

**STATE OF MAINE
PENOBSCOT, ss.**

**SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. PEN-23-230**

Wilmington Savings Fund Society FSB

v.

David D. Blake and Rose Blake

**On Appeal from the District Court
PENOBSCOT JUDICIAL CENTER**

BRIEF OF APPELLANT

**RICHARD W. McCARTHY, JR.
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ATTORNEY FOR APPELLANT

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STATEMENT OF MATERIAL FACTS

David and Rose Blake (Blakes) appeal from a judgment granting a foreclosure by Judge Michael Roberts, in the Bangor District Court. Blakes filed a timely notice of appeal.

By way of history, the Blakes were the Defendants in a foreclosure proceeding in 2013, involving the same security instruments, a promissory note and mortgage deed dated November 20, 2002 and recorded in Book 8466 Page 178, securing real property located on 742 North Main Street in Brewer, Maine.

That foreclosure action was dismissed without prejudice on the eve of trial. The Blakes were subsequently re-served with a foreclosure action and that matter was heard on May 31, 2023, the decision of which is the subject of this appeal.

The promissory note and mortgage deed were assigned no less than eight times during the period of the obligor's loan.

ISSUES FOR CONSIDERATION ON APPEAL

- 1. Whether the Plaintiff/Lender had met its burden with respect to standing to prosecute its claim of default and foreclosure of the promissory note and mortgage deed.**
- 2. Whether the record supports by a preponderance of the evidence that the amounts claimed by the Plaintiff as being owed in under the terms of the promissory note and mortgage deed in the Judgment of Foreclosure and Sale.**

SUMMARY OF ARGUMENT

1. Whether the Plaintiff/Lender had met its burden of standing to prosecute its claim of default and foreclosure of the promissory note and mortgage deed.

The Appellant believes that the Plaintiff has failed to meet one of the essential elements of standing to support its claim for foreclosure, in that one of the items in the chain of title and assignment of mortgages and any associated documentation were not correctly filed in the appropriate Registry of Deeds.

2. Whether the record supports by a preponderance of the evidence that the amounts claimed by the Plaintiff as being owed in under the terms of the promissory note and mortgage deed in the Judgment of Foreclosure and Sale.

The Appellant believes that the Plaintiff has not met its burden by a preponderance of the evidence as to the amounts owed by the Blakes under the terms of the promissory note and mortgage deed.

ARGUMENT

- 1. Whether the Plaintiff/Lender had met its burden of standing to prosecute its claim of default and foreclosure of the promissory note and mortgage deed.**

The Law Court has long held that foreclosure is a creature of statute. See 14 MRS Sec 6101-6325, and thus, standing to foreclose is informed by various statutory provisions, *Bank of America v. Greenleaf*, 2014 ME 89, 93. In *Chase Home Finance LLC v. Higgins*, the eight essential elements of proof were spelled out. The Blakes do not dispute they executed a promissory note and mortgage deed, the issue is whether the Plaintiff has “properly presented proof of ownership of the mortgage note and {evidence of the mortgage note and } the mortgage including all assignments and endorsements of the note and the mortgage.” *Chase Home Finance v Higgins* 2009 ME 136.

The note and assignment that Wilmington Savings relies upon to show proper evidence of proof has been assigned multiple times, seven in total.

The Power of Attorney which the most recent assignment is based upon, set forth as Plaintiff’s Exhibit J, was recorded in the York County Registry of

Deeds in Book 18707, Page 255 on June 21, 2021. The property being secured by the Mortgage Deed and all its subsequent assignments is located or recorded in Penobscot County, Maine. Maine is a notice state when it comes to real estate. Title 22 Sec 201 et seq.

The original promissory note (Plaintiff's Exhibit A) has three endorsements, none of which are dated nor are any of them endorsed to the purported current Lender.

A party seeking foreclosure by civil action must be “the mortgagee or any person claiming under the mortgagee,” and must “produce evidence of . . . all assignments . . . of the . . . mortgage.” 14 M.R.S. § 6321; see also *Bank of America, N.A. v. Cloutier*, 2013 ME 17, ¶ 13, 61 A.3d 1242. We review for clear error a trial court's factual findings underlying a judgment of foreclosure. See *KeyBank Nat'l Ass'n v. Sargent*, 2000 ME 153, ¶ 35, 758 A.2d 528. *Deutsche Bank Natl Trust v. Wilk* 2013 ME 79.

In this case, the authority to sign any essential documents was not given in the proper registry and jurisdiction. In addition with respect to Exhibit C and the lack of a power of attorney, counsel for the Plaintiff argued that M.R.S.A. Title 33 Section 353-A (4) would apply, but this action was filed in 2019, the complaint and allegation and evidence of ownership of the mortgage were certainly not present at that time. This court has held such ministerial acts and requirements are not harmless error. *Deutsche v. Wilk*. Appellant believes the lack of the necessary documentation and proper assignment of the note and mortgage deed preclude this Plaintiff's standing and that the action should be dismissed.

- 2. Whether the record supports by a preponderance of the evidence that the amounts claimed by the Plaintiff as being owed in under the terms of the promissory note and mortgage deed in the Judgment of Foreclosure and Sale.**

If the Court finds that the Plaintiff has standing despite the deficiencies in their transfer of ownership, the Plaintiff still must prove by a preponderance of the evidence of the amount in default and due under the terms of the promissory note and mortgage deed. *Chase Home Finance LLC v. Higgins*, “ ● the amount due on the mortgage note, including any reasonable attorney fees and court costs.....” A plaintiff seeking a foreclosure judgment must comply strictly with all steps required by statute. This note and mortgage was assigned seven times during the period of the loan. Plaintiff relied on the testimony of the current note holder and a thirty-eight page transactional history (Plaintiff’s Exhibit F) in arriving at the amount due on the mortgage, Defendant testified to making several payments that she testified were unreported or not credited Transcript at Page 67 Line 19 and Page 74 Line 15; or unapplied Transcript Page 71 Line 21. See Appendix, Exhibit J.

The representative for the Lender testified that he was able to determine from the transactional history that the large payments testified to by Ms. Blake were correctly and accurately applied to her account, yet despite her sizeable payments she was still in default. As the Plaintiff has the burden of proof, they have failed to prove by a preponderance of the evidence, the amount due.

WHEREFORE for the above-stated reasons, Appellant requests that the court's decision be vacated and remanded to the trial court for dismissal or further findings consistent with this order.

October 19, 2023

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TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

CITED

Bank of America N.A. v. Cloutier 2013 ME 17

Bank of America v. Greenleaf 2014 ME 89

Chase Home Furnishings v. Higgins 2009 ME 136

Key Bank National Assn. v. Sargent 2000 ME 153

Deutsche National Bank v. Wilk 2013 ME 79

Title 14 M.R.S.A. § 6101

Title 22 M.R.S.A. § 201

Title 33 M.R.S.A. § 353-A(4)