STATE OF MAINE

SUPREME JUDICIAL COURT

Sitting as the Law Court

DOCKET NO: Pen-16-316

FEDERAL NATIONAL MORTGAGE ASSOCIATION
PLAINTIFF/ APPELLANT

VS

PATRICIA W. DESCHAINE, PAUL J. DESCHAINE
DEFENDANTS/APPELLEES

ON APPEAL FROM THE SUPERIOR COURT (PENOBSCOT)

AMENDED BRIEF OF APPELLANT FEDERAL NATIONAL MORTGAGE ASSOCIATION

Respectfully Submitted by:
Jeffrey J. Hardiman, Esq. No. 009876
Dean J. Wagner, Esq. *Pro Hac Vice*
Shechtman Halperin Savage, LLP
1080 Main Street
Pawtucket, RI 02860
(401) 272-1400
jhardiman@shslawfirm.com
dwagner@shslawfirm.com
Attorneys for Appellant
Federal National Mortgage Association

Dated: September 30, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF THE CASE

On June 13, 2016, the Penobscot County Superior Court rendered a written decision and Order (the "Order") (Appendix (referred to hereinafter as "App.") at 15-23), granting summary judgment against Plaintiff/Appellant Federal National Mortgage Association ("FNMA") and for Defendants/Appellees, Patricia W. Deschaine and Paul J. Deschaine (the "Deschaines"), in FNMA's foreclosure action against the Deschaines, and declared that FNMA is not entitled to enforce its mortgage, which was to no longer encumber the Dechaines' real property located at 116 Hoover Lane, Lincoln, Maine (the "Property"). (App. at 23).[1]

The Deschaines acquired the Property by deed dated October 22, 2004 and recorded in the Penobscot County Registry of Deeds. (App. At 24-25, 31, 41, 90-91). On the same date, the Deschaines executed and delivered to First Horizon Home Loan Corporation ("First Horizon") a promissory note in the original principal amount of $127,920.00 (the "Note"). (App. at 15, 25, 31, 41, 93-97). The Deschaines voluntarily accepted the proceeds of the Note (the "Loan") from First Horizon, which, in part, paid off an existing mortgage on the Property in the amount of $116,682.30. (App. at 25, 31, 41, 100-101).

[1] Appellant's Brief has been amended only to the extent that references to the Appendix were made, pursuant to this Court's Order of September 21, 2016, so that such references correspond to the revised Appendix.

To secure the Note, on October 22, 2004, the Deschaines executed and delivered in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for First Horizon, a mortgage (the "Mortgage") in the amount of $127,920.00 on the Property, which Mortgage was recorded in the Penobscot County Registry of Deeds. (App. at 15-16, 25, 31, 41, 103-126). FNMA is the current mortgagee and owner of the Mortgage by an assignment dated January 27, 2015 from First Tennessee Bank, N.A., successor-in-interest to First Horizon, and recorded on February 4, 2015 in the Penobscot County Registry of Deeds. (App. at 16, 44, 66, 87).

The Deschaines defaulted by failing to make the payment due on January 1, 2011. (App. at 131-39, 142). As a result, after notice to the Deschaines, FNMA commenced a foreclosure action on December 15, 2011 (the "2011 Action"). (App. at 141-44).[2] At the time, FNMA relied for standing to foreclose on an assignment executed by MERS to FNMA. (App. at 128-29).[3]

---

[2] On April 5, 2011, the United States Bankruptcy Court for the District of Maine granted a discharge to the Deschaines, which extinguished their obligations under the Note. (App. at 36).

[3] On June 24, 2011, MERS purported to assign the Mortgage to FNMA (which assignment was duly recorded in the county registry) (App. at 77, 82, 125-26), but that assignment was ineffective to confer upon FNMA standing to foreclose and enforce the Mortgage. Rather, it merely conferred upon FNMA the same rights that MERS had as First Horizon's nominee – the right to record the Mortgage. *Bank of America v. Greenleaf*, 2014 ME 89, ¶¶ 12-17, 96 A.3d 700, 706-08 (Me. 2014). As a result, it is clear that FNMA lacked standing in the previous action filed in 2011 to seek foreclosure on the Note and Mortgage. (App. at 77).

In connection with the 2011 Action, the Deschaines submitted a Request for Mediation (the "Mediation Request"). (App. at 146-47). The District Court issued a Scheduling Order on or about February 15, 2012 (the "Scheduling Order"), which required both FNMA and the Deschaines to perform certain tasks. (App. at 149-50). On or about June 12, 2012, the District Court issued an Order stating that neither party complied with the Scheduling Order, and that failure to comply by June 29, 2012 by FNMA, "**could** result in a dismissal of this case with prejudice," and by Defendant, "**could** result in a default judgment being granted to the FNMA against that Defendant." (App. at 152).

On or about July 11, 2012, the District Court made a handwritten entry on the June 12, 2012 order indicating that **neither party** complied with that order, but still dismissed the 2011 Action "with prejudice." (App. at 154). It is undisputed that, in connection with said dismissal (the "2012 Dismissal Order"), the District Court made no findings as to the Dechaines' default or any other matter in the case, did not rule that the Note or Mortgage were unenforceable, and did not extinguish those instruments. (App. at 154).

Subsequent to the dismissal, on September 12, 2013, the servicer for FNMA sent a demand letter to the Deschaines, setting forth their subsequent default of the Note and Mortgage by failing to make the payments that were due on February 1,

2011 and thereafter.[4] (App. at 156-64). In addition to the default for non-payment, the Deschaines also committed various other defaults under the Mortgage. In this regard, Section 3(a) of the Mortgage required the Deschaines to pay to FNMA on a monthly basis, "all amounts necessary to pay for taxes, assessments . . . [and] insurance covering" the Property, with such amounts to be escrowed by FNMA until installments of the above items became due and payable. Section 3(c) of the Mortgage provides that the amounts escrowed pursuant to Section 3(a) of the Mortgage may from time to time be increased or decreased, in the event of a deficiency or surplus, respectively. (App. at 25, 107).

Section 4 of the Mortgage required the Deschaines to pay all taxes, assessments and other charges constituting liens against the Property that may become superior in right to the Mortgage, such as real estate taxes. Section 5 of the Mortgage required the Deschaines to maintain hazard insurance covering the Property. (App. at 25-26, 107). Section 5 of the Mortgage further provides that, in the event the Deschaines did not maintain hazard insurance covering the Property, FNMA was authorized to obtain and maintain such insurance, and to charge the Deschaines for the cost of such insurance. All amounts charged under that Section are deemed to be secured by the Mortgage. (App. at 26, 109).

---

[4] The defaults asserted in the September 2013 default notice were therefore subsequent to and different from the default that was the subject of the 2011 Action.

Finally, the Second Home Rider attached to the Mortgage contained the following provision:

> Occupancy. Borrower shall occupy, and shall only use, the Property as Borrower's second home. Borrower shall keep the Property available for Borrower's exclusive use and enjoyment at all times, and shall not subject the Property to any timesharing or other shared ownership arrangement or to any rental pool or agreement that requires Borrower either to rent the Property or give a management firm or any other person any control over the occupancy or use of the Property.

FNMA asserts that the Deschaines breached all of the foregoing provisions of the Mortgage. (App. at 25-27, 124-25).

On or about November 13, 2013, FNMA filed a second action (the "2013 Action"). (App. at 24-30). The Deschaines answered the 2013 Complaint and asserted a Counterclaim on or about December 4, 2013. (App. at 31-33). FNMA filed its Answer to the Deschaines' Counterclaim on or about December 23, 2013. (App. at 174-76). FNMA subsequently obtained leave to file an Amended Complaint. (App. at 24-30). That pleading asserts three claims for (i) statutory foreclosure of the Mortgage; (ii) enforcement of an equitable mortgage; and (iii) unjust enrichment. (App. at 25-28). The Deschaines answered the Amended Complaint, raising various affirmative defenses (including res judicata, bankruptcy, and lack of standing), and asserted a counterclaim to quiet title. (App. at 31-33, 174-76). On or about November 24, 2015, the Deschaines filed their motion for summary judgment, arguing that the 2013 Action was barred by the

doctrine of res judicata, inasmuch as the district court has dismissed the 2011 Action "with prejudice." (App. at 34-36, 52-62). On January 8, 2016, FNMA objected thereto (and filed a statement of opposing facts), and filed its own cross-motion for summary judgment, with statement of supporting facts, a supporting memorandum, and a supporting affidavit (with multiple exhibits). (App. at 37-46, 63-176). FNMA argued, inter alia, that res judicata was not applicable to the 2013 Action inasmuch as (i) the prior dismissal was merely the dismissal of an action that FNMA lacked standing initially to bring and was therefore not an adjudication "on the merits;" (ii) the dismissal of the 2011 Action was on procedural grounds and did not adjudicate either the Deschaines' alleged default or the enforceability of the Note and Mortgage; (iii) the 2013 Action pertained to new breaches of the Mortgage by the Deschaines since the dismissal of the 2011 Action; and (iv) there had been no valid acceleration of the Note and Mortgage.

In its June 13, 2016 Order on the parties' cross-motions for summary judgment, the Superior Court rejected FNMA's lack of standing argument, ruling that FNMA had standing to foreclose at the time that it filed the 2011 Action.[5] (App. at 18). The court further concluded that the 2012 Dismissal Order precluded any subsequent foreclosure action, even though it did not declare the Note and

[5] In addition, the court ruled that FNMA "currently has standing to foreclose," by virtue of the Maine Legislature's 2015 enactment of 33 M.R.S. § 508. As argued in detail below, the court's interpretation of 33 M.R.S. § 508 was incorrect.

Mortgage unenforceable, because it operated as an adjudication on the merits. (App. at 18-19). Next, purporting to follow *Johnson v. Samson Constr. Corp.*, 1997 ME 220, ¶ 8, 704 A.2d 866, 869 (1997), the court, without any analysis of the language of the Note or Mortgage, ruled that FNMA effectively accelerated the Note as part of the 2011 Action, and that such acceleration both eliminated the Deschaines' obligation to make monthly payments and precluded any subsequent foreclosure action on res judicata grounds. (App. at 19-21). The court additionally rejected FNMA's equitable theories, apparently on the grounds that the Note and Mortgage were unenforceable as a matter of contract law. (App. at 21-22). Finally, the Superior Court declared that, because there was nothing due on the Note, the Mortgage was unenforceable and no longer encumbered the Property. (App. at 22-23). As set forth in the following arguments, the Superior Court's rulings were erroneous and should be reversed.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court committed an error of law in determining that the dismissal "with prejudice" of the 2011 Action, which was entered in a case where FNMA had no standing, precluded subsequent enforcement of the Mortgage for a separate default?

2. Whether the Superior Court committed an error of law in holding that the dismissal of the 2011 Action on procedural grounds operated as an adjudication on the merits precluding the instant action, despite the fact that the instant action involves subsequent and different events of default not adjudicated in the 2011 Action?

3. Whether the Superior Court committed an error of law in holding that FNMA effectively accelerated the Note in the 2011 Action?

4. Whether the Superior Court committed an error of law or abused its discretion in failing to grant relief to FNMA due to FNMA's claims of equitable mortgage or unjust enrichment?

5. Whether the Superior Court committed an error of law or abused its discretion in allowing an unjust windfall to the Deschaines?

SUMMARY OF ARGUMENT

The Superior Court ruled incorrectly that FNMA had standing in connection with the dismissal "with prejudice" of the 2011 Action. This Court's decision in *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶ 17, 96 A.3d 700, 708 (2014) did not have prospective application only, and the Legislature's enactment of 33 M.R.S. § 508 (2015) did not cure the defective assignment of mortgage from MERS to FNMA and retroactively provide standing. As such, the effect of the dismissal of the 2011 Action could only have been "without prejudice."

Even if the dismissal of the 2011 Action was, indeed, with prejudice, the Superior Court erroneously concluded that such dismissal precluded a subsequent foreclosure based upon defaults that were separate and distinct from the default asserted in the 2011 Action. An adjudication on the merits as to one default did not preclude the mortgagee, on res judicata grounds, from subsequently enforcing the terms of the residential mortgage at issue in this case. Moreover, the Superior Court incorrectly ruled that FNMA effectively accelerated the Mortgage in the 2011 Action, and this case is distinguishable from the facts and ruling of the Law Court in *Johnson v. Samson Constr. Corp.*, 1997 ME 220, 704 A.2d 866 (1997).

STANDARD OF REVIEW

As the Law Court stated in *Wilmington Trust Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 6, 81 A.3d 371, 374 (2013), it reviews "a grant of a summary judgment on a res judicata issue de novo, viewing the record in the light most favorable to the party against whom judgment has been granted . . . ." The Law Court likewise reviews a trial court's conclusions of law de novo. *Eagle Rental v. State Tax Assessor*, 2013 ME 48, 65 A.3d 1278 (2013) (quoting *Gannett Co. v. State Tax Assessor*, 2008 ME 171, P 10, 959 A.2d 741 (2008)). In this case, although there appeared to have been no material issues of fact, the Superior Court committed legal errors requiring reversal of the grant of summary judgment in the Deschaines' favor.

ARGUMENT

A. Because FNMA Lacked Standing to Bring the 2011 Action, the Doctrine of Res Judicata Should Not Preclude this Action.

Despite its acknowledgment that, if "the district court did not have jurisdiction,[6] the [2011 Action] would not be an adjudication on the merits," the

---

[6] It appears that the Superior Court may have confused "jurisdiction" with "justiciability." Technically, a plaintiff's lack of standing in a foreclosure case would not necessarily divest a trial court of subject matter jurisdiction, which is conferred upon the trial courts by 14 M.R.S. § 6321. Rather, as this court explained in *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶¶16-17 (2015),

> Standing is properly labeled an issue of "justiciability." Justiciability requires a real and substantial controversy, admitting of specific relief through a judgment of conclusive character. Courts can only decide cases before them that involve justiciable controversies.

trial court erroneously reasoned that, because this Court had not yet ruled that MERS did not have authority to assign a mortgage, (*see Bank of America, N.A. v. Greenleaf*, 2014 ME 89, at ¶ 17, 96 A.3d at 708 (2014)), FNMA had standing at the time that it filed the 2011 Action. (App. at 18). Likewise, the trial court erred in ruling that the Maine Legislature's enactment of 33 M.R.S. § 208 in 2015 "reinstated the rights of nominee mortgagees" to assign, thereby eliminating or curing any standing issue. (App. at 18). Accordingly, this Court should conclude that the 2012 Dismissal Order should have merely been "without prejudice."

In *Greenleaf*, the Law Court reiterated that in order to foreclose, a plaintiff must be the holder of the note and the owner of the mortgage sought to be enforced. 2014 ME 89, at ¶¶ 12-17; 96 A.3d at 706-08. The *Greenleaf* court confirmed that the assignment of a mortgage from MERS did not confer on the assignee standing to foreclose; rather such an assignment merely granted to the assignee the same right that MERS possessed – the right to record the mortgage as

---

> We have recognized before that the words "jurisdiction" and "jurisdictional" are understood to have many, too many, meanings, and that [c]ourts have been less than meticulous in using the term[s]. The word "jurisdiction" most properly encapsulates only prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority.

(Internal citations and quotations omitted). In this case, FNMA does not contend that the district court lacked subject matter jurisdiction to adjudicate the dispute; only that the matter before it was not justiciable, inasmuch as the invalid assignment from MERS to FNMA did not confer standing to foreclose upon FNMA. In any event, to the extent that the invalid MERS assignment may not have conferred subject matter jurisdiction upon the district court in the 2011 Action, the judgment of dismissal was void and must be vacated. *Boyer v. Boyer*, 1999 ME 128, ¶ 6, 736 A.2d 273, 275 (1999) (citing *Coombs v. Governmental Employees Ins. Co.*, 534 A.2d 676, 678 (Me. 1987)).

nominee. *Id.* at ¶¶ 14-15; 96 A.3d at 707 (citing *Mortgage Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶¶ 10-11, 2 A.3d 289 (Me. 2010)). Because the original mortgagee in *Greenleaf* had never assigned the mortgage in question to Bank of America, it lacked standing to foreclose. 2014 ME 89, at ¶ 17, 96 A.3d at 708. Applying the *Greenleaf* rationale to the 2011 Action in the instant matter, even though the district court purported to dismiss the case "with prejudice," in actuality, it dismissed an action that was fatally flawed for lack of standing. Accordingly, the dismissal could only have been without prejudice.

"Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction in the first place." *Greenleaf v. Bank of America, N.A.*, 2015 ME 127, ¶ 7 (Me. 2015) ("*Greenleaf II*") (citing *Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶8 n. 3 (2015)).

> Because standing is "a threshold concept dealing with the necessity for the invocation of the [c]ourt's power to decide true disputes," it is an issue cognizable at any stage of a legal proceeding, even after a completed trial. When discovered, a standing defect does not affect, let alone destroy, the court's authority to decide disputes that fall within its subject matter jurisdiction. A plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable – i.e., incapable of judicial resolution.

Greenleaf II at ¶ 8 (internal citations omitted). In *Greenleaf II*, the Law Court ruled that, after remand, the district court properly dismissed the action without prejudice. *Id.* at ¶ 9.

The Superior Court apparently believed that it was not bound by *Greenleaf*, insofar as it concluded that, because this Court had yet to render its decision in that case, FNMA had standing when it filed the 2011 Action. However, nothing in *Greenleaf* indicated that its effect was to be prospective only, or that cases decided before the date of its issuance were immune from standing challenges. In fact, this Court has consistently ruled that a lack of standing due to the defective assignment of a mortgage from MERS requires a dismissal without prejudice, even where judgment had entered prior to the date of the *Greenleaf* decision (July 3, 2014). *See, e.g., Deutsche Bank Nat'l Trust Co. v. Meldrum*, Decision No. Mem. 16-1, 2016 Me. Unpub. LEXIS 1 (Me. Jan. 12, 2016); *OneWest Bank v. Laroche*, Decision No. Mem. 15-23, 2015 Me. Unpub. LEXIS 24 (Me. Mar 3, 2015, revised Apr. 2, 2015).

In *Meldrum*, the Law Court refused to apply the doctrine of res judicata to preclude a subsequent foreclosure action (even though the first action was purportedly an adjudication on the merits), where, in hindsight, the plaintiff, as assignee of a MERS mortgage, lacked standing to foreclose. Rather than reaching the merits of whether the foreclosure complaint in the case before it was barred by res judicata, the *Meldrum* court ruled that the plaintiff's lack of standing required it to vacate the judgment "with prejudice" for the borrower, and thus remanded the

matter for entry of a dismissal without prejudice. 2016 Me. Unpub. LEXIS 1, at *1. The *Meldrum* decision is wholly dispositive of the case at bar.

Similarly, in *LaRoche*, the district court had entered a judgment of foreclosure for the lender. The judgment predated this Court's decision in *Greenleaf*. On appeal, the borrower sought reversal of the judgment, arguing that the notice of default did not comply with 14 M.R.S. § 6111 (2014). This Court did not reach the borrower's argument, however, inasmuch as it vacated the judgment on the basis that the assignment of mortgage to the lender failed as a matter of law to confer standing to foreclose. 2015 Me. Unpub. LEXIS 24, at *1. The foregoing decisions demonstrate conclusively that this Court has consistently looked back at pre-*Greenleaf* foreclosure rulings to reverse same and/or to reject the alleged preclusive effect of such ruling, where the ruling involved a defective assignment of mortgage to the lender plaintiff. In this case, the Court should reach the same result and rule that, due to FNMA's lack of standing in the 2011 Action (as a consequence of the defective MERS assignment), the dismissal in that case must be treated as having been "without prejudice."

Nor did the Maine Legislature's enactment of 33 M.R.S. § 508 (2015) ("Section 508") cure FNMA's lack of standing or "reinstate" MERS' right to assign the mortgage to FNMA in connection with the 2011 Action. The Legislature enacted Section 508 primarily in response to *Greenleaf*, in order to

avoid myriad title problems on previously foreclosed properties that could surface as a result of the holding that a nominee mortgagee lack authority to assign a mortgage. To this end, among other provisions, Section 508 validated a nominee mortgagee's assignment of mortgage that was "the subject of a foreclosure judgment or other legal judgment affecting title to a mortgaged property for which, as of the effective date of [Section 508 – June 30, 2015], either the appeal period has run with no appeal having been filed or all rights of appeals have been exhausted." 33 M.R.S. § 508(4) (2015). Significantly, the dismissal of the 2011 Action was neither a "foreclosure judgment" nor a "legal judgment affecting title." In this regard, the dismissal of the 2011 Action acted as a judgment for the Deschaines, and was plainly not a judgment authorizing FNMA to foreclose. Likewise, the dismissal did not affect title to the Property. To the contrary, it left title in the Deschaines undisturbed and subject to the Mortgage. As such, the Superior Court erroneously concluded that Section 508 applied to the instant case and validated retrospectively the defective assignment from MERS to FNMA.[7]

In view of the foregoing, the 2011 Action could not have been an adjudication on the merits warranting a dismissal "with prejudice." Rather,

[7] Moreover, reaching such a conclusion in this case would not conflict with the rationale underlying the Legislature's enactment of Section 508. Recognition that the dismissal of the 2011 Action should have been without prejudice (for lack of standing) would not raise the type of title issues that Section 508 was intended to resolve, inasmuch as this case presents the discreet situation where reconsidering the effect of a court's dismissal (where there was a defective MERS assignment) has no effect on the title to the property in question.

because FNMA lacked the minimum interest in the Mortgage that was "a predicate to bringing the claim in the first place," *Greenleaf II* at ¶ 9, the complaint in the 2011 Action was nonjusticiable, i.e., incapable of judicial resolution. Accordingly, despite the use of the term "with prejudice" in its handwritten dismissal order, there can be no dispute that the court's dismissal acted merely as a dismissal without prejudice. As such, res judicata principles could not preclude FNMA from foreclosing in the 2013 Action. Because the Order was entered in error, this Court should reverse the trial court's Order and remand this matter for a decision on the merits (for the first time) of the 2013 Action.

B. The Trial Court Erred in Holding that Res Judicata Precluded a Subsequent Foreclosure Based upon Separate and Distinct Defaults and that FNMA Accelerated the Note Prior to Judgment in the 2011 Action.

Even if the standing defect in the 2011 Action was somehow not fatal to the district court's purported dismissal "with prejudice," the Superior Court made an unwarranted leap to conclude that res judicata precluded the instant foreclosure action. The Order was in error, inasmuch as (i) a dismissal "with prejudice" as to one default did not automatically forever preclude a subsequent foreclosure based upon separate and distinct defaults not adjudicated in the prior action, and (ii) in any event, there was no effective acceleration of the Note in the 2011 Action.

Because there can be no dispute that the district court, in dismissing the 2011 Action, did not extinguish the Note and Mortgage, or render them

unenforceable, this Court should rule, consistent with past decisions, that in the unique foreclosure context, FNMA was nevertheless entitled to pursue foreclosure remedies in a subsequent action based upon separate and distinct events of default. Furthermore, the Law Court should remand this case for further proceedings, inasmuch as FNMA, in the 2011 Action, did not effectively accelerate the Note under this Court's ruling in *Johnson v. Samson Constr. Corp.*, 1997 ME 220, 704 A.2d 866 (1997).

1. Res Judicata Did Not Preclude the 2013 Action, Which Was Based upon Separate and Distinct Defaults.

In the abstract, in explaining the doctrine of res judicata, the Law Court has stated that

> Res judicata prevents a party and its privies . . . from relitigating claims or issues that have already been decided. The doctrine of res judicata is grounded on concerns for judicial economy and efficiency, the stability of final judgments, and fairness to litigants.
>
> The doctrine of res judicata . . . has two components: collateral estoppel, also known as issue preclusion, and claim preclusion. Claim preclusion bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action.
>
> To determine whether the matter[s] presented for decision in the instant action were or might have been litigated in the prior action, we examine whether the same cause of action was before the court in the prior case. We define a cause of action through a "transactional test," which examin[es] the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if

> they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong. Put another way,
>
> > [w]hat factual grouping constitutes a transaction [is] to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they [form] a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Wilmington Trust Co. v. Sullivan-Thorne, 2013 Me. 94, at ¶¶ 6-8, 81 A.3d at 374-75 (internal quotations and citations omitted).

Very recently, the Law Court declined to apply the doctrine of res judicata to a subsequent mortgage foreclosure action, where the alleged default was based on a "different term of the mortgage" and "wholly separate conduct" from the prior case between the parties. *Id.* at ¶ 12, 81 A.3d at 376. In *Wilmington Trust*, the borrower's property (which the lender's mortgage secured) had sustained extensive ice damage, rendering her house uninhabitable. She subsequently initiated litigation against the lender, seeking to have the insurance proceeds payable exclusively to her. *Id.* at ¶ 3, 81 A.3d at 373. The lender responded by filing a counterclaim, asserting various borrower's breaches of the mortgage stemming from the damage to the property. Ultimately, the superior court granted the borrower's motion to dismiss, entered judgment for the borrower, and ordered that the insurance proceeds be paid to the borrower alone. *Id.* at ¶ 4, 81 A.3d at 373.

Several months later, the lender commenced a second action seeking to foreclose due to the borrower's alleged failure to make monthly payments that were due. In the complaint, the lender also "declared the entire principal amount outstanding, accrued interest thereon, and all other sums due under the Note and Mortgage to be presently due and payable." Id. at ¶ 5, 81 A.3d at 374. The borrower moved for summary judgment, arguing that the second action was barred by the doctrine of res judicata based on the judgment against the lender entered on the counterclaim in the first case. The trial court agreed and the lender appealed.

On appeal, the Law Court ruled that the two actions did not arise out of the same "nucleus of operative facts," and that the second action was therefore not barred under the "transactional test." *Id.* at ¶ 12, 81 A.3d at 376-77. Specifically, this Court found that failure to repair and maintain the mortgaged premises and failure to insure the mortgaged premises (alleged in the counterclaim in the first action) were defaults that were separate and apart from mortgagor's failure to make required payments under the Note (alleged in the lender's complaint in the second action). *Id.* at ¶ 12, 81 A.3d at 376. In reaching this conclusion, the Law Court was persuaded by cases from other jurisdictions which upheld the right of a mortgagee to bring a second foreclosure action for subsequent separate defaults. *See Id.* at ¶ 12, 81 A.3d at 376 (quoting *Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1008 (Fla. 2004)("We can find no valid basis for barring mortgagees from

challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged default"); *Afolabi v. Atlantic Mortg. & Inv. Corp.*, 849 N.E. 2d 1170, 1175 (Ind. Ct. App. 2006)("subsequent and separate alleged defaults under [a] note create[] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.").[8] Accordingly, the *Wilmington Trust* Court vacated the judgment for the borrower and remanded the case for further proceedings on the lender's foreclosure complaint.

The Law Court also distinguished the *Wilmington Trust* case from its previous decision in *Johnson v. Samson Constr. Corp.*, where a mortgagee was not permitted to bring a second foreclosure action after accelerating the indebtedness under the note prior to the first foreclosure action (that was dismissed as a result of a failure to comply with a procedural requirement). The *Wilmington Trust* court found that the summary judgment record, viewed in the light most favorable to the mortgagee, did not establish that the mortgagee had accelerated the debt prior to

---

[8] Several other courts have reached the same conclusion. *See, e.g., Fairbank's Capital Corp. v. Milligan*, 234 Fed. Appx. 21, 23-24, (unpublished)(3d Cir. 2007)(holding that "dismissal with prejudice ... cannot bar a subsequent mortgage foreclosure action based on defaults occurring after dismissal of the first action"); *Rousselle v. Jewett*, 101 Ariz. 510, 513 (Ariz. 1966)(holding that "[a] final determination of an action concerning one breach does not preclude a later action based upon a breach allegedly occurring after the judgment in the prior action"); *Mortgage Elec. Registration Sys. v. Dimou*, No. 2011-C-2248, 2013 Pa. Dist. & Cnty. Dec. LEXIS 79, at *10-11 (Pa. C.P. 2013) (finding subsequent defaults to be separate and distinct, and therefore not barred by res judicata). In *Cenlar, FSB v. Malenfant*, 2016 VT 93 (2016), the Vermont Supreme Court, in August 2016, rejected the approach articulated in *Johnson*, and likewise recognized that a prior dismissal "with prejudice" of a foreclosure action on procedural grounds does not preclude the mortgagee from bringing a subsequent foreclosure action based upon a later distinct event of default. *Id.* at ¶¶ 33-38.

filing the counterclaim in the first action. *Wilmington Trust*, 2013 Me. 94 at ¶ 12, 81 A.2d at 376 n.4.

In connection with the 2013 Action, the Deschaines committed multiple, additional breaches of the Mortgage that were not the subject of the 2011 Action. In addition to failing to make separate required installment payments due under the Note and Mortgage (as alleged in the new notice of default sent on September 12, 2013, (*see* App. at 156-64)), the Deschaines failed to fund a portion of the April 2011 taxes (due to a shortfall in the Deschaines' escrow account). FNMA funded this shortfall in October, 2011, after the demand that formed the basis of the 2011 Action had been sent to the Deschaines. Further, since the filing of the 2011 Action, the Deschaines failed to maintain insurance and pay other real estate taxes, which FNMA advanced in order to protect its security. Payment of real estate taxes and maintenance of insurance are obligations contained in Sections 4 and 5, respectively, of the Mortgage, and are independent of the obligation to make principal and interest payments under the Note. Finally, the Amended Complaint in the 2013 Action asserted that the Deschaines breached the Second Home Rider to the Mortgage, which requires the Deschaines to maintain the Property for their exclusive use. To this end, FNMA's summary judgment papers specifically disclose that the Deschaines leased the Property and collected rental income thereon. (App. at 46).

Based upon the Law Court's decision in *Wilmington Trust*, and consistent with prevailing legal authority, FNMA was well within its rights to bring a subsequent foreclosure action against the Deschaines for breaches of the Note and Mortgage that were not the subject of the 2011 Action. FNMA did not base its complaint upon the default(s) that were the subject of the 2011 Action, but rather upon other defaults that were different, based upon wholly separate conduct, and that were never adjudicated in the 2011 Action. The trial court thus erred in not allowing FNMA to pursue its remedies due to these separate events of default.

2. FNMA Did Not Effectively Accelerate the Note in Connection with the 2011 Action.

In the Order, the trial court determined that FNMA effectively accelerated the Note in 2011 and ruled that, after the dismissal "with prejudice" of the 2011 Action, the Deschaines were no longer required to make monthly mortgage payments. (App. at 21). Consequently, the trial court reasoned that "if there are no additional breaches, then this case is founded upon the same debt as the [2011 Action], so the current action encompasses matters that were litigated in the [2011 Action]." *Id.* Relying on *Johnson v. Samson Constr. Corp.*, the Superior Court ruled that once FNMA accelerated the Note, any foreclosure action was for all sums then due or to become due, thereby precluding any subsequent foreclosure. The Court should reject this conclusion as it both fails to accurately apply the terms of the Mortgage, and fails to recognize that the Deschaines' subsequent and

wholly separate defaults constitute valid grounds to foreclose in a subsequent action.

The trial court incorrectly posited that the 2012 Dismissal Order precluded FNMA from bringing a subsequent foreclosure action after accelerating the Note. The applicable provisions of the Mortgage are Section 22 (Lender's Rights Upon Default) and Section 19 (Borrower's Rights to Discontinue Enforcement). Specifically, the instrument provides, in pertinent part, that

> After the occurrence of [default] . . ., Lender *may* require that [Borrower] pay immediately the entire amount then remaining unpaid under the Note and [the Mortgage] . . . without making any further demand for payment. . . . If Lender requires immediate payment in full, Lender *may* bring a lawsuit to take away all of [Borrower's] remaining rights in the Property and have the Property sold. (Emphasis added).

(Mortgage, Section 22 (App. at 116)). The instrument further provides that

> Even if Lender has required immediate payment in full, [Borrower has] the right to have enforcement of [the Mortgage] discontinued . . . at any time before . . . a judgment has been entered enforcing [the Mortgage] . . . If [Borrower] fulfill[s] . . . the conditions [to discontinue enforcement], then *the Note and [Mortgage] will remain in full effect as if immediate payment had never been required.* (Emphasis added).

(Mortgage, Section 19 (App. at 114-15)).

In view of the foregoing, it is clear that although the lender might intend to accelerate and commence the foreclosure process, the borrower retains the ability to stop the acceleration (and foreclosure) at any time before *the entry of a judgment*

enforcing the mortgage simply by curing the specific event(s) of default. Accordingly, the contemplated acceleration remains inchoate and cannot be deemed effective and its obligation imposed upon the borrower prior to the entry of a judgment enforcing the mortgage, inasmuch as the borrower always has the power/ability until then to cure the alleged default and to continue with the installment payments. If the borrower cures, the contemplated and intended future acceleration does not occur and the parties return to the status quo that existed before the intended acceleration; the borrower must make periodic installment payments as though no acceleration had ever been contemplated.[9]

Analogously, to the extent that a prior dismissal "with prejudice" of a lender's foreclosure complaint can be construed as a judgment, it had the necessary effect of ruling that there was no default at all, which invalidates any lender's attempt at acceleration. As the Vermont Supreme Court recently explained while confronting this precise weakness in the reasoning of courts (such as *Johnson*) concerning the effect of "acceleration" in the face of a prior dismissal with prejudice of a foreclosure complaint,

---

[9] Notwithstanding the foregoing clear language of the Mortgage, the trial court misconstrued its effect. The Superior Court apparently reasoned that under *Johnson*, once the mortgagee opts to accelerate, regardless of a subsequent ruling in the borrower's favor on the default in question, the borrower's payment obligation becomes indivisible, and the lender's remedies "can only be enforced in a single, unitary proceeding." That argument misses the mark. The *Johnson* case involved a private commercial mortgage where the mortgage contract contained an apparently mandatory acceleration clause after a triggering event, not an optional acceleration provision in an institutional residential mortgage, as in the instant case. As such, this Court should conclude that the *Johnson* case is inapposite here.

The logical tension in these courts' analyses is that they rely on the fact that lender accelerated the entire debt, even though the court's necessary ruling on the merits – that there has been no default at all – essentially invalidates the lender's acceleration. The mortgage notes in the above cases, like the mortgage note here, afford the lender a right to accelerate the entire principal debt upon default by the borrower. The breach of a covenant, or default, by the borrower is a condition precedent to the acceleration. If the lender brings an action alleging default by the borrower, and the court determines that the borrower is not, in fact, in default – whether after actual adjudication on the merits or by dismissal with prejudice – then the acceleration is invalid. In other words, the adjudication against lender with prejudice, or "on the merits," requires us to treat the first judgment as essentially determining that lender did not establish a default on the note by borrowers as of the date alleged. Under these circumstances, the result of a court's judgment on the merits seems to invalidate the attempted acceleration, not to preserve it as an element of a final judgment that precludes future attempts to collect on the note.

The practical downside is that this approach deprives the lender of any repayment of principal or interest on a significant loan, while yielding the borrowers a free, or deeply discounted, house. By insulating the borrowers from any legally enforceable obligation to make future payments to lender, this approach imposes on lender a cost for its procedural default that may be wholly disproportionate to the lender's infraction. In fact, the consequences of such a rule might be to discourage lenders from engaging in the kind of forbearance and negotiation that preceded the trial court's dismissal of the first foreclosure action in this case. Nonetheless, if these perceived inequities necessarily flowed from the parties' contractual arrangement, we would impose them. But, here there is no such contractual provision and, as explained, the logic of the approach is questionable.

Cenlar, FSB v. Malenfant, 2016 VT 93, ¶¶ 26-27 (2016) (citations omitted).[10] Based upon the foregoing, this Court should recognize that *Johnson* no longer has any reasoned application in cases such as this, inasmuch as it fails to accurately construe the effect of a dismissal with prejudice in favor of the borrower, and it fails to do substantial justice between the parties.[11]

---

[10] It is further irrelevant that the Mortgage does not contain an express provision delineating the lender's right to reinstate, as it is an intrinsic right contained within its option to accelerate the loan. It need only stop its efforts to obtain a judgment of default in order to prevent the acceleration from becoming effective. Moreover, the Mortgage affords FNMA an optional right of acceleration. It would be peculiar indeed to suggest that a lender, which has the unilateral option to commence acceleration of a mortgage, does not likewise have the unilateral right to halt its pursuit of acceleration. The Mortgage provides such a right to the borrower, not because the ability to stop an attempted acceleration is somehow uniquely the borrower's, but because the lender can achieve the same result by simply dismissing (or allowing the dismissal of) the foreclosure action before there is a final judgment.

Furthermore, as the right to reinstate unquestionably existed, Defendant also had the right to stop the acceleration from becoming complete and effective until the trial court entered a final judgment ruling that FNMA had established the default. But that never occurred here. Although the court in the 2011 Action never reached the merits of the underlying debt or of the Deschaines' alleged default, the dismissal with prejudice had the effect of invalidatmg the attempted acceleration. Inasmuch as there was never a final judgment for foreclosure, the Deschaines never lost the right to reinstate, and the acceleration never ripened into a legal obligation to pay the accelerated balance.

[11] The foregoing principles are similarly made clear by the Florida court's ruling in *Singleton v. Greymar Assocs.*, 882 So. 2d 1004 (Fla. 2004), where it succinctly stated as follows:

> [A] mortgagor may prevail in a foreclosure action by demonstrating that she was not in default on the payments alleged to be in default, or that the mortgagee had waived reliance on the defaults. In those instances, the mortgagor and mortgagee are simply placed back in the same contractual relationship with the same continuing obligations. Hence, an adjudication denying acceleration and foreclosure under those circumstances should not bar a subsequent action . . . later if the mortgagor ignores her obligations on the mortgage and a valid default can be proven.
>
> This seeming variance from the traditional law of res judicata rests upon a recognition of the *unique nature of the mortgage obligation* and the continuing obligations of the parties in that relationship. [A strict application of traditional res judicata principles in the foreclosure context] would result in unjust enrichment or other inequitable results. If res judicata prevented a mortgagee from acting on a subsequent default even after an earlier claimed default could not be established, the mortgagor would have no incentive to make future timely payments on the note. The adjudication of the earlier default would

While there can be no dispute that the Deschaines made no accelerated payments and that the court in the 2011 Action entered no foreclosure judgment, the Superior Court characterized FNMA's attempted acceleration in the 2011 Action as complete. The trial court read into the dismissal of the 2011 Action a preclusive effect that was not there. Rather, contrary to the provisions of the Order, as the District Court in the 2011 Action never entered a judgment enforcing the Mortgage, there was never a completed acceleration, and FNMA cannot be precluded from pursuing this action.

By the language of the Mortgage, it is clear that the borrower's default is a condition precedent, such that without a default, there can be no valid acceleration. In other words, the order of dismissal with prejudice in the 2011 Action served to

---

> essentially insulate her from future foreclosure actions on the note – merely because she prevailed in the first action. Clearly, justice would not be served if the [lender] was barred from challenging the subsequent default payment solely because [it] failed to prove the earlier alleged default.
>
> We must also remember that foreclosure is an equitable remedy and there may be some tension between a court's authority to adjudicate the equities and the legal doctrine of res judicata. The ends of justice require that the doctrine of res judicata not be applied so strictly so as to prevent mortgagees from being able to challenge multiple defaults on a mortgage.

882 So. 2d at 1007-08 (emphasis added). Furthermore, in light of the Florida Supreme Court's ruling in *Singleton*, the continued vitality of *Johnson* is in doubt, inasmuch as the *Johnson* decision was premised upon an outdated Florida circuit court decision, *Stadler v. Cherry Hill Developers, Inc.*, 150 So. 2d 468, 472 (Fla. Dist. Ct. App. 1963), that the *Singleton* court rejected. *See Johnson,* 1997 ME 220 at ¶8 (citing *Stadler* decision to support conclusions that once mortgagee triggered acceleration clause of note and entire debt became due, contract became indivisible, and obligations to pay each installment merged into one obligation to pay entire balance on the note). *But see U.S. Bank Nat'l Ass'n v. Bartram,* 140 So. 3d 1007, 1011 (Fla. Dist. Ct. App. 2014)(Florida Supreme Court in *Singleton* rejected holding of *Stadler* that res judicata precluded subsequent foreclosure action; prior acceleration not preclusive where valid default not proven).

adjudicate, in favor of the Deschaines, the default alleged by FNMA. This adjudication determined that there was neither an actionable default nor an effective acceleration of the debt and thus, no resultant triggering of the rules of claim preclusion. As such, res judicata plainly does not apply.

The foregoing result is also consistent with the Law Court's holding in *Wilmington Trust*. That case held that there must be a showing that the mortgagee actually previously accelerated the debt in order for the prior action to have preclusive effect. 2013 ME 94, at ¶ 12 n. 4. Because it is clear that the effect of the dismissal with prejudice of the 2011 action was to render ineffective any attempted acceleration (assuming FNMA intended to do so), the Deschaines could not (and did not) make the requisite showing that a previous effective acceleration had occurred. As such, this Court should reverse the grant of summary judgment for the Deschaines, and should remand the case to the Superior Court for further proceedings on FNMA's amended complaint. [12]

[12] As to other issues raised by this appeal, in view of the foregoing arguments, it is unnecessary to address (i) whether the trial court erroneously concluded that the equitable relief sought by FNMA in the 2013 Action, arising from the counts of equitable mortgage and unjust enrichment, was precluded by res judicata, (App. at 21-22), or (ii) whether such claims were precluded as a matter of contract law, (App. at 22 nn. 3&4). As argued above, res judicata could not apply to the 2013 Action, and FNMA should be allowed to proceed on its foreclosure claim.

3. Applying Res Judicata Unjustifiably Rewards Defendants that Have Unclean Hands.

Contrary to the Superior Court's rulings in the Order, the Deschaines were not entitled to the windfall that the Order conferred upon them. In this regard, the District Court dismissal with prejudice of the 2011 Action acted as a sanction solely against FNMA, despite the fact that both parties violated the scheduling order and failed to file their witness and exhibit lists. The Deschaines also made false statements to the trial court in the 2013 Action, i.e., the attestation in their answer requesting mediation that they resided in the Property. The Deschaines subsequently conceded in discovery that not only was that statement untrue at the time it was made, but also that they were deriving rental income from the Property, despite forcing FNMA to pay ongoing taxes and insurance.

The resulting outcome from the application of res judicata produces a disproportionate outcome to each party and should therefore be rejected. *See Saxon Mortg. Inc. v. United Fin. Mortg. Corp.*, 312 Ill. App. 3d 1098, 1109, 728 N.E.2d 537 (Ill. App. Ct. 2000). In the Order, the Superior Court did not sanction FNMA for cause. Rather, it mistakenly concluded that res judicata precluded the 2013 Action. Even if res judicata were theoretically applicable, because its application would result in an unfair outcome (in that it rewards an undeserving party with a disproportionate windfall), this Court should refuse to apply it in the facts of this case. *See Malenfant, supra*, 2016 VT 93, at ¶ 27.

CONCLUSION

For all of the foregoing reasons, this Court should conclude that the Deschaines were not entitled to judgment as a matter of law. Instead, the Court should recognize that FNMA was entitled to proceed on its amended complaint for foreclosure. Accordingly, the Court should vacate the grant of summary judgment for the Deschaines, should vacate the judgment declaring the Mortgage to be unenforceable and no longer an encumbrance of record, and should remand this case for further proceedings on FNMA's amended complaint.

Respectfully submitted,

FEDERAL NATIONAL
MORTGAGE ASSOCIATION,

By its Attorneys,

SHECHTMAN HALPERIN SAVAGE, LLP

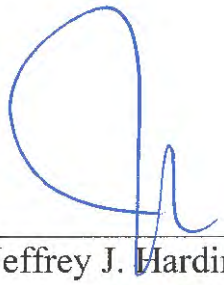
Jeffrey J. Hardiman, Esq., #9876
Dean J., Wagner, *pro hac vice*
1080 Main Street
Pawtucket, RI 02860
(401) 272-1400
(401) 272-1403 fax

Dated: September 30, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of September, 2016, I cause to be mailed two copies of Amended Appellant's Brief, and on the 27th day of September, 2016, I caused to be mailed two copies of the (revised) Appendix by first class mail, postage prepaid to:

James F. Cloutier, Esquire
Cloutier, Conley & Duffett, P.A.
465 Congress Street, #800
Portland, Maine 04101



Jeffrey J. Hardiman, Esq., #9876