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## **FORECLOSURE BY ENTRY**

***Physical entry on the property, recordation of a Certificate of Entry and three years provide a third, independent path to foreclosure.***

In *Emigrant Mortgage Company, Inc. v. Bourke*, 2022 WL 3566832, --- F.Supp.3d --- (D.Mass. Aug. 18, 2022) (“*Bourke II*”), Judge Gorton ruled in our favor on the third path to foreclosure in Massachusetts. Argued by Attorney Brian Linehan of Doonan, Graves and Longoria LLC, the U.S. District Court for the District of Massachusetts held that any defects in a contractual notice of default did not impact the mortgagee’s foreclosure by entry and possession under G.L. c. 244, § 1. The travel of the case through state court began in 2011. *See Retained Realty, Inc. v. Bourke*, 2019 Mass.App.Div., 183, at \*1 (2019) (“*Bourke I*”). On March 21, 2011, the mortgagee foreclosed the subject mortgage loan by exercise of the statutory power of sale found at G.L. c. 183, § 21, and incorporated into the subject mortgage. *See id.* At the time of its foreclosure sale, the mortgagee also made an entry for possession under G.L. c. 244, § 1 for the purpose of foreclosing the mortgage loan. *See id.* The Foreclosure Deed and Certificate of Entry were subsequently recorded on December 14, 2012. *See id.* Thereafter, the foreclosure-sale-purchaser (“Purchaser”) commenced a summary process action in the Nantucket District Court in which it attempted to recover possession of the foreclosed premises from the former mortgagors. *See id.*

The Purchaser’s summary process summons and complaint stated that its claim for possession arose out of the foreclosure deed executed and recorded following the mortgagee’s foreclosure by exercise of the statutory power of sale. *See Bourke I*, 2019 Mass.App.Div. 183, at \*4. The Nantucket District Court conducted a bench trial on May 22, 2017, which was more than three years after the mortgagee recorded its Certificate of Entry. *See id.* At trial, the mortgagors argued that defects in the mortgagee’s contractual notice of default rendered the sale void under the

Supreme Judicial Court's ("SJC") decision in *Pinti v. Emigrant Mortgage Co., Inc.*, 472 Mass. 226 (2015). *See Bourke I*, 2019 Mass.App.Div. 183, at \*2. The Purchaser responded by arguing that, even if the foreclosure by exercise of the statutory power of sale were void, the defective notice of default had no effect on the accompanying foreclosure by entry and possession, which is a wholly separate and distinct method of foreclosure. *See id.* at \*3. Because the statutory three-year redemption period had expired prior to the bench trial, the Purchaser argued that the Certificate of Entry provided an adequate basis for its claim for possession even if the Court were to determine that the mortgagee's foreclosure sale was void. *See id.* The Nantucket District Court agreed and entered Judgment for the Purchaser. *See id.*

The mortgagors appealed the Judgment to the Appellate Division of the District Court. On December 23, 2019, the Appellate Division issued its decision vacating the Judgment and dismissing the summary process action. The Appellate Division held that the defective notice of default rendered the foreclosure sale void and, because the Purchaser commenced its summary process action before the statutory three-year redemption period relating to the Certificate of Entry expired, the Certificate of Entry could not form the basis for the Purchaser's summary process action. *See id.* at \*4. Accordingly, the Purchaser lacked standing to bring its summary process action. *See id.*

Thereafter, the Purchaser and the mortgagee brought an action in the U.S. District Court seeking to quiet title to the property in the name of the Purchaser based on the foreclosure by entry and possession. *See Bourke II*, 2022 WL 3566832, at \*1. The Purchaser also included a claim for possession in its Complaint. *See id.* at \*2. The mortgagors moved to dismiss the Complaint arguing that, because the defective notice of default rendered the foreclosure by exercise of the statutory power of sale void, the mortgagee's accompanying foreclosure by entry and possession was likewise void. *See id.* at \*4. **The U.S. District Court determined that, unlike a foreclosure by exercise of the statutory power of sale incorporated into the mortgage, a foreclosure by entry and possession under G.L. c. 244, § 1 is purely a statutory remedy. *See id.* at \*5. Accordingly, the mortgagee was not required to send a contractual notice of default prior to making its entry for possession for the purpose of foreclosure. *See id.* As a result, the Court held that any defect in the mortgagee's notice of default was irrelevant with respect to the validity of the mortgagee's foreclosure by entry and possession. *See id.***