is made liable by G. L. [Ter. Ed.] c. 186, § 3, for such time only as he 'may occupy or detain' the land" from "payment and acceptance of rent" that may provide "prima facie proof of the creation of a tenancy at will"). Cf. Rubin v. Prescott, 362 Mass. 281, 285 (1972) (landlord's acceptance of "rent" payments that tenants at sufferance were "obligated to make" pursuant to G. L. c. 186, § 3, did not create tenancy at will).

their ordinary and usual meaning, and each clause or phrase is to be construed with reference to every other clause or phrase without giving undue emphasis to any one group of words, so that, if reasonably possible, all parts shall be construed as consistent with each other so as to form a harmonious enactment effectual to accomplish its manifest purpose" [quotation and citation omitted]).

Because the provisions of § 5 (e) apply to defendants whose bond conditions are governed by § 6, and because payment of rent under § 5 (e) is paid in lieu of a bond, we conclude that courts may order postforeclosure mortgagors like the defendant to pay use and occupancy "as rent" to the purchaser of the premises during the pendency of their appeal when the mortgagor's bond has been waived. Such an obligation is consistent with our case law and reflects a proper balancing of interests.[11]

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[11] Because the payment of rent under § 5 (e) is a requirement separate from the bond when the bond has been waived, as discussed supra, and because we conclude the use of the word "rent" in §§ 5 and 6 encompasses use and occupancy payments, the language in § 5 (e) prohibiting the court from requiring "any other payments" when a bond has been waived does not forbid the court from ordering use and occupancy payments for defendants under § 6, as the single justice in Bank of New York Mellon vs. Dundon, Mass. App. Ct., No. 2019-J-257 (July 17, 2019), reasoned. Given our analysis supra, the requirement to pay rent when there is a waiver under § 5 (e) does not present an all-or-nothing approach turning solely on whether there is a contract defining rent. We therefore reject the defendant's argument and the single justice's interpretation of the statute.

d. Reasonableness of payment ordered. The defendant requests that, if we conclude that a postforeclosure defendant is liable to pay use and occupancy during his pending appeal, as we have done, this court establish parameters for such payments. We begin as we must with the statutory language itself: G. L. c. 239, § 5 (e), provides that "[t]he court shall require any person for whom the bond or security provided for in [§ 5] (c) has been waived to pay . . . all or any portion of any rent which shall become due." This language is relatively open-ended, in that it provides for the payment of "all or any portion of any rent which shall become due," thereby providing for the exercise of discretion by the judge. See Comerford, 483 Mass. at 179; Kargman, 5 Mass. App. Ct. at 110 (judge may, "in the exercise of his [or her] sound discretion, . . . order payment of an appropriate portion of the rent as security"). In exercising that discretion, the court should attempt to achieve

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Nor does the language of § 6 providing that, "[u]pon final judgment for the plaintiff, all money then due to him may be recovered in an action on the bond" change our analysis of the issue before us. In this vein, we disagree with the conclusion in Bank of New York vs. Apollos, Mass. App. Div. 208 (Sept. 19, 2008), where the court reasoned that, "[i]f the Legislature intended that periodic payments be made directly to a victorious plaintiff, there would be no need to mandate a separate action." This reasoning fails to acknowledge that use and occupancy payments are ordered in lieu of the bond. If a bond has been waived, whereupon use and occupancy payments are ordered in its stead, there is no need to initiate an action to recover on the bond under § 6.

a fair balancing of both parties' interests. Among the factors that the court may consider are the fair rental value of the property, the merits of the defense, the amount owed per month on the mortgage, the number of months that no money has been paid on the mortgage, the real estate taxes on the property, the expected duration of the litigation, and the respective financial conditions of the parties.[12] See generally Comerford, supra at 179-182 (discussing factors for court to consider when exercising discretion in ordering use and occupancy payments in landlord-tenant summary process appeals).

The statute also appears to provide for a de novo standard of review of the judge's G. L. c. 239, § 5 (e), order: "The court receiving the request shall review the findings, the amount of bond or deposit, if any, and the amount of periodic payment required, if any, as if it were initially deciding the matter, and the court may withdraw or amend any finding or

[12] We recognize that, after oral argument in this case, on April 20, 2020, the Legislature passed, and the Governor signed, emergency legislation governing foreclosures during the COVID-19 pandemic. That legislation establishes a time-defined "moratorium on evictions and foreclosures during the [G]overnor's COVID-19 emergency declaration." St. 2020, c. 65 (preamble). Under that legislation, "[a] creditor or mortgagee shall grant a forbearance to a mortgagor of a mortgage loan for a residential property . . . if the mortgagor submits a request to the mortgagor's servicer affirming that the mortgagor has experienced a financial impact from COVID-19." St. 2020, c. 65, § 5 (b). The instant case precedes this emergency legislation and is not covered by it.

reduce or rescind any amount of bond, deposit or periodic payment when in its judgment the facts so warrant." G. L. c. 239, § 5 (f). In reviewing the order, we will therefore likewise review for a fair balancing of interests, considering those same factors.

While we seek to "avoid creating a 'monetary barrier' to an impecunious [defendant] with a potentially meritorious defense," Comerford, 483 Mass. at 182, a defendant who remains in possession after foreclosure is not entitled to remain on the property for nothing, even if he or she is indigent and even if he or she has a nonfrivolous defense. See G. L. c. 239, § 5 (c). See also Jones v. Aciz, 109 R.I. 612, 632 (1972) ("While we are mindful of the plight of the indigent we are also cognizant of the fact that the duty to care for the poor and the needy is on the state and not on the landlord"). Such a defendant is neither paying his or her mortgage and property taxes, nor the fair rental value of the property, but he or she is continuing to receive the benefit of possession of the property. Instead, the cost of the mortgage, real estate taxes, and the loss of fair rental value are being imposed on the plaintiff still seeking to recover possession. This is not the fair balancing of interests contemplated by the Legislature.

We discern no error in the amount selected by the Housing Court judge in the present case. The use and occupancy payment

that the judge required "as rent" was based on the fair market rental value of the property, which had a value of $1 million; took into account conditions-related defects, see Comerford, 483 Mass. at 170; and was less than the principal and interest of the defendant's mortgage.[13] The defendant had not paid any of his mortgage for twenty-one months before he was sent a letter in June 2017 notifying him of his ninety-day window to cure the default. His failure to cure resulted in the foreclosure on the property in August 2018. The real estate taxes on the property were also approximately $29,040 per year. The defendant was clearly hopelessly over his head, and had been so for years. Although the judge required the payment of all and not a portion of the fair market rental value of the property, we discern no error in that choice. The reality of the situation is such that, even assuming the defendant has a meritorious claim under Pinti, 472 Mass. at 236-237, if he cannot afford use and occupancy that amounts to less than his monthly mortgage payment -- an amount he has not been able to afford for years before this litigation commenced -- the bank will likely have no choice but to reinstate foreclosure proceedings. See Federal Nat'l Mtge. Ass'n v. Marroquin, 477 Mass 82, 90 n.8 (2017) (despite defendant's successful claim under Pinti, supra, and void

[13] In addition to the mortgage, the estimated tax on the property in this case amounts to $2,400 per month.

foreclosure sale, "[n]othing bars [the mortgagee] from reinitiating the foreclosure process with a notice of defaults that strictly complies with paragraph 22 of the mortgage"). In these circumstances, we conclude that there has been a fair balancing of interests.

Conclusion. A postforeclosure mortgagor may seek a waiver of an appeals bond under G. L. c. 239, § 5 (e), if he or she is indigent and has nonfrivolous claims on appeal. The court shall, however, order, pursuant to § 5 (e), a postforeclosure mortgagor remaining in possession of the property to pay use and occupancy to the purchaser of the property "as rent" pending the appeal if his or her bond has been waived. The amount of rent shall reflect a fair balancing of interests. Such a fair balancing occurred here, where the amount of use and occupancy was based on the fair market rental value of the property and was less than the mortgage payments the defendant would have otherwise been required to make, and where those mortgage payments had not been paid for years, indicating foreclosure was inevitable even if the defendant had a meritorious defense. For the foregoing reasons, we affirm the decision of the Housing Court ordering the defendant to pay $4,000 per month in use and occupancy to the bank during the course of his appeal.

So ordered.