SJC-13191

HSBC BANK USA, N.A., trustee,[1] vs. TOMMY L. MORRIS & another.[2]

Plymouth. April 4, 2022. - July 22, 2022.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt, & Georges, JJ.

Summary Process. Massachusetts Predatory Home Loan Practices Act. Mortgage, Foreclosure, Assignment. Practice, Civil, Summary process, Counterclaim and cross-claim. Statute, Construction. Consumer Protection Act, Unfair act or practice.

Summary Process. Complaint filed in the Southeast Division of the Housing Court Department on October 9, 2017.

After transfer to the Metro South Division of the Housing Court Department, the case was heard by Diana H. Horan, J., on a motion for summary judgment.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Tommy L. Morris, pro se.
David F. Kiah for Mary L. Morris.
Christopher J. Williamson for the plaintiff.

[1] Of the Fremont Home Loan Trust 2005-E, Mortgage Backed Certificates, Series 2005-E.

[2] Mary L. Morris.

The following submitted briefs for amici curiae:
Susan Ann Silverstein & Elizabeth A. Aniskevich, of the District of Columbia, & Joshua M. Daniels for AARP & others.
Maura Healey, Attorney General, & Matthew Lashof-Sullivan & Jane A. Sugarman, Assistant Attorneys General, for the Attorney General.
Grace C. Ross, pro se.
Paul R. Collier, III, for Joseph Cavaliere & another.

WENDLANDT, J. This case requires us to determine whether, in connection with a summary process action brought by the assignee of a home mortgage loan to obtain possession following a nonjudicial foreclosure, a borrower may bring a counterclaim under § 15 (b) (2) of the Predatory Home Loan Practices Act (PHLPA), G. L. c. 183C. We conclude that such a counterclaim may be asserted following a nonjudicial foreclosure but is limited to the extent of "amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan" plus costs and reasonable attorney's fees. Id. Further concluding that the borrowers' counterclaim under G. L. c. 93A is barred because it exceeds the extent of the claim of HSBC Bank USA, N.A., as trustee of the Fremont Home Loan Trust 2005-E, Mortgage Backed Certificate, Series 2005-E (HSBC), we reverse in part the Housing Court judge's grant of summary

judgment in favor of HSBC and remand for further proceedings consistent with this opinion.[3]

1. Background. a. Facts. The following facts are either undisputed "or viewed in the light most favorable to . . . the party against [whom] summary judgment entered." Berry v. Commerce Ins. Co., 488 Mass. 633, 634 (2021), citing Attorney Gen. v. Bailey, 386 Mass. 367, 371, cert. denied, 459 U.S. 970 (1982).

The defendants, Tommy L. and Mary L. Morris (Morrises), purchased their Brockton home (property) in October 2005 with the proceeds from two loans obtained from the lender, Fremont Investment & Loan, Inc. (Fremont); each loan was secured by a mortgage on the property. The primary loan, which is at issue in this litigation, was structured as an interest-only, fixed rate loan for the first two years, turning into an adjustable rate loan that included principal and interest, with the interest adjusted every six months after the initial two-year period expired.[4] Both loans had a maturity date of November 1,

[3] We acknowledge the amicus briefs submitted by the AARP, AARP Foundation, and the National Consumer Law Center; the Attorney General; Grace C. Ross; and Joseph Cavaliere and Blondine Etienne.

[4] The initial interest rate on the primary loan was 5.99 percent. After the first two years, the interest was adjusted to the London Interbank Offered Rate plus 4.2331 percent. The

2035. Mortgage Electronic Registration Systems, Inc. (MERS), was the mortgagee on the mortgage that secured the loans.[5]

In 2007, the Attorney General initiated a lawsuit against Fremont for engaging in unfair and deceptive practices in originating and servicing home mortgage loans between 2004 and 2007 in violation of G. L. c. 93A, including home mortgage loans like the Morrises' home mortgage loan, with a fixed interest rate for the first few years that then increased considerably for the remaining period. See Commonwealth v. Fremont Inv. & Loan, 452 Mass. 733, 737 (2008).

In December 2007, following the expiration of the initial two-year period on the primary home mortgage loan, the Morrises' monthly payment increased to an amount they could not afford. In 2008, the Morrises retained an attorney to assist them to obtain a modification of the home mortgage loans; the attorney advised them to stop making payments, ostensibly so that he could attempt to negotiate a more affordable monthly rate.[6] Acting on this advice, the Morrises made their last payment in September 2008 and subsequently defaulted by failing to make

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mortgage agreement stated that the interest could be no less than 5.99 percent and no greater than 11.99 percent.

[5] For a discussion of MERS, see Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 572 n.5 (2012).

[6] The attorney's bar license was later suspended for two years for unrelated instances of misconduct.

monthly payments. It does not appear that their attorney negotiated a loan modification.

In 2009, Fremont agreed to pay $10 million to settle the Attorney General's lawsuit, and the Morrises received approximately $2,000 as part of the settlement.[7]

In February 2012, the assignment of the mortgage from MERS to HSBC was recorded.[8] In February 2016, HSBC sent the Morrises a right to cure letter, informing them that if they did not pay the past due amount on their home mortgage loan, they "may be evicted from [their] home after a foreclosure sale." See G. L. c. 244, § 35A. In April 2016, HSBC sent the Morrises a letter regarding their right to request a modified mortgage loan, informing them that HSBC's "records indicate[d] that [the Morrises were] eligible to request a modification of [their] mortgage," and encouraged them to apply for the Home Affordable Modification Program and the Home Affordable Foreclosure Alternative Program. The Morrises did not respond, and it does not appear that they applied to modify their mortgage loan.

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[7] HSBC does not contend that the settlement extinguished the Morrises' home mortgage loan or that the settlement precluded any remedies they might have under the PHLPA or otherwise.

[8] HSBC was also assigned the promissory note. See Eaton, 462 Mass. at 586 (mortgagee must have possession of note or authorization of note holder to foreclose).

In July 2016, HSBC sent to the Morrises an acceleration notice in compliance with G. L. c. 244, § 35A, informing them that their home mortgage loan had been accelerated and that they "may have the right to reinstate the [m]ortgage [l]oan by paying" the amount due. The Morrises did not respond.

In November 2016, HSBC filed a complaint in the Land Court to determine the Morrises' military status pursuant to 50 U.S.C. §§ 3901 et seq. The Morrises did not respond.

In June 2017, HSBC sent to the Morrises a notice of foreclosure sale. See G. L. c. 244, § 14. The notice of sale was published on June 30, July 7, and July 14, 2017. The Morrises did not respond or otherwise reach out to HSBC.

In July 2017, HSBC held a foreclosure sale and sold the Morrises' home to itself as the highest bidder. See G. L. c. 244, § 14. The proceeds from the sale did not suffice to extinguish the amount of the Morrises' indebtedness.

In September 2017, the Morrises were served with a seventy-two hour notice to quit. The Morrises did not vacate the property. As discussed supra, the Morrises have made no loan payments since 2008.

b. Procedural history. HSBC initiated the present summary process action in the Housing Court in October 2017, seeking to obtain possession of the property. The Morrises filed an answer asserting, inter alia, that HSBC had no superior right to

possession, that HSBC violated the PHLPA, and that they were entitled to damages and injunctive relief under G. L. c. 93A.[9] HSBC moved for summary judgment on the ground that it had acquired title through proper compliance with its statutory obligations for a nonjudicial foreclosure. HSBC also contended that the Morrises' counterclaims were untimely. The Morrises filed a cross motion for summary judgment. The judge granted summary judgment in favor of HSBC, concluding that the Morrises' PHLPA and c. 93A counterclaims were barred by the applicable statutes of limitations. The Morrises' subsequent motion for reconsideration or to alter the judgment was denied.

The Morrises appealed, and a divided panel of the Appeals Court affirmed, holding first that the Morrises' counterclaim pursuant to G. L. c. 183C, § 15 (b) (2), was untimely because it could only be raised prior to foreclosure, and second that the c. 93A counterclaim was time barred by the four-year statute of limitations because the acts giving rise to the c. 93A claim were known to the Morrises no later than 2008, when they stopped making payments on their home mortgage loan on the advice of

[9] The Morrises asserted other counterclaims and defenses that they do not press on appeal. These included that the foreclosure sale was void because HSBC was without power to convey the property, that HSBC's predecessor committed a breach of the mortgage contract, that HSBC violated the Uniform Commercial Code, and that they are entitled to damages for the reduced value of their home.

counsel. See HSBC Bank USA, N.A. v. Morris, 99 Mass. App. Ct. 417, 421-423 & n.9 (2021). Following the denial of their motion for reconsideration, the Morrises applied for further appellate review, which we granted.

2. Discussion.[10] a. Standard of review. Summary judgment is appropriate where there is no material issue of fact in dispute and the moving party is entitled to judgment as a matter of law. See Kourouvacilis v. General Motors Corp., 410 Mass. 706, 716 (1991); Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002). "Our review of a decision on a motion for summary judgment is de novo." Berry, 488 Mass. at 636. We review the evidence in the light most favorable to the party against whom summary judgment entered. See Cabot Corp. v. AVX Corp., 448 Mass. 629, 636-637 (2007).

b. PHLPA. The PHLPA, enacted in 2004, aims to protect borrowers from predatory lending by creating a "broad scheme of liability" against lenders that make "high-cost home mortgage

[10] After filing their initial brief, the Morrises terminated their relationship with their attorney and requested leave to file a revised brief, citing a "profound divergence in strategy." See Mass. R. A. P. 16 (n), as appearing in 481 Mass. 1628 (2019). They filed a revised brief pro se, and filed a supplemental brief following oral argument. We acknowledge that the Morrises no longer advance some of the arguments made in their initial brief, but in the interest of completeness, we address all arguments made to the extent they are not waived.

loans"[11] without satisfying the statutory criteria. Drakopoulos v. U.S. Bank Nat'l Ass'n, 465 Mass. 775, 782-783 & n.11, n.13 (2013). See Lambiaso, Comprehensive Bill Targeting Predatory Lending Gains Momentum, State House News Service, Mar. 15, 2004 (Lambiaso, State House News Service) ("These measures will help working families from being victimized and give them new clout by increasing penalties").

i. Claims against lenders that make predatory loans. The statute provides that

> "[a] lender shall not make a high-cost home mortgage loan unless the lender reasonably believes at the time the loan is consummated that . . . the obligors . . . will be able to make the scheduled payments to repay the home loan based upon a consideration of the obligor's current and expected income, current and expected obligations, employment status, and other financial resources other than the borrower's equity in the dwelling which secures repayment of the loan."

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[11] The statute defines a "high cost home mortgage loan" as "a consumer credit transaction that is secured by the borrower's principal dwelling, other than a reverse mortgage transaction, a home mortgage loan" that has an annual percentage rate or total points and fees exceeding certain specified limits. G. L. c. 183C, § 2. In the Fremont decision, we stated that "Fremont's mortgage loans were not 'high cost home mortgage loans' governed by G. L. c. 183C," but concluded that "the conduct the [PHLPA] prohibits . . . is similar to the central element of unfairness . . . in Fremont's lending practices: the origination of a home mortgage loan that the lender should recognize at the outset the borrower is not likely to be able to repay." Fremont Inv. & Loan, 452 Mass. at 748-749. On appeal, HSBC contends that the Morrises' home mortgage loan was not a high-cost mortgage loan subject to the PHLPA, an argument it did not press before the Housing Court and which we do not reach on appeal.

G. L. c. 183C, § 4.

The broad remedial purpose of the PHLPA is reflected in the array of remedies available to a borrower when a lender makes a high-cost home mortgage loan in violation of the PHLPA. When a lender has violated the PHLPA,[12] a borrower may seek under the statute "injunctive relief or damages," "an order or injunction rescinding a home mortgage loan contract . . . or barring the

[12] A lender violates the PHLPA by originating a high-cost home mortgage loan "without first receiving certification from a counselor . . . that the borrower has received counseling on the advisability of the loan transaction," G. L. c. 183C, § 3; by making a high-cost home mortgage loan without reasonable belief "at the time the loan is consummated that [one] or more of the obligors, will be able to make the scheduled payments to repay the home loan based upon" the borrowers' financial resources, G. L. c. 183C, § 4; by originating a high-cost home mortgage loan that contains "any provision for prepayment fees or penalties," G. L. c. 183C, § 5, "the financing of points and fees greater than [five] per cent of the total loan amount or $800, whichever is greater," G. L. c. 183C, § 6, "a provision that increases the interest rate after default," G. L. c. 183C, § 7, "a scheduled payment that is more than twice as large as the average of earlier scheduled payments," G. L. c. 183C, § 8, "a demand feature that permits the lender to terminate the loan in advance of the original maturity date and to demand repayment of the entire outstanding balance," except in some circumstances, G. L. c. 183C, § 9, or "a payment schedule with regular periodic payments such that the result is an increase in the principal amount," G. L. c. 183C, § 10; by "charg[ing] a borrower a fee or other charge to modify, renew, extend or amend a high-cost home mortgage loan or to defer a payment due," G. L. c. 183C, § 11; by "includ[ing] terms pursuant to which more than [two] periodic payments required under the loan are consolidated and paid in advance from the loan proceeds provided to the borrower," G. L. c. 183C, § 12; or by "pay[ing] a contractor under a home improvement contract from the proceeds of a high cost home mortgage loan" except in certain circumstances, G. L. c. 183C, § 14.

lender from collecting" under the home mortgage loan, "reform[ation of] the terms of the home mortgage loan," "an order or injunction enjoining a lender from engaging in any prohibited conduct," or "other relief, including injunctive relief, as the court may consider just and equitable." G. L. c. 183C, § 18.[13]

ii. Claims against assignees. In addition to claims against the lender, G. L. c. 183C, § 15, sets forth claims and defenses a borrower may assert against a subsequent holder or assignee of the home mortgage loan;[14] these claims are in addition to any other rights available to the borrower under any other law.[15] See G. L. c. 183C, § 15 (c) ("This section shall be effective notwithstanding any other provision of law; provided, that nothing in this section shall be construed to limit the substantive rights, remedies or procedural rights available to a

[13] As set forth supra, Fremont was the lender of the Morrises' home mortgage loan. Nothing in this opinion affects the claims and remedies available against lenders that make predatory loans in violation of the PHLPA.

[14] We use the term "assignee" to refer to any subsequent holder or assignee of a home mortgage loan.

[15] Other laws designed to protect borrowers against predatory loans include, for example, G. L. c. 244, § 35A, passed in 2008, which provides borrowers the right to cure defaults within ninety days, and G. L. c. 244, § 35B, passed in 2012, which requires creditors of certain mortgage loans to make good faith efforts to help borrowers avoid foreclosure. The Morrises did not assert claims under these statutes.

borrower against any lender, assignee or holder under any other law"). Although the Morrises do not raise claims under §§ 15 (a) and 15 (b) (1), these provisions provide context for our analysis of the arguments raised by the Morrises, demonstrating that the PHLPA provides additional remedies against successors that were not pursued here.

A. Section 15 (a) claims against assignees that do not comply with diligence. Section 15 (a) sets forth that assignees "shall be subject to all affirmative claims and any defenses with respect to the loan that the borrower could assert against the original lender . . . ; provided that [§ 15 (a)] shall not apply if [the assignee] demonstrates by a preponderance of the evidence that it" has certain policies prohibiting the purchase or acceptance of an assignment of any high-cost home mortgage loan, requires the assignor to represent and warrant that it is not selling a high-cost home mortgage loan, and exercises due diligence to prevent its purchase or acceptance of a high-cost home mortgage loan. G. L. c. 183C, § 15 (a). Thus, where an assignee fails to make the requisite showing of its diligent efforts, the full panoply of claims and remedies set forth in § 18 are available to the borrower against the assignee. See discussion and note 12, supra.

Indeed, we have previously stated that § 15 (a) "demonstrates that the Legislature intended a broad scheme of

liability for assignees of high-cost mortgage loans," noting that, under § 15 (a), an assignee is subject to "all affirmative claims and any defenses" with respect to the loan, not just those under the PHLPA (emphasis added). Drakopoulos, 465 Mass. at 781, 782 n.11, quoting Cooper v. First Gov't Mtge. & Investors Corp., 238 F. Supp. 2d 50, 55 (D.D.C. 2002) (noting breadth of § 15 [a] of PHLPA "is in harmony with the analogous provision of the Federal Truth in Lending Act [TILA], 15 U.S.C. § 1641[d][1] [2006], which has been read to make 'assignees [of high-cost mortgage loans] subject to all claims and defenses, whether under [TILA] or other law, that could be raised against the original lender'"). The Morrises do not contend that HSBC is liable under § 15 (a).

B. Section 15 (b) claims against assignees. In addition to the broad claims and remedies pursuant to § 15 (a), two types of claims that the borrower could have asserted against the original lender are available to borrowers against assignees under § 15 (b). See G. L. c. 183C, § 15 (c) ("The rights conferred on borrowers by subsections [a] and [b] are independent of each other and do not limit each other"). The claims under § 15 (b), however, are not as broad as those under § 15 (a). Each of the claims available under § 15 (b) is "[l]imited to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan"

plus costs, including reasonable attorney's fees. G. L. c. 183C, § 15 (b). In other words, the remedies under § 15 (b), unlike those available under § 15 (a), do not include the full panoply of remedies available against lenders and instead are limited to monetary damages capped at the borrower's liability under the high-cost home mortgage loan (plus costs, including reasonable attorney's fees).

I. Section 15 (b) (1) claims brought in first five years. First, under § 15 (b) (1), a borrower may bring an "original action" against an assignee for violation of the PHLPA that the borrower could have brought against the original lender if the action is brought within five years of closing. Thus, unlike the claims under § 15 (a), regardless of the assignee's diligent efforts to avoid purchase or assignment of a high-cost home mortgage loan, under § 15 (b) (1), an assignee is subject to any claims that the borrower could have brought against the original lender under the PHLPA for the first five years after the closing.[16] The Morrises did not bring an action within five years of closing of their home mortgage loan, and do not contend that § 15 (b) (1) applies to their case.

[16] Unlike § 15 (a), which preserves "all" affirmative claims and defenses against assignees that the borrower has against the original lender whether under the PHLPA or otherwise, the claims under § 15 (b) (1) are limited to those under the PHLPA. See G. L. c. 183C, § 15 (b) (1) ("A borrower may bring an original action for violation of this chapter . . . " [emphasis added]).

II. Section 15 (b) (2) claims brought "during the term" of home mortgage loan. Second, under § 15 (b) (2), a borrower may, "at any time during the term of a high-cost home mortgage loan, employ any defense, claim, [or] counterclaim,[17] including a claim for a violation of [the PHLPA]" against the assignee that the borrower could have asserted against the original lender in any one of three circumstances: (1) "after an action to collect on the home loan or foreclose on the collateral securing the home loan has been initiated," (2) after "the debt arising from the home loan has been accelerated or the home loan has become [sixty] days in default," or (3) "in any action to enjoin foreclosure or preserve or obtain possession of the home that secures the loan." As is the case under § 15 (b) (1), and

[17] A counterclaim "may or may not diminish or defeat the recovery sought by the opposing party" and "may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party." Mass. R. Civ. P. 13 (c), 365 Mass. 758 (1974). A defense, however, can only defeat the plaintiff's claim and cannot provide affirmative recovery. See Mount Vernon Fire Ins. Co. v. VisionAid, Inc., 477 Mass. 343, 348 (2017), quoting Webster's Third New International Dictionary 591 (1993) ("In common usage, to 'defend' means to 'deny or oppose the right of a plaintiff in . . . a suit or wrong charged.' . . . As the plain meaning of the word 'defend' is clear, we do not deviate from it"). See also Mass. R. Civ. P. 8 (b), 365 Mass. 749 (1974) ("Denials shall fairly meet the substance of the averments denied"). Thus, a counterclaim asserted under § 15 (b) (2) could result in affirmative recovery for the defendant, limited to monetary damages capped at the borrower's outstanding liability plus costs, including reasonable attorney's fees, whereas a defense would serve only to extinguish the plaintiff's claim related to any deficiency on the loan.

unlike under § 15 (a), the defenses, claims, and counterclaims set forth in § 15 (b) (2) exist regardless of the assignee's diligent efforts to avoid purchase or assignment of a high-cost home mortgage loan. While the defenses, claims, and counterclaims under § 15 (b) (2), unlike § 15 (b) (1), are not subject to a five-year statute of limitations,[18] they must be brought "during the term of [the] high-cost mortgage loan." Furthermore, § 15 (b) (2) also limits the availability of the defenses, claims, and counterclaims to the three aforementioned scenarios.[19]

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[18] HSBC wisely no longer presses the argument it raised before the Housing Court and the Appeals Court that the five-year statute of limitations applicable to original actions under § 15 (b) (1) applies to § 15 (b) (2). See Anderson St. Assocs. v. Boston, 442 Mass. 812, 817 (2004) (declining to read words into statute that are not there).

[19] The first scenario is inapplicable in the present case because no action was initiated to collect on the loan and the foreclosure on the collateral was nonjudicial. See G. L. c. 244, §§ 14, 35A. The Morrises do not contend that HSBC failed to comply with the statutory nonjudicial foreclosure requirements. See U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 646 (2011) (Ibanez), quoting Moore v. Dick, 187 Mass. 207, 211 (1905) (Massachusetts "adhere[s] 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'"); Ibanez, supra at 647 n.16 (mortgagee must also act in good faith and use reasonable diligence to protect interests of mortgagor, especially when mortgagee becomes buyer at foreclosure sale).

Similarly, while the second scenario was available to the Morrises after they were at least sixty days in default or once HSBC accelerated the loan, the Morrises did not avail themselves

The Morrises assert only that the third scenario applies because HSBC's summary process action is one to "obtain possession" and that they are therefore entitled to raise a counterclaim under § 15 (b) (2).[20] HSBC contends that the counterclaim is untimely because the foreclosure sale concluded the term of the home mortgage loan and thus the Morrises did not bring the counterclaim "during the term of [the] high-cost home mortgage loan," as required by § 15 (b) (2).

c. Statutory construction. Whether the counterclaim asserted by the Morrises is available under § 15 (b) (2) is a

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of this option, and they do not contend that this second scenario applies in the circumstances of this case. The Morrises defaulted on the home mortgage loan in 2008 and received $2,000 from the Fremont settlement in 2009. They received a notice of default and a notice of acceleration in 2016.

[20] Citing no specific provision, the Morrises contend that their home mortgage loan is "void" under the PHLPA and that the Morrises' PHLPA challenge to the home mortgage loan thus did occur during the term of the loan because no legal foreclosure had occurred. It is not clear whether, in making this argument, they seek to challenge the foreclosure itself or to seek other relief. To the extent that the Morrises rely on G. L. c. 183C, § 3, which requires consultation with a counsellor as to the advisability of a loan and further that "[a] high cost home mortgage loan originated by a lender in violation of this section shall not be enforceable," such a claim might be available if there were record support for the claim and, as against a successor, might fall within the scope of § 15 (a), if, in addition, the successor failed to make the requisite showing under that section. Here, however, the Morrises' sole claim in connection with the PHLPA arises under § 15 (b) (2), which is limited to monetary damages required to extinguish any liability on the home mortgage loan.

question of the statutory construction of the phrase "during the term of a high-cost home mortgage loan." "Accordingly, our analysis begins with 'the "principal source of insight into legislative intent"' -- the plain language of the statute." Patel v. 7-Eleven, Inc., 489 Mass. 356, 362 (2022), quoting Tze-Kit Mui v. Massachusetts Port Auth., 478 Mass. 710, 712 (2018).

> "A fundamental principle of statutory interpretation is that a statute must be interpreted according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated" (quotation and citation omitted).

Harvard Crimson, Inc. v. Presidents & Fellows of Harvard College, 445 Mass. 745, 749 (2006). Clear and unambiguous statutory language is "conclusive as to legislative intent." Patel, supra, quoting Monell v. Boston Pads, LLC, 471 Mass. 566, 575 (2015). Where the statutory language is not conclusive, we may "turn to extrinsic sources, including the legislative history and other statutes, for assistance in our interpretation." Chandler v. County Comm'rs of Nantucket County, 437 Mass. 430, 435 (2002).

Here, the statutory language is inconclusive. On the one hand, the phrase "during the term of a high-cost home mortgage loan" suggests a construction that does not include the period following a foreclosure sale. This is because when a property

is sold at a foreclosure sale, the mortgage is extinguished. See Bevilacqua v. Rodriguez, 460 Mass. 762, 775 (2011), quoting Santiago v. Alba Mgt., Inc., 77 Mass. App. Ct. 46, 50 (2010) (upon foreclosure, "the former mortgagee owns the legal and equitable interest in the property and the mortgage no longer exists"); 4 M.A. Wolf, Powell on Real Property § 37.12[2] (2022) (Powell) (upon foreclosure, "there is no longer a mortgage"). Thus, in a purely technical sense, following foreclosure there is no longer a "mortgage loan," as the mortgage ceases to exist. It would follow, therefore, that the "term of a high-cost home mortgage loan" has ended.

On the other hand, § 15 (b) (2) refers to the "term of a high-cost home mortgage loan" (emphasis added), rather than the term of the mortgage itself. See generally Eaton v. Federal Nat'l Mtge. Ass'n, 462 Mass. 569, 575-577 (2012) (discussing distinction between promissory note evincing underlying indebtedness, or loan, and mortgage); U.S. Bank Nat'l Ass'n v. Ibanez, 458 Mass. 637, 649 (2011) (Massachusetts is "title theory" State in which "a mortgage is a transfer of legal title in a property [to the mortgagee] to secure a debt"); id. at 652 (discussing difference between mortgage note and mortgage underlying note). While the mortgage is extinguished upon foreclosure, if the proceeds of the sale do not satisfy the borrower's entire remaining debt, the borrower may continue to

carry liability under the loan. Powell, supra at § 37.12[2] (if "the foreclosure sale [does] not bring in enough money to satisfy the full mortgage obligation . . . the mortgagor may remain liable for a judgment for the deficiency"). Any remaining deficiency may be collected through a deficiency action pursuant to the requirements of G. L. c. 244, § 17B. Indeed, the underlying promise to repay the amounts borrowed often is evidenced by a promissory note -- an instrument separate from the mortgage instrument -- that itself is enforceable against the borrower. See Powell, supra at § 37.12[1] ("The debt to repay a sum of money may be evidenced by an instrument separate and distinct from the mortgage instrument, . . . [which] commonly takes the form of a promissory note"); id. at § 37.12[2] ("The note evidences the borrower's personal obligation to repay a debt"). Thus, the loan -- that is, the underlying indebtedness and promise to repay -- may not have ended at foreclosure even if, by virtue of the foreclosure, the mortgage instrument no longer secures that promise. See Eaton, supra at 575 (mortgage "serves as security for an underlying note"); Powell, supra at § 37.12[1] ("A mortgage is given to secure the repayment of an underlying debt"). Accordingly, the "term of a high-cost home mortgage loan" may refer to the period of time from the origination date of the loan to the date when the underlying indebtedness is

extinguished or to the maturity date of the original loan, whichever occurs earlier,[21] a period that may well continue past the extinguishment of the mortgage.[22]

Unfortunately, looking at § 15 (b) (2) as a whole does not resolve this ambiguity. See Commonwealth v. Woods Hole,

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[21] Construing the "term of a high-cost home mortgage loan" as the period between the origination date of the loan and the loan's original maturity date corresponds to the anticipated term of the loan; nonetheless, we acknowledge that this construction is imperfect, because as evidenced by other provisions in the PHLPA, when the Legislature sought to refer to the original maturity date, it did so expressly. See, e.g., G. L. c. 183C, § 9 ("A high-cost home mortgage loan shall not contain a demand feature that permits the lender to terminate the loan in advance of the original maturity date . . ." [emphasis added]).

[22] Of course, the equity of redemption -- the right of the debtor to redeem the mortgage obligation after its due date, and ultimately to insist on foreclosure as the means of terminating his or her equitable title in the mortgaged real estate -- does not continue past the foreclosure. Restatement (Third) of Property: Mortgages c. 3, Introductory Note, at 97 (1996). The equity of redemption is inseparable from the mortgage: "When the right of redemption is foreclosed, the mortgage has done its work and the property is no longer mortgaged land. Instead, the former mortgagee owns the legal and equitable interests in the property and the mortgage no longer exists." Bevilacqua, 460 Mass. at 775, quoting Santiago, 77 Mass. App. Ct. at 50. See G. L. c. 244, § 18 (mortgagor holds equity of redemption until mortgagee forecloses).

By contrast, in a preforeclosure claim brought under § 15 (b) (2), the equity of redemption has not yet been extinguished, so the limitation in § 15 (b) that restricts the borrowers' recovery "to amounts required to reduce or extinguish the borrower's liability under the high-cost home mortgage loan" plus costs, including reasonable attorney's fees, would not prevent the borrower from paying off the indebtedness and avoiding foreclosure.

Martha's Vineyard & Nantucket S.S. Auth., 352 Mass. 617, 618 (1967) ("It is a well established principle of statutory interpretation that none of the words of a statute is to be regarded as superfluous, but each is to be given its ordinary meaning without overemphasizing its effect upon the other terms appearing in the statute, so that the enactment considered as a whole shall constitute a consistent and harmonious statutory provision . . ." [quotation, citation, and alteration omitted]). Applying one canon of statutory construction, see Awuah v. Coverall N. Am., Inc., 460 Mass. 484, 496 (2011) ("When a statute lists elements in a series, the rules of statutory construction guide us to construe general phrases as restricted to elements similar to specific elements listed"), the Appeals Court posited that each of the three circumstances set forth in § 15 (b) (2) arguably occurs prior to foreclosure, lending support to a construction of the phrase "during the term" as limited to preforeclosure actions. HSBC Bank USA, N.A., 99 Mass. App. Ct. at 422-423. The first scenario involves an action to collect on the home loan or to foreclose on the collateral that has been initiated; thus, it occurs prior to foreclosure. The second scenario occurs after the loan has been accelerated or has become sixty days in default; again, this occurs prior to foreclosure. The third scenario occurs in an

action to enjoin foreclosure; perforce, this occurs prior to foreclosure.

However, the third scenario also extends the availability of § 15 (b) (2) claims and defenses "in any action to . . . obtain possession of the home that secures the loan." G. L. c. 183C, § 15 (b) (2). As the Appeals Court acknowledged, the phrase seems to include postforeclosure summary process actions. HSBC Bank USA, N.A., 99 Mass. App. Ct. at 423. Consistent with the aforementioned canon of statutory construction, however, the Appeals Court construed the phrase "in any action to . . . obtain possession" to exclude postforeclosure summary process actions, relying on the additional limitation "of the home that secures the loan" because, after foreclosure, the home no longer "secures" the loan (emphasis added). Id. Under this construction, the third scenario largely would be circumscribed to the circumstances where the assignee takes preforeclosure possession by "open and peaceable entry," which the borrower may then oppose. G. L. c. 244, § 1. See U.S. Bank Nat'l Ass'n, 458 Mass. at 646 n.15 (describing foreclosure by peaceable entry as alternative to foreclosure through right of statutory sale).

As the dissenting justice of the Appeals Court noted, however, the phrase "home that secures the loan" could merely describe the home as the collateral that secured the loan prior to the foreclosure. See HSBC Bank USA, N.A., 99 Mass. App. Ct.

at 429 (Sullivan, J., dissenting). Under this view, the third scenario would be available in postforeclosure summary process actions, more broadly protecting aggrieved borrowers against successors to the original lender. We conclude that either view is reasonable, and thus neither resolves dispositively whether the phrase "during the term of a high-cost mortgage loan" is limited to preforeclosure actions.

Accordingly, to resolve the question whether "during the term of a high-cost mortgage loan" includes the period following foreclosure, we must turn to "extrinsic sources, including the legislative history . . . , for assistance in our interpretation." Chandler, 437 Mass. at 435. As discussed supra, the Legislature intended for the PHLPA to provide a "broad scheme of liability," Drakopoulos, 465 Mass. at 782 n.11, to "help working families from being victimized and give them new clout by increasing penalties" for lenders and successors, Lambiaso, State House News Service. In addition, because Massachusetts is a nonjudicial foreclosure State, see generally G. L. c. 183, § 21; G. L. c. 244, §§ 11-17C, and thus "does not require a mortgage holder to obtain judicial authorization to foreclose on a mortgaged property,"[23] U.S. Bank Nat'l Ass'n, 458

[23] Illinois, Indiana, New Jersey, New Mexico, and Rhode Island each have a similar statute, allowing borrowers to raise defenses and counterclaims "during the term" of the home

Mass. at 645-646, postforeclosure actions in a very real sense often may be the first time a borrower will raise the PHLPA as a defense or counterclaim. See Endeavor Capital N. LLC vs. Smith, Mass. Land Ct., No. 18 MISC 000118 (RBF) (Nov. 15, 2018) ("Nearly all the foreclosures of mortgages in the Commonwealth are made by [foreclosure] sale . . ."); MassLegalHelp, What Happens When the Bank Forecloses? (July 2013), http://www.masslegalhelp.org/housing/foreclosures/process [https://perma.cc/LRH3-THXM] (describing normal foreclosure process through foreclosure sale). As the Attorney General states in her amicus brief, construing § 15 (b) (2) as unavailable postforeclosure would, in effect, make the claims, counterclaims, and defenses set forth therein meaningless, ignoring the "practical realities of how foreclosures work in Massachusetts." See Massachusetts Access to Justice Commission,

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mortgage loan. See 815 Ill. Comp. Stat. 137/135(d)(2)(B); Ind. Code § 24-9-5-1(b)(3); N.J. Stat. Ann. § 46:10B-27(c)(2); N.M. Stat. Ann. § 58-21A-11(B)(2); R.I. Gen. Laws § 34-25.2-7(b)(2). Of these, only the New Jersey statute has been addressed by a court. The United States District Court for the District of New Jersey held that the borrower's defense raised after foreclosure was untimely because "the loan was terminated with the foreclosure judgment." Lutzky vs. Deutsche Bank Nat'l Trust Co., U.S. Dist. Ct., No. 09-03886 (JAP) (D.N.J. Jan. 27, 2009). New Jersey, however, is a judicial foreclosure State, meaning that a New Jersey borrower would have the opportunity to raise the statute as a defense in a foreclosure action, unlike in Massachusetts, where a borrower may not have the same opportunity because foreclosure is permitted to be accomplished through a nonjudicial process. Thus, the Lutzky analysis is unhelpful to our construction of the PHLPA.

Annual Report on Activities 5 n.5 (Aug. 2021), https://massa2j.org/wp-content/uploads/2021/09/MA-Access-to-Justice-Commission-Annual-Report-August-2021.pdf [https://perma.cc/RV34-RFDV] (up to two-thirds of litigants appear without lawyers in important legal matters, including postforeclosure evictions).

Based on this history and underlying legislative intent to enact a broadly remedial statute, see Jinks v. Credico (USA) LLC, 488 Mass. 691, 700 (2021) (remedial statutes should be interpreted "with some imagination of the purposes which lie behind them" [citation omitted]), we conclude that the "term of the high-cost mortgage loan" refers to the period from the origination date to the date when the underlying indebtedness is repaid, or to the original maturity date, whichever is earlier, so that borrowers may avail themselves of the PHLPA's expansive protections in a postforeclosure "action to . . . preserve or obtain possession of the home that secures the loan." G. L. c. 183C, § 15 (b) (2). Therefore, the Morrises' counterclaim under § 15 (b) (2) may be asserted after foreclosure. As set forth supra, however, the § 15 (b) (2) counterclaim is limited to monetary damages capped at the "amounts required to reduce or extinguish the borrower's liability under the high-cost home

mortgage loan" plus costs and reasonable attorney's fees.[24] G. L. c. 183C, § 15 (b).

d. G. L. c. 93A claim. The Morrises contend that summary judgment should not have entered on their G. L. c. 93A counterclaim for HSBC's "unfair or deceptive acts or practices in the conduct of any trade or commerce." G. L. c. 93A, § 2 (a).[25] Originating a loan "that the lender should recognize at the outset the borrower is not likely to be able to repay," is an "unfair" practice prohibited by G. L. c. 93A. Fremont Inv. & Loan, 452 Mass. at 749. See Drakopoulos, 465 Mass. at

[24] HSBC argues that the fact that a third party could have purchased the property at the foreclosure sale and thus would be the party bringing the postforeclosure summary process action against the borrowers requires us to conclude that a defense under § 15 (b) (2) is not available in a postforeclosure summary process action. We disagree. Section 15 of the PHLPA provides for circumstances where an assignee of the home mortgage loan, like HSBC, is subject to claims, defenses, and counterclaims by the borrower. The fact that it does not also affect a third-party bona fide purchaser for value is not material to our analysis.

[25] To the extent that the Morrises base their c. 93A claim on the PHLPA violation, it is limited to monetary damages required to extinguish the claim as set forth in G. L. c. 183C, § 15 (b) (2). See Drakopoulos, 465 Mass. at 787 n.16, citing Ford Motor Credit Co. v. Morgan, 404 Mass. 537, 545 (1989) (common-law principle that assignee stands in assignor's shoes "has never been interpreted to mean that the assignee will be liable for all the assignor's wrongs," but borrower may have c. 93A counterclaim "to be used only defensively to extinguish assignee creditors' claim for remaining debt").

786.[26] Under G. L. c. 93A, § 9 (1), consumers who are affected by an unfair practice made unlawful by § 2 (a) can bring suit "by way of original complaint, counterclaim, cross-claim or third-party action, for damages and such equitable relief, including an injunction, as the court deems to be necessary and proper."

HSBC argues that the Morrises' c. 93A counterclaim was time barred because such claims are subject to a four-year statute of limitations. See G. L. c. 260, § 5A ("Actions arising on account of violations of any law intended for the protection of consumers, including . . . [G. L. c. 93A], . . . shall be commenced only within four years next after the cause of action accrues"). While an affirmative claim under G. L. c. 93A would be barred under this statute of limitations, the four-year limitations period does not apply to preclude a party from raising a defensive counterclaim alleging a violation of G. L. c. 93A; such a defensive counterclaim "arising out of the same transaction or occurrence that is the subject matter of the

[26] As an assignee of the mortgage, HSBC could be liable under G. L. c. 93A for violations by the original lender, but would only be subject to equitable defenses to extinguish the remaining debt. See Drakopoulos, 465 Mass. at 777 & 787 n.16 (reversing grant of summary judgment in favor of bank on plaintiffs' c. 93A claim because bank, as assignee, "[was] not shielded from liability as a matter of law by virtue of its status as an assignee" but could be liable for equitable remedies to extinguish any claim for borrower's remaining debt).

plaintiff's claim,[27] to the extent of the plaintiff's claim, may be asserted without regard to the provisions of the law relative to limitations of actions." G. L. c. 260, § 36. See Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415-416 (1998) ("[T]he object of a statute of limitation in keeping stale litigation out of the courts would be distorted if the statute were applied to bar an otherwise legitimate defense to a timely lawsuit, for limitation statutes are aimed at lawsuits, not at the consideration of particular issues in lawsuits" [quotations and citations omitted]); Shaw's Supermkts., Inc. v. Melendez, 488 Mass. 338, 345 (2021) ("A statute of limitations does not refer to the date on which the cause of action expires, but, rather, to the period during which a legal proceeding may be initiated").

To fall within G. L. c. 260, § 36, the counterclaim must be limited "to the extent of the plaintiff's claim." This

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[27] The Morrises' counterclaim arguably arises out of the same transaction or occurrence as HSBC's claim, namely, the home mortgage loan. See Potier v. A.W. Perry, Inc., 286 Mass. 602, 608 (1934) ("The word 'transaction' . . . should not be construed narrowly or technically, but should be construed in a sense to effectuate the settlement in one proceeding of controversies so closely connected as appropriately to be combined in one trial . . ."); Keystone Freight Corp. v. Bartlett Consol., Inc., 77 Mass. App. Ct. 304, 309-310 (2010) (for purposes of compulsory counterclaim, which must "arise[] out of the transaction or occurrence that is the subject matter of the opposing party's claim," counterclaim "need not rest on precisely identical facts or pose identical allegations," but rather must be "so closely connected as appropriately to be combined in one trial" [citation omitted]).

restriction derives from the common-law concept of recoupment. Bose Corp. v. Consumers Union of U.S., Inc., 367 Mass. 424, 427 (1975). See Bernstein v. Gramercy Mills, Inc., 16 Mass. App. Ct. 403, 409 (1983), quoting Bose Corp., supra at 427-431 ("as a § 36 counterclaim can go only 'to the extent of the plaintiff's claim,' it corresponds to 'recoupment'"). See also Developments in the Law Statutes of Limitations, 63 Harv. L. Rev. 1177, 1245-1246 (1950) (counterclaim must arise out of transaction forming basis of plaintiff's claim "and may be used only to reduce or extinguish the plaintiff's recovery"). A successful recoupment claim by a defendant may "reduce or extinguish the plaintiff's claim, but it could not result in an affirmative recovery for the defendant." Bose Corp., supra at 427-428. See Restatement (First) of Judgments § 55 comment a (1942).

Here, "[t]he present counterclaim . . . bears no resemblance to a recoupment" (quotation omitted). Bernstein, 16 Mass. App. Ct. at 409. In its summary process action, HSBC asserted that it had the title to the property by virtue of its compliance with the statutory framework permitting a nonjudicial foreclosure.[28] See Wayne Inv. Corp. v. Abbott, 350 Mass. 775,

[28] Contrary to the Morrises' suggestion, neither Kattar v. Demoulas, 433 Mass. 1, 13, 17 (2000), nor Ford Motor Credit Co., 404 Mass. at 540, 545, permits a borrower to assert a c. 93A counterclaim for the reconveyance of property that is otherwise

775 (1966) ("Legal title is established in summary process by proof that the title was acquired strictly according to the power of sale provided in the mortgage; and that alone is subject to challenge"). There is no claim by HSBC for any outstanding liability under the loan; the Morrises' c. 93A counterclaim is not for recoupment or "reduc[ing] or extinguish[ing]" any remaining debt, as there is none asserted.[29] Bose Corp., 367 Mass. at 427-428. Therefore, the Morrises cannot assert this c. 93A counterclaim as a defense to HSBC's summary process eviction action.[30]

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barred by G. L. c. 260, § 36, because it exceeds the extent of the plaintiff's claim.

Similarly, the Morrises rely on Bank of Am., N.A. v. Rosa, 466 Mass. 613, 615 (2013), and Federal Nat'l Mtge. Ass'n v. Rego, 474 Mass. 329, 338 (2016), to suggest that equitable claims are available generally in postforeclosure actions. Neither case suggests that an affirmative claim that is otherwise untimely under G. L. c. 260, § 5A, is revivable, or that a counterclaim under G. L. c. 260, § 36, may exceed the scope of the plaintiff's claim.

[29] Thus, in contrast to a counterclaim under G. L. c. 183C, § 15 (b) (2), which allows the Morrises to pursue damages sufficient to extinguish their deficiency on the loan even though there is not presently a claim by HSBC for the deficiency, see supra, a counterclaim under G. L. c. 93A would allow the Morrises to extinguish their deficiency only if HSBC brought a deficiency claim against them.

[30] The Morrises argue that HSBC lacked standing because the foreclosure was invalid. See Rental Property Mgt. Servs. v. Hatcher, 479 Mass. 542, 547 (2018) (dismissal of action for lack of standing proper even if not raised previously). Here, HSBC had standing to assert a claim for summary process by virtue of

3. Conclusion. The Housing Court judge's grant of summary judgment in favor of HSBC is reversed insofar as it concerns the Morrises' PHLPA counterclaim and reversed in part and affirmed in part insofar as it concerns the c. 93A claim. The case is remanded for further proceedings consistent with this opinion.

So ordered.

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the properly executed foreclosure sale. To the extent the Morrises' argument concerns subject matter jurisdiction, it also fails. See G. L. c. 185C, § 1 (jurisdiction proper in Metro South Housing Court over matters arising in Brockton); G. L. c. 185C, § 3 (Housing Court has jurisdiction over summary process actions); G. L. c. 239, § 2 (same). See also Federal Nat'l Mtge. Ass'n, 474 Mass. at 338 ("The Housing Court also has jurisdiction to hear summary process complaints, in which the owner of a housing unit seeks to evict the occupant of that unit and recover possession").

In addition, in their amended brief, the Morrises summarily raise the claim that their due process rights were violated, and claims under various Massachusetts statutes, including G. L. c. 260, § 21, which provides for a twenty-year statute of limitations on actions for the recovery of land; G. L. c. 93, §§ 102 and 103, for equal rights violations based on race and age; and G. L. c. 183, § 64, for discrimination in residential mortgage loans on the basis of location of property. In addition, they raise claims related to the predatory nature of the home mortgage loan, including unconscionability and fraud. These arguments were not raised before the Housing Court and therefore are waived. See Porter v. Treasurer & Collector of Taxes of Worcester, 385 Mass. 335, 338 n.5 (1982) ("We will refuse to consider as a basis for reviewing the trial judge's rulings, arguments inspired by the loss in the trial court and urged for the first time on appeal" [quotation and citation omitted]).