STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. PEN-25-389

FEDERAL NATIONAL MORTGAGE ASSOCIATION,

Plaintiff/Appellee

v.

JASON D. SMITH,

Defendant/Appellee

KEYBANK NATIONAL ASSOCIATION,

Party-in-Interest/Appellant

SYNCHRONY BANK; LAURA L. SMITH,

Parties-in-Interest/Appellees

BRIEF OF APPELLEE JASON D. SMITH

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INTRODUCTION

This case is a foreclosure matter brought by Federal National Mortgage Association (hereinafter "Fannie Mae") against Jason D. Smith (hereinafter "Smith"). The appeal in this case is brought by KeyBank National Association (hereinafter "KeyBank"), a party-in-interest with an alleged junior mortgage. Two other parties-in-interest, Synchrony Bank and Laura L. Smith, were defaulted and did not appear or participate in the proceedings.

STATEMENT OF FACTS

KeyBank appeared in this litigation and, with leave of court, filed a late answer to the foreclosure complaint. The matter proceeded through an unsuccessful mediation then was scheduled for trial. Neither the plaintiff, Fannie Mae, nor the party-in-interest, KeyBank, filed any dispositive motions. The case was scheduled for a bench trial on December 17, 2024, which was ultimately continued. Apparently in anticipation of that trial, KeyBank filed an "Affidavit of Party-in-Interest" on December 16, 2024. That purported affidavit was not filed in support of a motion; therefore, it did not trigger the application of the time limits set forth in M.R.Civ.P. 7(c) for an objection to a motion. Thus, defendant Jason Smith had no reason (or time limit) to file an opposition to that document.

A bench trial was held on February 19, 2025. As the transcript of that hearing reflects, KeyBank did not appear at that hearing. The hearing was not completed on

that date and had to be continued to another date. As KeyBank did not appear at hearing (despite the fact that it had answered the complaint), Smith's counsel inquired of the court whether KeyBank would be defaulted. See Transcript 2/19/25, page 71. The court responded 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." *Id.* There was no specific discussion of the KeyBank "Affidavit of Party-in-Interest" at that time; however, since KeyBank was not in attendance at the trial, it clearly did not move to admit that document into evidence at that time. Again, there was no filing or motion that would have triggered the necessity of a timely objection.

On June 4, 2025, a motion hearing was held which was attended by KeyBank's attorney, Andrew Schaefer. There was a discussion at that hearing as to whether the court would default KeyBank, as Smith's attorney had sent a letter to the court on March 19 asking for clarification as to whether KeyBank would be defaulted. Attorney Schaefer argued that KeyBank took the position that it should not be defaulted because all it was required to do was file an affidavit of debt, which had been filed on December 16, 2024. See Transcript 6/4/25, pages 9-11. The court indicated that it was not inclined to default KeyBank, and Smith's attorney indicated that he would withdraw the request for default if a copy of the affidavit was emailed to him. Again, no motion was made to trigger a deadline for filing an objection to the affidavit.

The continued foreclosure hearing was scheduled for June 27, 2025. On June 26, Smith's attorney filed a motion asking the court to dismiss KeyBank from the case because KeyBank had failed to file a witness and exhibit list in advance of the hearing. KeyBank responded to that motion by asserting that it did not intend to call any witnesses or offer any exhibits but would rely on its previously-filed "Affidavit of Party-in-Interest." At the hearing, the court indicated that it hadn't yet made a decision on Smith's motion and that the court would hear arguments and would look at the statute before making any decisions. At the end of the testimonial hearing, the court did hear arguments, at which time Smith's attorney objected to the KeyBank affidavit, arguing that KeyBank had the burden of proving the amount it was owed at trial. See Transcript 6/27/25, pages 94-95. KeyBank's attorney presented its argument on the admissibility of the affidavit at that time as well. See Transcript 6/27/25, pages 95-96.

On July 31, 2025, the court entered a judgment of foreclosure and sale in favor of Fannie Mae. Appendix, page 8. That judgment found the order of priority of the claims of the parties was "FIRST: The Plaintiff, by virtue of its mortgage in the above amounts and attorney's fees, Second: The Defendant." Appendix, page 9. On the same day, the court entered a judgment as to KeyBank, Synchrony Bank and to Defendant's counterclaim. Appendix, page 14. That judgment found in favor of Jason Smith and against KeyBank because "KeyBank did not present evidence to

preserve its interest in the property." *Id.* The court further made Findings of Fact and Conclusions of Law which, among other things, explained its conclusion that KeyBank was required to present evidence at trial to prove its claim, absent agreement to the admissibility of its affidavit. Appendix, page 16.

ISSUES PRESENTED FOR REVIEW

I. WHETHER THE TRIAL COURT'S RULING IN FAVOR OF JASON SMITH AGAINST KEYBANK WAS A PROPER EXERCISE OF ITS DISCRETION.

LEGAL ARGUMENTS

I. THE TRIAL COURT APPROPRIATELY CONCLUDED THAT KEYBANK HAD FAILED TO PROVE ITS CLAIM BY ITS FAILURE TO PRESENT ANY ADMISSIBLE EVIDENCE IN SUPPORT OF THAT CLAIM.

A. Standard of review.

If the trial court finds that a party with the burden of proof fails to meet that burden, this Court reviews the entire record to ascertain whether the record compels a finding contrary to that made by the trial court. *In re Adoption of T.D.*, 2014 ME 36, ¶ 12, 87 A.3d 726. This Court reviews trial court rulings admitting or excluding evidence for clear error or abuse of discretion. *State v. Grindle*, 2017 ME 83, ¶ 10, 160 A.3d 528 (citation omitted).

B. Defendant did not waive objection to the KeyBank affidavit.

In its brief, KeyBank strenuously argues that Jason Smith waived his objection to the KeyBank affidavit by failing to "timely" object to it; however,

KeyBank does not elaborate on its theory of precisely when an objection must have been made in order to avoid waiver. As noted above, KeyBank did not file its affidavit in conjunction with a motion, but rather as a standalone filing in advance of a foreclosure hearing. That is not an event that triggers a specific deadline for an objection. KeyBank did not even appear at the February 27, 2025 hearing; thus, the affidavit was not offered in evidence (or even really discussed), and no deadline for an objection was triggered at that time either. Indeed, the trial court would have acted within its discretion if it had defaulted KeyBank for failure to appear at that hearing. Had the hearing been completed on that date, that may have been the result. However, the hearing had to be continued to a later date, and Smith's attorney flagged the issue of his request to default KeyBank by sending a letter to the court in advance of the next hearing. Only then did KeyBank's attorney start showing up for hearings and arguing against default. The court allowed KeyBank to participate in the continued hearing despite its failure to show up for the first hearing, and KeyBank still presented no evidence to support its claim, arguing that its affidavit was all that was required. Prior to that hearing on June 27, 2025, there was no deadline for Smith to object to the affidavit. KeyBank's argument that Smith waived his objection to that affidavit by failing to object at some unspecified earlier time is unavailing.

C. The trial court properly excluded the KeyBank affidavit from evidence.

1. The KeyBank affidavit was hearsay that was inadmissible at trial and it was not an abuse of the trial court's discretion to exclude it.

Other than arguing that Jason Smith waived his objection to the KeyBank affidavit, KeyBank does not make a substantive legal argument as to why the affidavit would have been admissible in evidence other than it is "accepted practice." Blue Brief at page 26. Beyond its bare assertion that the use of an affidavit is "accepted practice," KeyBank fails to cite any case law in which the court accepted an affidavit from a junior lienholder as evidence in lieu of trial testimony. If no party objects to the use of an affidavit, it may not be error for the court to allow that practice; however, here, Smith did object to the use of the affidavit. KeyBank apparently did not seek the agreement of the parties regarding its use of an affidavit in lieu of trial evidence, but simply filed the affidavit and failed to appear at the trial. KeyBank did so at its peril. The other parties and the court were not required to warn KeyBank that its affidavit might not be admitted in evidence. KeyBank was represented by counsel, and it was a calculated decision to submit an affidavit rather than to appear and prove its case at trial. That decision was fatal to KeyBank's claim.

"Pursuant to the Maine Rules of Evidence, unless an exception applies, a nontestifying party cannot offer that party's own out-of-court statements as

substantive evidence. See M.R.Evid. 801, 802. Such statements are hearsay and are not excluded from the definition of hearsay by Rule 801(d)(2), which allows their admission only when offered *against* the party that made the statement." *State v. Grindle*, 2017 ME 83, ¶ 11, 160 A.3d 528 (emphasis in original). See also *U.S. Bank Nat'l Ass'n v. Carney*, 2018 Me. Super. LEXIS 10 (Aroostook Super. Jan. 16, 2018). In *Carney*, the plaintiff Bank sought foreclosure of a mortgage but failed to introduce evidence at trial proving the assignment of the mortgage to the plaintiff. After trial, the Bank submitted with its closing argument an affidavit which attempted to authenticate and introduce as evidence a quitclaim assignment to the plaintiff along with a limited power of attorney demonstrating the authority of the signer to execute that assignment. The court found that there were several problems with accepting those documents as part of the trial record:

> First of all, the evidence was closed at the conclusion of the November 2, 2017 trial and the Bank has not filed a motion to reopen the evidence or sought leave to offer additional evidence. Second, the Affidavit of Jaimee L. Ruccolo is hearsay and is not a business record admissible as an exception to the hearsay rule pursuant to Rule 803(6). Which leads to the next problem, that Defendant was not provided an opportunity to object to the admission of either the November 18, 2015 Quitclaim Assignment or the Limited Power of Attorney or to cross examine the witness proffered by the Bank to introduce those documents.

Id. at *8. As such, the court in *Carney* declined to accept the proffered affidavit and attached documents into evidence or to consider them on the merits of the case.

The same problems exist in the present case. The KeyBank affidavit was filed with the court prior to the foreclosure hearing, but no one from KeyBank appeared at the hearing. The KeyBank affidavit signed by Alyssa Bartholomew, a "banking officer" of KeyBank, included attached exhibits: Exhibit A, which purported to be a copy of a promissory note signed by Jason Smith; and Exhibit B, which purported to be a copy of the mortgage given by Smith to KeyBank. The affidavit contained Ms. Bartholomew's assertion as to the outstanding amount owed on the note by Jason Smith as of the date of the first scheduled hearing, December 17, 2024 (which was continued).

If it were acceptable for plaintiffs or parties-in-interest to simply file affidavits as to how much they were owed under a promissory note secured by a mortgage, there would never be any foreclosure hearings. There was no opportunity for Jason Smith to cross-examine Ms. Bartholomew as to the method of calculation of the alleged outstanding balance on the note. There also was no opportunity for Jason Smith to object to the admission of the two exhibits, or to cross-examine the witness about those documents. Indeed, the KeyBank affidavit was never formally offered into evidence, nor was it admissible even if it had been offered. It was hearsay, plain and simple, and the trial court correctly found that KeyBank had failed to prove its case because it failed to call any witnesses or submit any evidence to prove its case at trial.

Even if a sworn affidavit were otherwise admissible as evidence at a trial, the KeyBank affidavit does not indicate that the affiant swore, under oath, to the truth of the statements contained therein. The affidavit recites in Paragraph 6 that "The foregoing statements by me are true and are based on my own personal knowledge and belief; and were (sic) based on my own personal knowledge and belief, I believe them to be true." Appendix, page 49. The jurat reads "On December 12, 2024, personally appeared the above-names (sic) Alyssa Bartholomew, of KeyBank National Association, and acknowledged the foregoing instrument to be his/her free act and deed in such capacity aforesaid and the free act and deed of KeyBank National Association, before me." *Id.* The jurat does not indicate that the affiant swore to the truth of the statements under oath. Thus, not only is Ms. Bartholomew's affidavit hearsay, it is not even made under oath. See *Pineland Lumber Co. v. Robinson*, 382 A.2d 33, 37 (Me. 1978) (holding that a jurat that merely recited that the signer acknowledged the instrument to be his free act and deed and the free act and deed of the corporation was insufficient to be "sworn to" under oath). As such, the KeyBank affidavit was simply an unsworn out of court statement which did not fall within any exception to the hearsay rule, and it was properly excluded from consideration by the trial judge.

2. The foreclosure statute, 14 M.R.S. § 6322, does not mandate acceptance of an unsworn hearsay affidavit for preservation of a junior lienholder's interest.

KeyBank argues that Section 6322 mandates that a court must determine the order of priority of junior lienholders and that by finding that KeyBank failed to prove its claim, the court somehow violated Section 6322. KeyBank's reasoning is rather unclear; however, Section 6322 obviously does not require a court to accept inadmissible evidence in proof of a junior lienholder's claim.

Section 6322 provides: "**After hearing**, the court shall determine whether there has been a breach of condition in the plaintiff's mortgage, the amount due thereon, including reasonable attorney's fees and court costs, the order of priority and those amounts, if any, that may be due to other parties **that may appear**…." (emphasis added). Section 6322 does not contemplate the filing of an affidavit by a junior lienholder instead of its appearance and participation in a hearing. Thus, KeyBank's argument at page 29 of its brief that Section 6322 does not put a burden on a junior lienholder to present evidence to establish the amount of its lien is patently incorrect. Nor is this a "wholly new standard," as KeyBank argues at page 30 of its brief. The language of Section 6322 expressly contemplates a hearing at which junior lienholders may appear and establish their order of priority and amounts that may be due. KeyBank provides no citation to any authority whatsoever to support its argument that being required to present evidence at a

hearing is somehow a new standard. Indeed, presenting evidence at a contested hearing is the very backbone of the American jurisprudence system.

The trial court in this case complied with Section 6322 by determining that the order of priority was first, the plaintiff, and second, the defendant. Appendix, page 9. The court effectively found that the amount due to KeyBank was zero, since KeyBank failed to meet its burden of proving it was entitled to some other amount as a junior lienholder. Section 6322 requires no more.

3. The trial court's holding that KeyBank's affidavit was inadmissible was not a sanction but an evidentiary ruling.

There is no suggestion anywhere in the records of the three transcribed hearings that the trial court was excluding the KeyBank affidavit from evidence as a form of sanction. Indeed, the trial court declined to default KeyBank despite its failure to appear at the first day of hearing, and allowed KeyBank to participate in the second day of the continued hearing. It was KeyBank's choice, not the trial court's, not to present any witnesses or evidence at that continued hearing. KeyBank's erroneous belief that the submission of an unsworn affidavit in advance of the hearing relieved it of the obligation to appear at the hearing and present evidence to support its claim is not the fault of the trial court or the other parties. KeyBank seems shocked at the notion that "parties-in-interest would have to present a witness at every trial" when objection is made to their affidavit (Blue Brief, page 31), but Maine courts have never allowed the submission of an

affidavit to substitute for the testimony of a witness at trial. Had KeyBank filed a dispositive motion such as a motion for summary judgment, an affidavit would have been appropriately considered in conjunction with such a motion; however, that is not what KeyBank did. KeyBank made a tactical decision to submit an affidavit in lieu of attending the hearing and presenting evidence. KeyBank took that risk of its own accord and must bear the consequences of its own conduct. The court did not default KeyBank or dismiss its claim as a sanction, but merely as an evidentiary ruling that the affidavit was not admissible in evidence.

CONCLUSION

The trial court correctly concluded that an affidavit submitted by KeyBank was not admissible in evidence to prove KeyBank's claimed junior lienholder interest at trial in lieu of live testimony. This Court should affirm the trial court's judgment in favor of Jason Smith and against KeyBank because KeyBank failed to present any evidence to prove its claim.

Dated at Island Falls, Maine this 30th day of March, 2026.

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CERTIFICATE OF SERVICE

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

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