

**MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT**

FEDERAL NATIONAL MORTGAGE ASSOCIATION

Plaintiffs/Appellees

v.

JASON D. SMITH,

Defendants/Appellees

and

KEYBANK NATIONAL ASSOCIATION,

Party-in-Interest/Appellant

SYNCHRONY BANK; LAURA L. SMITH

Parties-in-Interests/Appellees

ON APPEAL FROM A JUDGMENT OF THE PENOBSCOT COUNTY
SUPERIOR COURT

BRIEF OF APPELLANT KEYBANK NATIONAL ASSOCIATION

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NATURE OF THE CASE

Before this Honorable Court is not merely a matter of evidentiary sufficiency, but more importantly, a matter of procedural sufficiency, candor and due process rights in the form of notice to the parties before a tribunal. The instant case was initiated as a foreclosure against real property brought by a senior mortgage holder, Plaintiff Federal National Mortgage Association, against Defendant Jason D. Smith (hereinafter, “Smith”). The action named KeyBank National Association (hereinafter, “KeyBank”), as a party-in-interest, which holds a junior mortgage against the same real property. KeyBank’s claim for lien against the property being foreclosed was denied by the Penobscot County Superior Court (the “Superior Court”), despite the Superior Court’s obligation to determine the value of KeyBank’s lien pursuant to 14 M.R.S. § 6322.

KeyBank’s lien was denied in its entirety despite its submission of affidavit evidence admitted by Smith and the Court which, in similarly situated cases, has historically and typically been sufficient to support the value of its lien. Despite there being no active objection to the evidence submitted, the Court’s own representation was that it was inclined to accept the evidence submitted and offered no opportunity or notice to KeyBank to supplement its evidence. KeyBank appeals the judgment of the Superior Court to the extent that the judgment invalidates KeyBank’s priority lien status and holds, “Judgment is entered in favor of Jason

Smith as to KeyBank National Assoc. as KeyBank did not present evidence to preserve its interest in the property”.

FACTS OF THE CASE

On December 8, 2010, Smith and Linda M. Chase Smith executed a mortgage in favor of Mortgage Electronic Registration Systems, Incorporated as nominee for Quicken recorded December 28, 2010, in Book 12360 at Page 54 of the Penobscot County Register of Deeds (“Senior Mortgage”) which has since been assigned to Federal National Mortgage Association (“Fannie Mae”) by Assignment of Mortgage dated February 21, 2023 and recorded January 22, 2024. App. at A25. On February 25, 2011, Smith and Linda M. Chase Smith executed a mortgage in favor of KeyBank in the amount of \$32,000.00 which was recorded in Book 12422 at Page 285. (“KeyBank’s Mortgage”) App. at A55 and 66-71. KeyBank’s Mortgage is secured against real property located at 937 Station Road, Stacyville, ME 04777 (the “Property”). App. at 66-71.

On April 17, 2024, Fannie Mae filed a “Complaint of Foreclosure” for the “Mortgaged Premises” listed as “937 Station Road, Stacyville, ME 04777, Book 12360, Page 54” (“Complaint”). App. at A24. The Complaint named Smith as the sole Defendant and named KeyBank as a party-in-interest along with Synchrony Bank and Laura L. Smith. *Id.* According to the Complaint, Synchrony Bank held an interest in the Property by virtue of a Writ of Execution in the amount of \$5,767.54 dated May 27, 2021, and recorded in the Penobscot County Registry of Deed in Book 16718, Page 320. App. at A26. The Complaint further alleged that

Laura L. Smith held an interest in the Property by virtue of a Quitclaim Deed dated September 13, 2016, recorded in the Penobscot County Registry of Deed in Book 14287, Page 201. *Id.*

In its Complaint, Fannie Mae alleged Smith's default on the terms of the Senior Mortgage for failure to pay the payment due on the Senior Mortgage due on January 1, 2023, and each month thereafter. *Id.* Fannie Mae claimed a total debt of \$66,118.72 and requested foreclosure and sale for the amount due on the Senior Mortgage to be determined by the Court. *Id.* The Complaint also requested that the Court determine the order of priority of other appearing parties and the amounts due to each party, among other prayers for relief, including a judgment of foreclosure "in conformity with Title 14 section 6322". App. at A28.

On June 28, 2024, KeyBank's retained counsel filed its Appearance, Motion For Late Answer, and Answer. Fannie Mae consented to the motion and Smith was not responsive to provide a position. KeyBank's Answer provided no counterclaims. On July 3, 2024, KeyBank's Motion For Late Answer was granted and its Answer was permitted. On September 5, 2024, Smith filed a Request for Default against parties-in-interest Synchrony Bank and Laura L. Smith, which default was entered by the Court on October 24, 2024.

Prior to the filing of any dispositive motion or trial, KeyBank filed an Affidavit of Party-in-Interest (“KeyBank’s Affidavit”) on December 16, 2024, executed by Alyssa Bartholomew as Banking Officer of KeyBank National Association who attested to having under her,

custody and control the records relating to the mortgage transactions with respect to said note and mortgage. My knowledge as to the facts set forth in this Affidavit is derived from my personal knowledge of these records, which are kept and maintained in the ordinary course of business by KeyBank National Association, and which are made at or near the time of the transactions by, or from information transmitted by, a person with knowledge of the facts set forth in said records. These records are kept and maintained in the ordinary course of business, pursuant to KeyBank National Association’s regular practice of making such records. App. at A55.

By attachment, KeyBank’s Affidavit also presented a copy of a promissory note and mortgage. App. at A57-71. KeyBank’s Affidavit further attests that the “outstanding amount owed to KeyBank National Association by Jason D. Smith is the sum of \$35,933.78, with additional interest accruing, and additional fees and costs incurred by KeyBank National Association from this date forward.” App. at A55. KeyBank attested that it is in first priority position of all parties-in-interest and confirmed that all statements in its Affidavit are true and based on personal knowledge and belief. App. at A56.

While the Court Docket reflects motion filings and hearings between December 2016 and June 2025, those events took place between Smith and Fannie

Mae and do not bear relevance to events that resulted in KeyBank's denied claim in this case.

Relevant to the issues of this appeal, on February 19, 2025, a Foreclosure Hearing was held before the Honorable Ann M. Murray which was attended by Attorney John Doonan, counsel for Fannie Mae and Attorney Patrick Hunt, counsel for Smith. ("February Hearing"). The transcript of that hearing is a part of the record for this appeal ("February Hearing Transcript"). At that hearing, Attorney Hunt confirmed KeyBank had filed a response but nonetheless verbally requested default against it claiming "KeyBank and a credit card company have been listed as parties-in-interest, but have not participated in either hearing. KeyBank did file a response. Are you inclined to default those two parties?" *See* Tr. Feb. 19, 2025, 71:3-6. At the February Hearing, the Court confirmed, "And I thought that - - I thought the KeyBank was - - sent in what they needed to, but I guess I'll have to take another look at that. Maybe they didn't." *See* Tr. Feb. 19, 2025, 71:9-11. Attorney Hunt then confirmed that was his "memory as well". *See* Tr. Feb. 19, 2025, 71:12.

On June 4, 2025, a motion hearing was held again before the Honorable Ann M. Murray which was attended by Attorney John Doonan, counsel for Fannie Mae, Attorney Patrick Hunt, counsel for Smith, as well as Attorney Andrew Schaefer, counsel for KeyBank ("June 4th Hearing"). The transcript of that hearing is a part

of the record for this appeal (“June 4th Hearing Transcript”). At the June 4th Hearing the issue of defaulting KeyBank and the sufficiency of KeyBank’s Affidavit was discussed. The discussion related to default of KeyBank during the June 4th Hearing is reflected in the June 4th Hearing Transcript as follows:

MR. HUNT: Yes, Your Honor. I am inclined -- well, I think at an earlier hearing you imply that whether you would default KeyBank. And I did drop a note to the Court on March 19th asking for a clarification at issue if the Court intends to default KeyBank before the next hearing.

THE COURT: I’m sorry. What do you think I did?

MR. HUNT: I think the first hearing, the transcript reflected that, I think, they were going to default KeyBank.

THE COURT: Oh.

MR. HUNT: And my question today is, do you intend to do that? If so, that’s fine with us because it eliminates just one more issue.

THE COURT: I don’t have any present intention because I don’t remember. But - -

MR. SCHAEFER: Your Honor - - Your Honor, may I be heard briefly on that?

THE COURT: Yes.

MR. SCHAEFER: It's Attorney Andrew Shaefer from Brock & Scott. We represent KeyBank in this case. We've previously filed an affidavit of debt on - - in this case, I'm not aware that it was ever objected to. And in our position as a junior lien holder, that's really all we're required to do to preserve our priority position. So if there's any suggestion of defaulting us, I would obviously object to that. And I'd also ask an opportunity to brief that.

THE COURT: Do you remember what date it was that you filed that?

MR. SCHAEFER: Your Honor, I do. It looks like 12/16/24 at 1:51 p.m. There's an affidavit of party in interest....

[THE COURT:] So Mr. Hunt, I'm not inclined to - - I'm not inclined to be defaulting - - defaulting them. Do you want to - - did you get that?

MR. HUNT: Andrew, would you please email me a copy when you get a chance and my request is withdrawn.

MR. SCHAEFER: Sure. I'll be happy to do that. *See* Tr. June 4, 2025, 9:14-11:4.

On June 26, 2025, at 3:56p.m.- more than six (6) months after KeyBank filed its Affidavit and approximately 17 hours before the scheduled bench trial-

Smith filed a “Motion in Limine and Motion for Sanctions Foreclosure Scheduling Order Witness & Exhibit List” (“Smith’s Motion”). Within his Motion, Smith requests that the Court dismiss KeyBank from the action for its failure to file a Witness and Exhibit List within the time permitted by the Court’s Foreclosure Scheduling Order dated May 28, 2024. Notably, Smith’s Motion did not question the authenticity or sufficiency of KeyBank’s Affidavit, only the procedural matter of KeyBank's failure to file a Witness and Exhibit List.

KeyBank filed its “Objection to Defendant’s Motion *In Limine* and for Sanctions” on June 26, 2025, at 8:17p.m. In its objection, KeyBank highlighted for the Court that the KeyBank Affidavit had been filed since December 16, 2024, and had been on record with the Court without objection from Smith or any other appearing party since then. KeyBank also asserted that it had not filed a Witness and Exhibit List because it was not calling any witnesses or offering any exhibits. KeyBank’s position was that it had already provided all that was required of it as a party-in-interest to provide the Court with evidence of its priority position and the amount due to it. KeyBank further cited *Green Tree Servicing, LLC v. Cope*, 2017 ME 68, for the assertion that the sanction of dismissal of KeyBank’s interest for its failure to present a witness was not appropriate without having been put on notice that such a drastic result was possible.

On June 27, 2025, a final Bench Trial was held before the Honorable Ann M. Murray which was attended by Attorney John Doonan, counsel for Fannie Mae, Attorney Patrick Hunt, counsel for Smith, as well as Attorney Andrew Schaefer, counsel for KeyBank (“Bench Trial”). The transcript of that Bench Trial is a part of the record for this appeal (“Bench Trial Transcript”). At the Bench Trial the issue of the sufficiency of KeyBank’s Affidavit was again discussed. The Bench Trial Transcript indicated that there was a chambers discussion which did not include KeyBank’s counsel regarding Smith’s Motion. On the record, the Court described that in chambers, she “did indicate that I was unlikely to do anything other than perhaps rely on the affidavit that your client had filed and limit the amount due to your client to whatever’s in the affidavit. I didn’t make that decision, but I certainly tipped my hand on it.” Tr. June 27, 2025, 4:16-21; App. at A75. The Court indicated that it was willing to have more full argument on the issue however, KeyBank’s counsel indicated that limitation to recovery of the amount asserted in the affidavit is an acceptable result. *See* Tr. June 27, 2025, 6:1-5; App. at A76.

The discussion related to KeyBank’s Affidavit continued during the Bench Trial and is reflected in the Bench Trial Transcript as follows:

MR. HUNT: Now, in the KeyBank issue, you have before you a copy of the - - of the statute.

THE COURT: Yes.

MR. HUNT: I was under the impression it had to be proven somehow. I'm well aware that in general, courts accept the affidavits. What if the bank asked for \$1 million? Someone has to question it. Someone has to make sure that the bank is accepting the proper amount. Now, it will take - - in my experience KeyBank is honorable. That's my experience. But people do make mistakes."

THE COURT: Great. Does KeyBank want to be heard on the issue of whether or not the affidavit is adequate for purposes of the hearing?

MR. SCHAEFER: Your Honor, thank you. Just real briefly, I second attorney Hunt's statement that KeyBank is an honorable institution. Certainly we don't disagree with that. We thank him for his kind words. We're not asking for \$1 million, so the possibility that we might be isn't really relevant. The affidavit not only sets forth the amounts due to our priority interest, but it was executed by an individual in the affidavit who claimed to have knowledge of the records that were set forth.

It was timely, provided it wasn't objected to at the start of this trial. It wasn't objected to when I raised it again at the hearing a couple of weeks ago and indicated that that's what we were relying on. And when I provided

another copy to Attorney Hunt at that time, there was no response. So it has been timely provided. Everyone's been on notice that's what we're going to rely on. It's sufficient and reliable on its face. So under the circumstance and complete - - and in particular in keeping with standard practice in foreclosure trials in this state, it's a - - it's an acceptable piece of evidence. And it wouldn't be a timely objection not to raise it 12 hours before this continuation took place this morning." Tr. June 27, 2025, 94:21-96:7; App. at A77-79.

The Bench Trial later concluded with the Court indicating that it was taking the matter under advisement but making no other representations related to the argument presented regarding the KeyBank Affidavit. On August 6, 2025, Judgment of Foreclosure was entered on the docket dated July 31, 2025, in favor of Fannie Mae ("Judgment"). App. at A15. Schedule A of the Judgment lists KeyBank as being "Pro Se" even though the record is clear that Attorney Andrew Schaefer entered his appearance and represented the interests of KeyBank. App. at A18. On that same date, the Court entered as part of its Judgment a "Judgment as to KeyBank National Association, Synchrony Bank and to Defendant's Counterclaim" which stated, "Judgment is entered in favor of Jason Smith as to KeyBank National Assoc. as KeyBank did not present evidence to preserve its interest in the property". App. at A21. The Court also issued an "Order RE Pending

Motions”, which indicated that “Defendant’s Motion in Limine and for Sanctions filed June 26, 2025, as to KeyBank is Moot as Judgment is being entered in favor of Defendant as to KeyBank.” App. at A22. Lastly, the Court’s Findings of Fact and Conclusions of Law dated July 31, 2024, and entered on August 6, 2025, noted with regard to KeyBank’s Affidavit,

At the end of the hearing, Defendant objected to the Court’s consideration of the Affidavit filed by KeyBank National Association, a party-in-interest. The Court was inclined to accept the Affidavit, as that is how such parties-in-interest generally preserve their rights. However, upon further reflection and in light of Defendant’s objection and argument, the Court is satisfied that the party-in-interest was required to present evidence at the trial. Affidavits are accepted in connection with motions for summary judgment, but when a case proceeds to trial, evidence from a witness(es) is necessary, absent agreement to the admissibility of the Affidavit. App. at A23.

STATEMENT OF THE ISSUES

1. Whether the Superior Court erred in finding that Defendant Jason Smith presented a timely objection to the admissibility of the Affidavit of Party-in - Interest.
2. Whether the Superior Court erred in finding, post-trial, that KeyBank National Association was required to present a witness at trial contrary to accepted practice for preservation of a junior lien holder's interest pursuant to 14 M.R.S.A. § 6322.

SUMMARY OF THE ARGUMENT

The Superior Court entered Judgment of Foreclosure dated July 31, 2025, onto the docket on August 6, 2025. The “Judgment as to KeyBank National Association, Synchrony Bank and to Defendant’s Counterclaim”, entered judgment in favor of Jason Smith as to KeyBank, explaining in its Findings of Fact and Conclusions of Law that based on an objection raised at the June 27, 2025 Bench Trial to KeyBank’s Affidavit filed on December 16, 2024, KeyBank was required to present witness testimony at trial to preserve its lien status pursuant to 14 M.R.S.A. § 6322. The record reflects that KeyBank’s Affidavit was filed without objection and remained without objection until the day of the Bench Trial—more than 6 months thereafter. The record also reflects multiple instances of the parties and the Superior Court agreeing that general practice to establish the priority lien status and amount due of a junior lien holder pursuant to 14 M.R.S.A. § 6322 is the filing of an affidavit by the junior lien holder.

The law supports that an untimely objection shall be deemed waived pursuant to the simultaneous objection rule. The law also establishes that there are minimum requirements for what constitutes an objection. Objections may not be vague and open-ended, leaving the other party to presume what might be unsuitable about the submission. Rather the objection must be stated with definiteness and state precise grounds. *See State v. Savage*, 69 Me. 112, 114 (1879),

citing Bonney v. Merrill, 57 Maine, 368. Lastly, statute supports that it is the court's duty to determine the priority and amounts due to junior lien holders which have an established right to payment from the proceeds from a foreclosure sale of a property. *See* 14 M.R.S.A. § 6322.

Equity and fairness in the judicial process require the maintenance of the generally accepted practice of affidavit submission to establish the lien priority of a junior lien holder pursuant to 14 M.R.S.A. § 6322. As there was no timely objection raised to KeyBank's Affidavit and KeyBank was given no advance notice of a need to present a witness prior to the Bench Trial, the Superior Court's Judgments must be overturned, and KeyBank's Affidavit should be used to re-establish its priority lien status. Any other outcome amounts to an impermissible sanction without notice by the Superior Court.

ARGUMENT

I. Whether the Superior Court erred in finding that Defendant Jason Smith presented a timely objection to the admissibility of the Affidavit of Party-in - Interest.

a. Standard of Review

The order presented to this Honorable Court for review are the Orders following Bench Trial dated July 31, 2025, and entered on the docket on August 6, 2025, titled Judgment of Foreclosure and Sale and Judgment as to KeyBank National Association, Synchrony Bank, and to Defendant's Counterclaim. "When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion cannot be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law." *Rioux v. Portland Water Dist.*, 132 Me. 307, 309, 170 A. 63, 64 (1934).

b. KeyBank's Affidavit should have been accepted by the Superior Court as Smith did not timely raise an objection to KeyBank's Affidavit and therefore waived the same.

KeyBank's Affidavit was filed on December 16, 2024. App. at A55. After the filing of KeyBank's Affidavit, no formal objection thereto was ever filed by Smith or any other party to the Superior Court action. According to the Superior Court's Findings of Fact & Conclusions of Law dated July 31, 2025, and entered on the docket August 6, 2025, "The hearing in this case was held on February 19, 2025,

and June 25, 2025”. App. at A23. The Superior Court’s Findings of Fact & Conclusions of Law further found that, “At the end of the hearing, Defendant objected to the Court’s consideration of the Affidavit filed by KeyBank National Association, a party-in-interest. The Court was inclined to accept the Affidavit, as that is how such parties-in-interest general preserve their rights. However, upon further reflection and in light of Defendant’s objection and argument, the Court is satisfied that the party-in-interest was required to present evidence at the trial....” *Id.*

The transcript from the hearing held on February 19, 2025 (the “February Hearing”), is a part of the record for this appeal. While at the February Hearing, the February Hearing Transcript reflects discussion of whether KeyBank should be defaulted and confirmation that the Court was under the impression that KeyBank had, according to the Court, “sent in what they needed to”. *See* Tr. Feb. 19, 2025, 71:9-10. The February Hearing Transcript does not indicate any objection to KeyBank’s Affidavit raised by Smith, rather the only discussion was over the merits of whether KeyBank should be defaulted for its lack of participation at prior hearings and the Court’s impression that KeyBank had already made sufficient filings. *See* Tr. Feb. 19, 2025, 71:2-10. Notably, counsel for Smith conceded at the February Hearing that was also his recollection but did not make any further

argument that the filings made by KeyBank two months prior were objectionable on any grounds. *See* Tr. Feb. 19, 2025, 71:12.

A hearing was held on June 4th, 2025 (“June 4th Hearing”). The transcript of that hearing is a part of the record for this appeal (“June 4th Hearing Transcript”). At the June 4th Hearing the issue of default of KeyBank and the sufficiency of KeyBank’s Affidavit was discussed but not by Smith, by counsel for KeyBank who explained that the filing of KeyBank’s Affidavit was sufficient to preserve its interest and protect it from default. *See* Tr. June 4, 2025, 10:8-14. Upon KeyBank’s counsel’s argument and confirmation of the date and filing of KeyBank’s Affidavit, the Court and Attorney Hunt, counsel for Smith agreed that default was not proper and the request for default withdrawn. No further objection to KeyBank’s Affidavit was presented. In fact, no filed objection to KeyBank’s Affidavit ever appears on the docket.

On June 26, 2025, at 3:56p.m., more than 6 months after KeyBank filed the KeyBank Affidavit and approximately 17 hours before the scheduled bench trial filed a “Motion in Limine and Motion for Sanctions Foreclosure Scheduling Order Witness & Exhibit List” (“Smith’s Motion”). Smith’s Motion itself does not contain within it any objection to KeyBank’s Affidavit. The content of Smith’s Motion is a procedural matter of assessing sanctions upon KeyBank for an alleged failure to file a Witness and Exhibit List. Despite the late hour of its filing, and the

attempt by Defendant's counsel of trial by ambush, KeyBank filed its "Objection to Defendant's Motion *In Limine* and for Sanctions" on June 26, 2025, at 8:17p.m., in which it preserved its arguments that the KeyBank Affidavit had been filed with the Court for more than six months without objection from any party or noted concern from the Court and that it had filed all that was necessary to preserve its priority position and the amount due to it.

At the Bench Trial on June 27, 2025, the Bench Trial Transcript reflects that there were chambers discussions that did not include KeyBank's counsel during which concerns regarding the sufficiency of KeyBank's Affidavit were actually raised for the first time. *See* Tr. June 27, 2025, 3:15-22; App. at A74. When the Bench Trial turned to the issue of Smith's Motion and the newly raised concerns regarding the sufficiency of KeyBank's Affidavit to establish its interest pursuant to 14 M.R.S. § 6322, the entirety of Smith's objection raised verbally by counsel amounted to conjecture:

MR. HUNT: I was under the impression it had to be proven somehow. I'm well aware that in general, courts accept the affidavits. What if the bank asked for \$1 million? Someone has to question it. Someone has to make sure that the bank is accepting the proper amount. Now, it will take - - in my experience KeyBank is honorable. That's my experience. But people do make mistakes. *See* Tr. June 27, 2025, 94:24-95:5; App. at A77-78.

The Bench Trial Transcript shows that KeyBank did respond to that objection preserving its position as to the lateness of Smith's objection, the

appropriateness of relying on an affidavit as a party-in-interest to present its evidence as to lien priority and amount due. *See* Tr. June 27, 2025, 95:11-96:6; App. at A78-79.

It is well established that, “[o]bjections to evidence should be stated at the time it is offered, and with sufficient definiteness to apprise the court and the opposite party of the precise grounds of the objection; and all objections not thus specifically stated, should be held to be waived. This is a well settled and salutary rule of practice, and should be strictly adhered to.” *State v. Savage*, 69 Me. 112, 114 (1879), *citing Bonney v. Merrill*, 57 Maine, 368. This standard exists to limit abuse and allow for the timely, orderly and fair administration of justice. For example, it has been found that “[t]o await the close of the evidence and seek for the first time to rule out evidence by motion to strike, if such procedure were allowed as an ordinary trial practice, would frustrate the beneficial objectives of the simultaneous objection rule, so-called, would lead to abuse and subject the parties to unnecessary costly retrials.” *Michaud v. Steckino*, 390 A.2d 524, 532 (1978).

Here, the Superior Court allowed Smith to raise an objection to KeyBank’s reliance on the KeyBank Affidavit six months after its filing. Not only was the objection made far outside the time that the filing was offered, but the verbal objection on the record lacked any specificity, or even a good faith basis, as to why

the KeyBank Affidavit was not sufficient on its own. Smith solely acknowledged that it is generally the typical practice of the courts to accept affidavits of parties-in-interests to establish their priority interests pursuant to 14 M.R.S. § 6322 and went on to opine that “Someone has to question it.”, without making any specific objection or stating any specific concern as to the *KeyBank Affidavit* at issue in this case. The mere assertion that mistakes *can* be made is not the same as asserting that a mistake has been made or is suspected to have been made in an affidavit presented to the Court in a matter presently before it. Smith’s objection was not offered at the time the KeyBank Affidavit was filed, nor was it stated with any level of definiteness and therefore, does not meet the minimum standards of the simultaneous objection rule.

The Superior Court represented at the February Hearing and again at the outset of the Bench Trial that it was inclined to rely on the KeyBank Affidavit for the amount of the lien stated therein. *See* Tr. February 19, 2025, 71:9-10; and Tr. June 27, 2025, 4:16-21-96:7; App. at A75. The Superior Court’s Findings of Fact and Conclusions of Law dated July 31, 2024, and entered on August 6, 2025, likewise said it was inclined to accept KeyBank’s Affidavit but ultimately did not in light of Smith’s objection and argument. App. at A23. Since Smith’s objection did not meet the minimum standards of the simultaneous objection rule in timeliness and substance and the Superior Court was otherwise inclined to accept the KeyBank

Affidavit, the Superior Court erred in considering the objection raised by Smith and should have accepted the KeyBank Affidavit.

II. Whether the Superior Court erred in finding, post-trial, that KeyBank National Association was required to present a witness at trial contrary to accepted practice for preservation of a junior lien holder's interest pursuant to 14 M.R.S.A. § 6322.

a. Standard of Review

The order presented to this Honorable Court for review are the Orders following Bench Trial dated July 31, 2025, and entered on the docket on August 6, 2025, titled Judgment of Foreclosure and Sale and Judgment as to KeyBank National Association, Synchrony Bank, and to Defendant's Counterclaim. "When the determination of any question rests in the judicial discretion of the trial court, the exercise of that discretion cannot be reviewed by an appellate court unless it is made to appear that the decision was clearly wrong or that it was based upon some error in law." *Rioux v. Portland Water Dist.*, 132 Me. 307, 309, 170 A. 63, 64 (1934).

b. The Superior Court's Judgment as to KeyBank National Association runs contrary to accepted practice agreed by parties is typically required for preservation of a junior lien holder's interest pursuant to 14 M.R.S.A. § 6322 and is akin to a sanction against KeyBank.

Following the Bench Trial in its Judgment as to KeyBank National Association, Synchrony Bank and to Defendant's Counterclaim, the Superior Court

stated, “Judgment is entered in favor of Jason Smith as to KeyBank National Assoc. as KeyBank did not present evidence to preserve its interest in the property”. App. at A21. In its Findings of Fact and Conclusions of Law, the Superior Court expanded on that ruling:

At the end of the hearing, Defendant objected to the Court’s consideration of the Affidavit filed by KeyBank National Association, a party-in-interest. The Court was inclined to accept the Affidavit, as that is how such parties-in-interest generally preserve their rights. However, upon further reflection and in light of Defendant’s objection and argument, the Court is satisfied that the party-in-interest was required to present evidence at the trial. Affidavits are accepted in connection with motions for summary judgment, but when a case proceeds to trial, evidence from a witness(es) is necessary, absent agreement to the admissibility of the Affidavit; App. at A23.

In determining the interests of a party-in-interest in a foreclosure against real property for breach of mortgage covenants, the responsibilities of the presiding court are established by statute. 14 M.R.S.A. § 6322 provides in relevant part that after finding what is owed to the foreclosing mortgage holder the court “shall determine...the order of priority and those amounts, if any, that may be due to other parties”. The plain language of the statute is not permissive but rather mandatory. “The statutory civil foreclosure procedure preserves two fundamental rights to a junior mortgagee: the right to redeem the property from the senior mortgagee and the right to participate in a public foreclosure sale and

to receive any surplus proceeds after the senior mortgage has been satisfied.”

Union Trust v. MacQuinn-Tweedie, 2001 ME 43, 767 A.2d 289 (2001).

On numerous occasions throughout the proceedings in this matter, all parties and the Court were in agreement that that KeyBank had, by filing the KeyBank Affidavit, completed all that was typically necessary and required of a party-in-interest in a proceeding of this type. During the February Hearing, the Court noted that it thought KeyBank had, “sent in what they needed to”, and Attorney Hunt confirmed that was his “memory as well”. *See* Tr. Feb. 19, 2025, 71:9-12. The June 4th Hearing Transcript reflects argument from counsel for KeyBank that the filing of the KeyBank Affidavit is all that is required to preserve its priority position to which no counterargument is offered by Smith or the Court. *See* Tr. June 4, 2025, 10:8-14. Finally, the Bench Trial Transcript indicates the Superior Court’s representation that it had discussed in chambers when KeyBank’s counsel was not present that it was, “unlikely to do anything other than perhaps rely on the affidavit that your client had filed and limit the amount due to your client to whatever’s in the affidavit. I didn’t make that decision, but I certainly tipped my hand on it.” Tr. June 27, 2025, 4:17-21; App. at A75. During the Bench Trial, Smith’s counsel also conceded, “I’m well aware that in general, courts accept the affidavits.” Tr. June 27, 2025, 94:25-95:1; App. at A77-78.

Inexplicably, the Superior Court found it appropriate to enter judgment against KeyBank, barring it from collecting on its lien against the property which is now foreclosed and will hold no value despite the agreement of all parties that it is generally accepted practice for a junior mortgage holder to file an affidavit to preserve its priority position and amount so that the court may make its required finding pursuant to 14 M.R.S.A. § 6322. Not only does the Superior Court's judgment run contrary to typical practice, but it also impermissibly shifted a burden upon KeyBank which is not anticipated by 14 M.R.S.A. § 6322. While it is understandable that the court requires or requests some tools to complete its analysis pursuant to 14 M.R.S.A. § 6322, there is no language in statute or in case law which requires that a party-in-interest bears the burden of putting on a case or presenting evidence to establish its lien by participating in full at a contested trial. The cost of presenting witness for examination for every junior lien holder appearing at a foreclosure trial is ultimately recoverable under most loan instruments from the borrower. Therefore, this policy would increase expense to the borrower and decrease the possibility of surplus funds from sales flowing into their pockets after a foreclosure sale. Moreover, it is difficult to imagine that requiring a witness from each junior lien named as a party-in-interest would not add significantly to the time required for a trial, further burdening an overtaxed

court. The additional expenditure in time and cost is not outweighed by the evidentiary value of a witness over a competent affidavit.

If it were to become a requirement to present a witness at trial as a party-in-interest solely to preserve the priority of a junior lien, as the Judgment in this matter suggests is a requirement, it would be a wholly new standard by which a party-in-interest is expected to participate a senior mortgagee's foreclosure and therefore, should have been made clear to KeyBank *prior* to the Bench Trial so that it could be prepared. Alternatively, the Bench Trial should have been postponed so that KeyBank could have time to present a witness based on the Court's new standard of evidence for a party-in-interest. To allow the Bench Trial to proceed while suggesting that the court was, "unlikely to do anything other than perhaps rely on the affidavit that [KeyBank] had filed and limit the amount due to [KeyBank] to whatever's in the affidavit.", knowing that KeyBank was proceeding without a witness present in reliance on that very same affidavit, dramatically weighs the scales of justice against the party relying on the representation of the Court as to its position. *See* Tr. June 27, 2025, 4:17-18; App. at A75. Instead, the Superior Court waited until after the Bench Trial was over to enter its Judgment stripping KeyBank of its interest entirely.

The Superior Court's Judgment as to KeyBank amounts to a sanction against it for failing to present a witness despite it not having, 1) any previous requirement

to do, or 2) any notice that it was now going to be requested to do so in this proceeding.

As noted in KeyBank's Objection to Smith's Motion *In Limine* and For Sanctions, dismissal as a sanction is only appropriate where the sanctioned party has been previously put on notice that such a drastic result was a possibility. *See, e.g., Green Tree Servicing, LLC v. Cope*, 2017 ME 68. The record does not reflect that KeyBank was ever put on notice that this particular action was going to be handled differently than others and it would be required to present a witness to establish its priority position and amount of its lien. No objection to the KeyBank Affidavit's content or veracity had been presented prior to the morning of the Bench Trial, therefore when KeyBank presented itself at the trial it was presenting what it believed to be an uncontested affidavit. To read the Superior Court's judgment, in light of the facts as reflected by the record in this case, parties-in-interest would have to present a witness at every trial, in anticipation of the event that an objection is raised to their affidavit at the very last moment. This cannot be the intent of the Superior Court. It certainly is not a cost-effective outcome for the borrower, who will ultimately bear the burden of additional expenditures of the junior lien holder.

CONCLUSION

For the reasons stated in its brief as presented here, KeyBank National Association requests this Honorable Court reverse the Superior Court's Judgment of Foreclosure entered on the docket on August 6, 2025, and dated July 31, 2025, including the Judgment as to KeyBank National Association and enter judgment allowing KeyBank's claim.

CERTIFICATION

The undersigned hereby certifies that a copy of the within brief and accompanying appendix was served electronically to all appearing parties.

Date: March 6, 2026

Signed: /s/Eva M. Massimino
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