

2013 WL 9900539 (Mass.Super.) (Trial Pleading)  
Superior Court of Massachusetts.  
Suffolk County

PROVIDENT FUNDING ASSOCIATES, L.P.,

v.

Carl JONES, et al.

No. SUCV201202011.  
January 10, 2013.

**The Defendants' Summary Process Answer, Counterclaim and Jury Demand**

[Todd S. Kaplan](#) (BBO # 634710), Greater Boston Legal Services, 197 Friend Street, Boston, MA 02114, (617) 603-1234 (main), or (617) 603-1647 (direct dial)

1. The Defendants Nancy Henry and Robert (a/k/a Bobby) Jones (hereafter the "Defendants") admit that they are in possession of the premises located at 24 Upton Street, Cambridge, Massachusetts, 02139 ("the premises"), which are within the judicial district of this Court, but deny that such possession is unlawful or against the right of the Plaintiff.
2. The Defendants deny that they are indebted to the Plaintiff in any amount or that "use & occupancy" is owing as alleged in the "Account Annexed" of the Plaintiff's Complaint
3. The Defendants deny all remaining allegations contained in Plaintiff's Complaint.

**FIRST AFFIRMATIVE DEFENSE:**

**DEFENSE; NO SUPERIOR RIGHT TO POSSESSION**

4. The Defendants repeat and realleges all paragraphs above and throughout as if set forth fully herein,
5. In 2007, Dennis Dunphy, Scott Moore, People's Choice Mortgage and others conspired to defraud Defendant Mrs. Nancy Henry, a 76 year old **elder** with Alzheimer's disease, of ownership of her home.
6. Dunphy led Mrs. Henry to believe he would help her find a new home, when in fact he presented her with papers that she did not understand to induce her to deed the property to him for \$228,000.
7. Defendant Nancy Henry was induced to deed over her home, the premises to a trust set up by Dennis Dunphy.
8. After deceiving Mrs. Henry, Dennis Dunphy arranged for Melody Santos to be a straw buyer from the trust, purchasing the property in a paper transaction for \$580,000 a mere five months after the original conveyance from Mrs. Henry.
9. Melody Santos then took out \$517,000 in fraudulent mortgage loans from the Plaintiffs.
10. The Plaintiff was on constructive or actual notice that Melody Santos was not eligible for the mortgage the Plaintiff approved for her.

11. The Plaintiff was on constructive or actual notice that Melody Santos was not eligible for the mortgage.
12. The Plaintiff approved Melody Santos she had just obtained a mortgage in the amount of \$294,300 on or about June 27, 2007 with Countrywide Home Loans secured by a property on Burrill Place in South Boston, MA.
13. The Plaintiff had actual or constructive notice that the mortgage for property at Burrill Place in South Boston, MA required Melody Santos to reside in that property and that she still held legal title to that property.
14. The Plaintiff was on constructive or actual notice that Melody Santos was not eligible for the mortgage the Plaintiff that it approved for her as the amount of income stated on the loan application was not reasonable based on the nature of the borrower's profession, current position, and tenure.
15. The Plaintiff was on constructive or actual notice that Melody Santos was the holder of a deed to the premises that had been obtained through fraud or theft.
16. The Plaintiff failed to inquire into the questionable circumstances surrounding the Santos loan, despite numerous red flags and warnings.
17. The Plaintiff, claims to have lawfully foreclosed upon the premises.
18. In order to evict the Defendants, the Plaintiff must establish that it has a superior right to possession.
19. It is the Plaintiff's burden *to* show that it was a innocent bon-fide purchaser for value and that it did not have actual or constructive notice of the fraud or deceit,
20. Therefore, Plaintiff, is precluded from claiming bona fide encumbrancer status,
21. Plaintiff will be unable to meet its' burden of proof and therefore it has no equitable interest in the premises.
22. As the Plaintiff is unable to prove that it is a bona fide purchaser for value, the foreclosure must be revoked and the Plaintiff must be stripped of any equitable interest it claims in the premises.
23. The Plaintiff initiated foreclosure proceedings when it did not hold proper title and engaged in a wrongful foreclosure.
24. Therefore, the Plaintiff is barred from evicting the Defendants.

**SECOND AFFIRMATIVE DEFENSE:**

**EQUITY**

25. The Defendants repeat and realleges all paragraphs above and throughout as if set forth fully herein.
26. The Defendants invoke this courts equitable jurisdiction.
27. Based on the facts asserted in Defendants Summary Process Answer and Counterclaims, it is against the principles of equity to allow the Plaintiff to evict the Defendants and should rescind the foreclosure and revoke the Plaintiff's mortgage of the premises.

28. “[A] court acting under general principles of equity jurisprudence has broad power to reform, rescind, or cancel written instruments, including mortgages, on grounds such as fraud, mistake accident or illegality.” *Beaton v. Land Court*, 367 Mass. 385, 392, 326 N.E.2d 302, 307 (1975).

**THIRD AFFIRMATIVE DEFENSE:**

**DEFENSE: RELIEF FROM FORFEITURE**

29. The Defendants repeat and realleges all paragraph above and throughout as if set forth fully herein.

30. The Defendants state that on the facts of this case that they may be granted relief from the forfeiture of the premises and requests that this Court exercise its jurisdiction accordingly upon such conditions it deems just and equitable.

**FOURTH AFFIRMATIVE DEFENSE:**

**DEFENSE: EQUITABLE ESTOPPEL AND/OR WAIVER**

31. The Defendants repeat and realleges all paragraphs above and throughout as if set forth fully herein.

32. The plaintiff’s claims are barred under the equitable doctrines of estoppel and/or waiver.

**FIFTH AFFIRMATIVE DEFENSE:**

**LACK OF STANDING**

33. The Plaintiff engaged in a wrongful foreclosure of the premises and therefore lacks standing to pursue the present action.

34. The Defendant asserts the following counterclaim against the Plaintiff:

***FIRST COUNTERCLAIM***

***NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS***

35. The Defendants repeat and realleges all paragraphs above and throughout as if set forth fully herein.

36. The Plaintiff, by their failures as set out above caused the Mrs. Henry severe emotional upset and anxiety in that:

37. The Plaintiff intended to inflict emotional distress or knew or should have known that emotional distress was the likely result of their conduct; and

38. The Plaintiff’s conduct was extreme and outrageous under the circumstances; and

39. The emotional distress sustained by the Mrs. Henry was severe.

40. Mrs. Henry suffered actual and consequential damages as a result of the Plaintiff’s intentional infliction of emotional distress.

***SECOND COUNTERCLAIM***

***UNFAIR OR DECEPTIVE ACTS IN VIOLATION OF THE  
MASSACHUSETTS CONSUMER PROTECTION ACT. G.L. C. 93A***

41. Plaintiff repeats and realleges all paragraphs above and throughout as if set forth fully herein.
42. The Defendants are engaged in business within the meaning of G.L.c 93A.
43. The Defendants have victimized a **vulnerable elder** and deprived her of her home.
44. The Defendants engaged in unfair and deceptive business practices including but not limited to negligent underwriting, fraud, wrongful foreclosure and eviction, civil conspiracy to commit unlawful acts, and intentional infliction of emotional distress.
45. Defendants actions were willful.
46. The Defendants have failed to make a reasonable offer of settlement pursuant to a 93A Demand letter.
47. Therefore Mrs. Henry is entitled to double or triple damages and attorneys fees on all of her claims.

***DAMAGES***

48. Therefore on account of the Defendants illegal or otherwise unlawful activities as set forth above, Defendants are entitled to actual and compensatory damages.
49. The Defendants are also entitled to” statutory and punitive damages as allowed, by law, and reasonable attorneys fees and costs, as provided by law, for the causes of action set forth above.

***DEMAND FOR JURY***

50. The Defendants hereby demand a trial by jury on all claims so triable,

***PRAYER FOR RELIEF***

WHEREFORE, DEFENDANTS request that the Court:

- i. Enter judgment for the Defendants as against the Plaintiff on all claims herein;
- ii. Award the Defendants actual, statutory and punitive damages, reasonable attorneys' fees and court costs;
- iii. Rescind the Mortgage Loan;
- iv. Vacate the Execution for Possession;
- v. Rescind the Foreclosure;
- vi. Transfer the Deed to Mrs. Henry; and

vii. grant any further relief it deems just and proper.

7/5/12

Date

DEFENDANTS,

<<signature>>

Todd S. Kaplan (BBO # 634710)

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