MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
Law Court Docket Number PEN 23-230

WILMINGTON SAVINGS FUND SOCIETY, FSB, as
Owner Trustee of the Residential Credit Opportunities Trust VII-B

Plaintiff-Appellee

v.

DAVID D. BLAKE and ROSE M. BLAKE
aka Rose-Anne M. Blake

Defendant-Appellant

ON APPEAL FROM BANGOR DISTRICT COURT

Hon. Michael P. Roberts, Judge

Trial Court Docket No. BANDC-RE-2019-050

CORRECTED BRIEF FOR THE PLAINTIFF-APPELLEE WILMINGTON SAVINGS FUND SOCIETY, FSB

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COUNTER STATEMENT OF FACTS

1. On November 20, 2002, Defendants David D. Blake and Rose Blake (the "Borrowers") executed a Note and Mortgage in favor of Home Loan and Investment Bank, F.S.B. (the "Note" and the "Mortgage"), duly recorded in the Penobscot County Registry of Deeds on November 25, 2002, in Book 8466, Page 178. (A. 9)

2. The last timely payment credited toward Borrowers' loan was the November 2009 payment, the cessation of payments constituting a breach of the Note and Mortgage. (Tr. 33)

3. Borrowers failed to cure their breach despite having received a valid Notice of Default and Opportunity to Cure complying with all requirements of 14 M.R.S. § 6111. (Tr. 32)

4. The resulting foreclosure, filed on July 8, 2019, proceeded to trial on May 31, 2023, after completion of the foreclosure mediation program. (A. 6)

5. Before trial, a Motion was GRANTED substituting Wilmington Savings Fund Society, FSB, as Owner Trustee of The Residential Credit Opportunities Trust VII-B as Plaintiff. (A. 6)

6. At trial, Plaintiff proved, *inter alia*, standing to foreclose via *possession* of the Note (A. 21-22), and ownership of the

Mortgage (A. 23-35), pursuant to a chain of Assignments, the most recent of which occurred on **April 26, 2023** from Wilmington Savings Fund Society, FSB, as Owner Trustee of the Residential Credit Opportunities Trust **VII-A** to Wilmington Savings Fund Society, FSB, as Owner Trustee of the Residential Credit Opportunities Trust **VII-B**. (A. 45-46) via a valid Power of Attorney admitted *without objection* (Tr. 65) as Exhibit J. (A. 53-59)

7. All assignments of the Mortgage between 2002 and 2023 in chronological order were admitted into evidence *without objection* (Tr. 26) as Exhibit C (A. 36-46).

8. On June 2, 2023, the trial court entered judgment in Plaintiff's favor, which was entered on the docket June 5, 2023. (A. 9-13)

9. Borrowers timely appealed.

ISSUES PRESENTED and STANDARD OF REVIEW

Respectfully, Appellee ***disagrees*** with the description of the two issues Appellants argue in their Brief (Blue Br. 5). The trial court found in Plaintiff's favor after trial, entering judgment for Plaintiff from which Borrowers have appealed. Thus, the trial court found that Plaintiff met its burden of establishing standing to foreclose (A. 9-10), *and* its burden of establishing the amounts owed under the terms of the Note and Mortgage (A. 10).

In fact, the two issues on Appeal are:

1. Did the trial court *commit reversable error* in finding that Plaintiff had standing to foreclose?

2. Did the trial court *commit reversible error* in finding that Plaintiff proved the amount owed by Borrowers under the terms of the note and mortgage?

SUMMARY OF ARGUMENT

I. Standing to Foreclose

The trial court did not err in its findings based upon the evidence admitted *without objection*:

A) that Plaintiff was the holder of the Note;

1) in that Plaintiff possessed the Note at trial; and

2) the Note was indorsed in blank.

B) that Plaintiff owned the Mortgage;

1) in that the Assignments of Mortgage admitted without objection as Exhibit C proved an uninterrupted chain of ownership ending with Plaintiff; and

2) the Power of Attorney underlying the final assignment within Exhibit C was valid.

II. The Amount Due under the Terms of the Note and Mortgage

A) The trial court did not err in its finding based upon the evidence admitted *without objection* that the amounts due under the note and mortgage were proven as recited in the Foreclosure Judgment (A. 10), namely $188,067.55

ARGUMENT

I. Introduction and Standard of Review

Of the eight elements of proof necessary to prevail in a foreclosure action as listed in *Chase Home Finance LLC v. Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508, Appellants take issue with only two: standing to foreclose (Blue Br. 4), and proving the amount owed under the terms of the Note and Mortgage. (Blue Br. 4)

As to standing, Appellants assert a "belief" that Plaintiff failed to "meet one of the essential elements of standing". (Blue Br. 5)

As to the element of proof of the amount owed under the terms of the Note and Mortgage, Appellants assert a "belief" that "Plaintiff has not met its burden to a preponderance of the evidence". (Blue Br. 5).

Respectfully, Appellants' arguments repeat those made at trial (Tr. 97-98) and are of little assistance to this Court.

M. R. App. P. 7A(a)(1)(G) states: "[t]he argument for each issue presented shall begin with a statement of the standard(s) of appellate review applicable to that issue".

The appellate standard of review for *both issues* is the deferential standard of **clear error**.

Justice Alexander explained "clear error" in *Lincoln v. Burbank*, 2016 ME 138 ¶59,147 A. 3d 1165:

> On factual issues, we conduct a **deferential** review for clear error, meaning that we will **defer** to the fact-finder's decision as to (1) which witnesses to believe and not believe, (2) what **significance** to attach to particular evidence or exhibits, and (3) what **inferences** may or may not be drawn from evidence or exhibits. The existence of contrary evidence that would support a different result, without more, **will not justify** vacating the trial court's fact-findings. We "will not substitute our judgment as to the weight or credibility of the evidence for that of the factfinder if there is evidence in the record to rationally support the trial court's result."
>
> (Citations omitted, emphasis added)

This Court has repeatedly and specifically taught: "A factual finding is only clearly erroneous if there is **no** competent evidence in the record to support it." *State v. Bartlett,* 661 A.2d 1107, 1108 (Me. 1995). Therein, this Court incorporated its reasoning about why the "clear error" standard of review remains a *deferential* one, from *Qualey v. Fulton,* 422 A.2d 773, 776 (Me.1980) as follows:

> When we test the trial court's resolution of the issue of the credibility of the witnesses and of their testimony, we are

> not in a position to be able to accurately determine the weight the trial court assigned to ... [the] factors on which its credibility determination is based.... Subtleties of meaning are often tied to manner of expression, modes of speech, and turns of phrase, knowledge of which is readily available to the trial court but is denied to the appellate tribunal. Those subtleties of meaning may very well and properly have a significant effect upon the trial court's ultimate decision to believe or disbelieve the witness either generally or on a particular point. Hence, we must accept the trial court's evaluation ... save where the physical evidence and the written record rationally forbid his conclusion on the credibility issue....

II. The Trial Court Did Not Err When It Found That Plaintiff Has Standing to Foreclose

Bank of Am., N.A. v. Greenleaf, 2014 ME 89, 96 A.3d 700, citing *Higgins*, *supra.* teaches us that standing to foreclose is comprised of two elements: the Note and the Mortgage.

1) As to the note, a foreclosure plaintiff must be entitled to enforce the note by virtue of being either its holder, its owner owner, its beneficiary; **or** it must *identify* the beneficiary.

2) As to the Mortgage, a foreclosure plaintiff must be the owner of the mortgage.

A. Plaintiff was the Holder of the Note

Plaintiff possessed and presented the original Note (A. 21-22) at trial as Exhibit A. It was admitted *without objection.* (Tr. 18).

The Note itself bears three indorsements (A. 22):

1) From Home Loan and Investment Bank, FSB to CitiFinancial Mortgage Company;

2) From CitiFinancial Mortgage Company to CitiMortgage Inc.; and

3) From CitiMortgage Inc. **in blank**

Appellants, as many before this Court have done, conflate the Note and the Mortgage; as well as ownership with power to enforce. They argue:

[t]he original promissory note (Plaintiff's Exhibit A) has three endorsements, none of which are dated nor are any of them endorsed to the purported current Lender. (Blue Br. 7)

While true, this argument is not relevant to Plaintiff having satisfied the "Note" aspect of proving standing to foreclose.

Bank of America., N.A. v. Greenleaf, 2014 ME 89, ¶¶ 10, 96 A.3d 700 recites the actual requirements to show standing to foreclose as regards the Note. The Court stated, in pertinent part:

> Because foreclosure regards two documents—a promissory note and a mortgage securing that note—standing to foreclose involves the plaintiff's interest in both the note and the mortgage. See, e.g., *JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 9, 10 A.3d 718 (stating that the plaintiff bank's failure to establish its ownership of the mortgage renders it "vulnerable to a motion ... challenging [its] ability to foreclose" as a matter of standing); [*MERS v.*] *Saunders*, 2010 ME 79, ¶ 15, 2 A.3d 289 ("Without possession of **or** any interest in the note, [a party] lack[s] standing to institute foreclosure proceedings and [may] not invoke the jurisdiction of our trial courts.").
>
> . . .
>
> Because a mortgage note is a negotiable instrument, 11 M.R.S. § 3–1104(1) (2013), the enforceability of the plaintiff's interest in the note is governed by Maine's Uniform Commercial Code (U.C.C.), 11 M.R.S. § 3–1301 (2011). *Wells Fargo Bank, N.A. v. Burek*, 2013 ME 87, ¶ 18, 81 A.3d 330; see 11 M.R.S. § 1–1101(1) (2013). Section 3–1301 permits a party to enforce a note **if it is the "holder" of the note, that is, if it is in possession of the original note that is indorsed in**

blank. 11 M.R.S. § 1–1201(5), (21)(a) (2013); 11 M.R.S. § 3–1301(1).[1]

This is precisely what the Bank established, and the court found in this matter; as the possessor of a note indorsed in blank, the Bank proved its status as the holder of the note **and therefore enjoys the right to enforce the debt**.

(Emphasis added)

The case at bar is identical to *Greenleaf, supra*, as regards the Note in that Plaintiff, as the possessor of the Note, indorsed in blank proved its status as the holder of the note, and therefore enjoys the right to enforce the debt.

The trial court committed no error in finding that Plaintiff established standing to foreclose as regards the Note.

B. Plaintiff Owned the Mortgage

Plaintiff established ownership of the Mortgage at trial via the entry into evidence the unbroken and sequential chain of Assignments as Exhibit C (A. 36-46) *without objection.* (Tr. 26). Plaintiff supported the most recent April 23, 2023 Assignment (A. 45-46) with a June 2021 *recorded* copy of the Power of Attorney (A.

[1]11 M.R.S. § 3–1301 provides: "Person entitled to enforce" an instrument means: (1). The holder of the instrument

53-59) pursuant to which that final assignment was executed as Exhibit J, *without objection.* (Tr. 65)

Although Appellants did not raise arguments at trial concerning the validity of these assignments, in the brief they criticize the assignment recorded May 12, 2003 (Blue Br. 8), and the 2023 Assignment and its accompanying Power of Attorney (Blue Br. 6-7).

Appellants' arguments critical of the trial court's findings concerning mortgage ownership appear not to have been developed in their brief, being devoid of citation to the record, or authority, (Blue Br. 6-8). Regardless, their arguments are not correct.

1) The First Six Assignments

Valid copies of the first six Assignments of the Mortgage were dated and *recorded* between May 12, 2003 (A. 36) and November 21, 2017 (A.42).

Borrowers argued after the close of evidence that the "record of assignments refers to several powers of attorney that haven't been

presented" (Tr. 97) as if the introduction of each power of attorney was somehow a required prerequisite to a finding of validity.[2]

Developed or not, any argument that **any** of the six assignments are invalid because of some speculative or possible defect in execution, or in the underlying powers of attorney is *preempted* by 14 M.R.S.A. § 352. This 2017 legislation, entitled, "An Act To Amend and Remove the Need for Periodic Update of the Laws Governing the Validation of Title Defects" 2017 Me. Legis. Serv. Ch. 196 (H.P. 888) (L.D. 1275) (WEST) states:

A record of a **deed** or other instrument, **including a power of attorney**, made for the conveyance of real property, or of **any interest in real property**, and recorded for at least 2 years in the registry of deeds of the county or district in which the real property is located is valid and enforceable even if:

1. Acknowledgment. The acknowledgment was incomplete or defective in any respect, no acknowledgment appears in the record of the deed, other instrument or power of attorney or no acknowledgment was taken; or

[2] During rebuttal argument, Plaintiff referenced the "twenty- year exception" from 33 M.R.S.A. § 353-A(4) as supporting the validity of the 2003 assignment (Tr. 99). Appellants contend without authority that the figure used in the calculation of the twenty-year period should be based upon the filing date of the complaint rather than the date of the trial at which the recorded document is offered. As discussed below, this Court need not decide that issue to find the 2003 Assignment valid.

2. Records relating to title to real property. The records in relating to the title to real property fail to disclose the date when received for record or the records have not been signed by the register of deeds or other duly authorized recording officer for the county or district.

Having been recorded between 2003 and 2017, the first six assignments within Exhibit C were therefore valid, regardless of whether the powers of attorney referred to therein were present or absent; pristine or flawed.

2) The 2023 Assignment and Exhibit J

The April 26, 2023 Assignment (A. 45-46) completed the chain of title which proved that Plaintiff owned the Mortgage. The only argument against its validity made at trial and on appeal is that the supporting Power of Attorney referenced therein (A. 53-59) admitted *without objection* as Exhibit J (Tr. 65) had been recorded in June 2021 in York County, rather than Penobscot County. (Blue Br. 6-7)

This argument (undeveloped at trial, and unsupported by any authority on appeal) is also wrong on many levels.

a) There is neither a "rule", nor persuasive authority requiring the *recordation* of a **power of attorney** in order for an

assignment to be valid. This was noted by Judge Hornby in *PROF-2014-S2 Legal Title Tr. II by U.S. Bank Nat'l Ass'n, as Legal Title Tr. v. Sidelinger*, No. 2:19-CV-220-DBH, 2020 WL 6292742, at *3 (D. Me. Oct. 26, 2020). As Judge Hornby pointed out, there was a single Maine Superior Court Case[3] which extended the recordation requirement from mortgages and assignments to powers of attorney. However, but the sole cited authority for that proposition was Cowan & Scannell, *Maine Real Estate Law and Practice, Second Edition*, §§10:10, 24:20 (2007). As cited in fn. 11 of *Sidelinger, id:*

> "The treatise that Carney relied upon has since been revised and no longer includes its prior statement that a power to convey or mortgage real estate must be recorded. See Cowan & Scannell, *Maine Real Estate Law and Practice* §§ 10:10, 24:20 at 41-42, 86-87 (Supp. 2019-2020). The earlier edition of the treatise did not cite a statute or case for the proposition and the Maine Law Court has not spoken on the matter.

b) There is no statute in Maine requiring recordation of a power of attorney. The Maine statutes setting forth the elements of a valid power of attorney are:

[3] *U.S. Bank Nat. Ass'n v. Carney*, No. CARSC-RE-15-032, 2018 WL 1002004, at *3 (Me.Super. Jan. 16, 2018)

i) 18-C M.R.S.A. § 5-905, stating in pertinent part:

1. Signed by principal; acknowledged.

A power of attorney must be signed by the principal or in the principal's conscious presence by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments. A power of attorney under this Part is not valid unless it is acknowledged before a notary public or other individual authorized by law to take acknowledgments.

ii) 18-C M.R.S.A. § 5-906, stating in pertinent part:

4. Executed other than in this State. A power of attorney executed other than in this State is valid in this State if, when the power of attorney was executed, the execution complied with:

A. The law of the jurisdiction that determines the meaning and effect of the power of attorney pursuant to section 5-907; or

c) Even if the recordation of a power of attorney were either required, or even regarded as an indicium of reliability, Exhibit J *was* recorded in Maine. Appellants cite no authority supporting

counsel's opinion that recordation of the power of attorney (as opposed to the Mortgage or an Assignment of Mortgage, somehow *also requires* recordation in each county where a signature utilizes it.

III. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT PLAINTIFF PROVED THE AMOUNT OWED UNDER THE TERMS OF THE NOTE AND MORTGAGE

The documentary evidence admitted *without objection* as to the amount owed is more voluminous than the evidence supporting standing. It consists of Exhibits E and F comprising 44 pages of the Appendix (A. 47-52 and 60-97).

Appellants' argument that the trial court committed reversable error consists of conclusory observations that the "Note was assigned seven times", that the defendant "testified to making several payments that she testified were unreported or not credited, or unapplied", and that Plaintiff's witness "testified that he was able to determine that the large payments testified to by Mrs. Blake were correctly and accurately applied to her account, yet despite her sizeable payments she was still in default" (Blue Br. 9)

Appellants cite no area within the 44 pages of evidence testified to that demonstrate any inaccuracy. They point to not a single figure they dispute, nor any math mistake.

Although the evidence may be voluminous, and the copies provided in the Appendix may not be as clear as those contained in the court file sent to the Law Court; the law regarding how the clear error standard is applied to computations of the amount due is both clear and determinative.

Deutsche Bank Tr. Co. Americas as Tr. for Residential Accredit Loans, Inc., Mortg. Asset-Backed Pass-Through Certificates, Series 2007-QS9 v. Clifford, 2021 ME 11 ¶8, 246 A.3d 597 involved criticisms on appeal by a borrower about the calculations of the amount owed. Therein this Court stated:

> Clifford also contends that Exhibit E was insufficient to meet the standard to prove the amount due on the loan as set forth by our decision in *M&T Bank v. Plaisted*, because Torres's testimony reflected "conflicting information as to various unpaid amounts." 2018 ME 121, ¶¶ 29-30, 192 A.3d 601. Whether Deutsche Bank proved the amount due and owed by Clifford is reviewed by us for clear error. *State v. Bartlett*, 661 A.2d 1107, 1108 (Me. 1995). A finding is clearly erroneous only if there is no competent evidence in the record

to support it. *Id.* Because there was extensive testimony regarding the contents of Exhibit E, the court was able to weigh this potentially conflicting evidence and did not err in crediting Torres's testimony as more credible, particularly as the only contradiction came from Clifford's attorney's calculations of the figures. *See State v. True*, 2017 ME 2, ¶ 19, 153 A.3d 106 (stating that "the weighing of conflicting or inconsistent evidence … falls solidly within the province of the … fact finder").

In *Lincoln v. Burbank*, 2016 ME 138, ¶ 59, 147 A.3d 1165, 1178, *as corrected* (Oct. 13, 2016) this Court examines the concept of deference on appeal as if addressing these Appellants directly in stating:

> On factual issues, we conduct a deferential review for clear error, meaning that we will defer to the fact-finder's decision as to (1) which witnesses to believe and not believe, (2) what significance to attach to particular evidence or exhibits, and (3) what inferences may or may not be drawn from evidence or exhibits. *See Stickney v. City of Saco*, 2001 ME 69, ¶ 13, 770 A.2d 592; *Sturtevant v. Town of Winthrop*, 1999 ME 84, ¶ 9, 732 A.2d 264; *Lewisohn v. State*, 433 A.2d 351, 354 (Me.1981). The existence of contrary evidence that would support a different result, without more, will not justify vacating the trial court's fact-findings. *Preston v. Tracy,* 2008

ME 34, ¶¶ 10–11, 942 A.2d 718. We "will not substitute our judgment as to the weight or credibility of the evidence for that of the factfinder if there is evidence in the record to rationally support the trial court's result." *State v. Connor,* 2009 ME 91, ¶ 9, 977 A.2d 1003.

CONCLUSION

For all the reasons contained and argued herein, Appellee respectfully requests this Honorable Court to:

1) AFFIRM the Judgment of the trial court herein;

2) AWARD Appellee fees and costs on appeal on such terms as may be just and proper; and

3) For such other and further relief as the Court may deem just and proper.

DATED: December 13, 2023

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CERTIFICATE OF SERVICE

I, William A. Fogel, hereby certify that concurrent with the filing of the Appellee's Brief, that I caused two printed copies to be sent to opposing counsel by mail, and that a copy was e-mailed to:

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