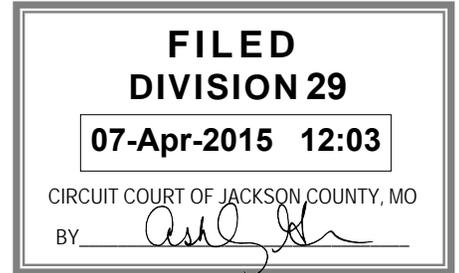


IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
ASSOCIATE CIRCUIT DIVISION  
AT KANSAS CITY



SUMMIT BANK OF KANSAS CITY )  
 )  
 Plaintiff, )  
 )  
 )  
 v. )  
 )  
 )  
 KANSAS CITY, MISSOURI HOUSING )  
 AUTHORITY )  
 )  
 Defendant. )

Case No. 1416-CV09029  
Division 29

**ORDER GRANTING DEFENDANT KANSAS CITY, MISSOURI  
HOUSING AUTHORITY’S MOTION FOR SUMMARY JUDGMENT**

Pending before the Court is Plaintiff Summit Bank of Kansas City’s (hereinafter “Summit Bank”) *Motion for Summary Judgment*, filed December 11, 2014, and Defendant Kansas City, Missouri Housing Authority’s (hereinafter “Housing Authority”) *Motion for Summary Judgment*, filed December 18, 2014. For the following reasons, Defendant Housing Authority’s Motion for Summary Judgment is granted, and Plaintiff Summit Bank’s Motion for Summary Judgment is denied.

**STANDARD OF REVIEW**

Under Supreme Court Rule 74.04, summary judgment shall be granted only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The movant bears the burden of establishing a right to judgment as a matter of law on the record as submitted. *ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 382 (Mo. banc 1993). The movant must establish that there is no genuine dispute as to those material facts upon which the movant would have had the burden of persuasion at trial. *Id.*

Any evidence in the record that presents a genuine issue as to the material facts defeats the movant's prima facie showing. *Id.* The non-movant is accorded the benefit of all reasonable inferences from the record. *Martin v. City of Washington*, 848 S.W.2d 487, 489 (Mo. banc 1993).

### **STATEMENT OF UNCONTROVERTED FACTS**

1. Plaintiff Summit Bank is a duly authorized and chartered Missouri state bank doing business in the State of Missouri.
2. Defendant Housing Authority is a statutory Missouri municipal corporation organized and existing by virtue of RSMo Section 99.040.
3. One objective of Defendant Housing Authority is to provide housing benefits to low income and very low income families.
4. Through the Housing Authority's Section 8 tenant-based assistance program, Section 8 participants lease residential units from private owners and the Housing Authority makes a "housing assistance payment" (hereinafter HAP) to the owner on behalf of the participant family.
5. The Housing Authority enters into a written housing assistance payment contract (hereinafter HAP contract) with an owner who seeks to have tenants who are eligible to participate in the Section 8 program. Those Section 8 tenants then enter into a separate, written lease with the private owner.
6. Defendant Housing Authority receives funding for its housing programs from the United States Department of Housing and Urban Development (hereinafter "HUD"). As a result, HAP and HAP contracts are governed by Federal regulations.

7. On or about April 27, 2011, Plaintiff Summit Bank loaned money to Thomas R. O'Shea so that he could purchase several rental properties in the Kansas City, Missouri area. The loan was secured, in part, by an Assignment of Rents, which Plaintiff recorded with the Jackson County, Missouri, Recorder of Deeds on May 2, 2011.
8. Mr. O'Shea leased the rental properties to Section 8 tenants who qualified for housing subsidies pursuant to 42 U.S.C. Chapter 8, Section 1437f.
9. Defendant Housing Authority and Mr. O'Shea entered into multiple HAP contracts involving these Section 8 tenants.
10. The HAP contracts contain the following language: "[t]he family is responsible for paying the owner any portion of the rent to owner that is not covered by the PHA [public housing agency] housing assistance payment. Each month, the PHA will make a housing assistance payment to the owner on behalf of the family in accordance with the HAP contract. The amount of monthly housing assistance payment will be determined by the PHA in accordance with HUD requirements for tenancy under the Section 8 voucher program. The monthly housing assistance payment shall be credited against the monthly rent to owner for the contract unit."
11. On May 8, 2012, Mr. O'Shea died.
12. In June of 2012, a representative of Plaintiff Summit Bank contacted Defendant Housing Authority, advised that Mr. O'Shea was deceased, and asked that any monies that Defendant was paying to Mr. O'Shea on behalf of any Section 8 tenants be redirected and paid to Plaintiff Summit Bank.

13. Defendant Housing Authority declined to make payments on the HAP contracts directly to Plaintiff Summit Bank, at least in part because the Defendant did not consider Plaintiff to be the owner of the properties.
14. On April 16, 2014, Plaintiff Summit Bank filed its *Petition for Breach of Assignment Obligation* against Defendant Housing Authority.

### **CONCLUSIONS OF LAW**

#### **I. Defendant Housing Authority's Housing Assistance Payments Are Not Rent**

The Court concludes that the Defendant is entitled to judgment as a matter of law because housing assistance payments (HAP) are not rent and, therefore, Plaintiff was not entitled to collect HAP directly from the Defendant under the Assignment of Rents. In Missouri, "rent" is defined as "a stated payment for the temporary possession or use of a house, land or other real property, made at fixed intervals by a tenant or lessee to a landlord." RSMo Section 441.005(5). However, the Housing Authority's purpose in making the HAP was not to gain possession or use of the property, but to provide a subsidy to the actual tenants. These types of subsidies encourage "the redevelopment of areas that contain unsanitary or unsafe housing conditions for the benefit of persons of low income" and provide low income tenants with a place to live that they could not otherwise afford. *In Re Foreclosure of Liens v. Housing Authority of Kansas City, Missouri*, 150 S.W.3d 364, 367 (Mo. App. W.D. 2004).

It is also clear that Defendant Housing Authority was not a "tenant" of any of the subject properties involved in this litigation in that it never occupied the premises. A "tenant" is defined as "a person who occupies the premises with the landlord's consent." RSMo Section 441.005(6). In addition, Summit Bank was never acting as a landlord when it accepted the assignment of

rents. A “landlord” is defined as “the owner or lessor of the premises or a person authorized by the owner to exercise any aspect of the management of the premises.” *Id.* 441.005(1). Summit Bank never took any action to manage or maintain the properties or to perform any of the other obligations that a landlord holds to its tenants. Instead, the bank accepted the assignment of rents as security for the loan it had extended to Mr. O’Shea.

Finally, the housing assistance payments are distinguished from rent payments because they were made pursuant to a separate contract. Defendant Housing Authority and Mr. O’Shea entered into HAP contracts, which were separate agreements from the rental agreements between Mr. O’Shea and the tenants of the subject properties. Without a landlord-tenant relationship established between Defendant Housing Authority and Mr. O’Shea, it is not legally possible for the housing assistance payments to constitute rent. Mr. O’Shea assigned the income he received from the rental properties, including the income under the HAP contracts, to Plaintiff Summit Bank as security for the loan, but that fact alone does not make the housing assistance payments rent. Therefore, the Court holds that Plaintiff Summit Bank is not entitled to collect HAP directly from the Defendant under the Assignment of Rents, because HAP are not rent.

## **II. Plaintiff Was Not Entitled to Collect HAP Directly from Defendant Because It Did Not Take Action Equivalent to Possession of the Subject Rental Units**

Even if housing assistance payments were rent, the Court holds that Plaintiff did not take action equivalent to possession that would entitle it to collect HAP directly from Defendant after Mr. O’Shea’s death. In Missouri, a mortgagee may collect rents through an Assignment of Rents clause directly from tenants<sup>1</sup> when certain requirements are met. *In re Mews Associates, L.P.*,

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<sup>1</sup> The Court has already held, in Point I, that Defendant Housing Authority is not a tenant and that the housing assistance payments are not rent. The law regarding a mortgagee’s right to collect rents through possession or action equivalent to possession focuses specifically on the mortgagee’s right to collect *rents* directly from *tenants*. To the extent that Defendant Housing Authority may be subject to the law regarding a mortgagee’s right to collect

144 B.R. 867, 868 (Bankr. W.D. Mo. 1992). These requirements are: “(1) proper documentation of the assignments; (2) proper recording of the assignments in the form required for an interest in real estate; (3) default on the part of the assignor; and (4) possession of the premises by the assignee; or (5) action equivalent to possession by the assignee.” *Id.* at 868-69 (quoting *In re Stoneridge Apartments*, 119 B.R. 706, 707 (Bankr. W.D. Mo. 1990)). A mortgagee must satisfy these requirements before collecting rent directly from tenants so that the tenants “will be paying rent to an entity which is in possession of the premises and is responsible to use those rents to provide ongoing maintenance and services.” *Id.* at 869. The parties agree that the first three requirements were met, and that Plaintiff did not have actual possession of the premises, so the only element at issue is whether Plaintiff took action equivalent to possession.

A mortgagee is not limited to a specific course of action, but rather may take action equivalent to possession through various methods. *See, e.g. In re Stuckenberg*, 374 F. Supp. 15, 19 (E.D. Mo. 1974) (noting that the mortgagee sent written notice of its right to possession to all of the tenants, reimbursed tenants for repairs, made repairs to various units, and rented vacant units); *Pine Lawn Bank & Trust Co. v. M. H. & H., Inc.*, 607 S.W.2d 696, 700 (Mo. App. E.D. 1980) (finding action equivalent to possession existed when plaintiff maintained office space at the property, placed rent collected from tenants in escrow, and paid the property’s expenses). In the case of *In re Mews*, however, the Court declined to find that the plaintiff took action equivalent to possession when the plaintiff only noticed up a foreclosure and notified some, but not all, of the tenants of the need to pay rent to plaintiff. *In re Mews*, 144 B.R. at 870.

It is undisputed that a representative of Plaintiff Summit Bank asked Defendant Housing Authority to pay HAP directly to Summit Bank after Mr. O’Shea’s death. Plaintiff argues that

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rents directly through an assignment of rents, the Court still finds that Plaintiff Summit Bank has failed to establish that it had possession or took action equivalent to possession.

this demand for payment alone was action equivalent to possession. The Court disagrees. Plaintiff relies heavily on the case of *Imperial Gardens Liquidating Trust v. Northwest Commons, Inc.*, 136 B.R. 215, 218 (Bankr. E.D. Mo. 1991) (hereinafter “*Imperial Gardens*”), to support its position that mere “notice by a mortgagee that it is activating its rights under an assignment of rents clause is ‘action equivalent to taking possession.’” *Id.* (citing *In re Stuckenberg*, 374 F. Supp. at 19). However, even in the *Imperial Gardens* case, the mortgagee did more than merely demanding payment by sending notice to all of the tenants in the apartment complex, commencing foreclosure proceedings, advertising a foreclosure sale, and collecting seven or eight rent checks before the debtor filed its Chapter 11 petition. *See id.* at 217. In addition, *Imperial Gardens* cites back to *Stuckenberg*, which, as stated above, required more than a mere demand to establish action equivalent to possession. Here, Plaintiff has failed to produce evidence that it foreclosed on the properties while the Section 8 tenants resided there, took over management or maintenance of the properties, gave notice to individual tenants, or took any other action sufficient to establish the equivalent of possession. *See ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381 (Mo banc. 1993). Therefore, the Court finds as a matter of law that Plaintiff has failed to meet an essential element of its cause of action and judgment must be entered in favor of Defendant.

**IT IS NOW HEREBY ORDERED, ADJUDGED AND DECREED** that Defendant Kansas City, Missouri Housing Authority’s Motion for Summary Judgment is GRANTED and Plaintiff Summit Bank of Kansas City’s Motion for Summary Judgment is DENIED.

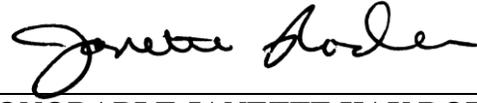
**IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that judgment is entered in favor of Defendant Kansas City, Missouri Housing Authority and against Plaintiff Summit Bank of Kansas City.

**IT IS SO ORDERED.**

April 7, 2015

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Date



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**HONORABLE JANETTE KAY RODECAP**

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was duly delivered on the 7<sup>th</sup> day of April, 2015 to:

ROBERT O JESTER, Attorney for Plaintiff, 1100 MAIN, SUITE 2121, KANSAS CITY, MO 64105

WESLEY J CARRILLO, Attorney for Plaintiff, 1100 MAIN STREET, SUITE 2121, KANSAS CITY, MO 64105

KEVIN R THOMAS, Attorney for Defendant, 920 MAIN STREET, SUITE 701, KANSAS CITY, MO 64105



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Ashley Grace, Law Clerk, Division 29