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Foreclosure Cases: The Reawakening Of Strict Pleading

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Foreclosure Cases: The Reawakening Of Strict Pleading

by Robert S. Hark

In the course of the past year, the jurisprudence from the Law Court regarding the process of judicial foreclosure proceedings has offered a continuous procession of cases.[1] In decades past, it was typical of counsel for foreclosure defendants to begin discussing the bankruptcy option as the first resort, rather than the last, at the initial consultation. This has all changed.

In writing this compendium of the errors committed by foreclosing plaintiffs, I note that the lion's share are errors made by the mortgagees and their *seriatim* assignees, rather than by the hapless counsel who find themselves in the position of defending these flawed transactions. I venture to suggest that much of this sea change in case law derives from the implementation of the Foreclosure Diversion Program instituted by the Law Court in the past several years, along with its implementing statutes. At the very least, this program has served to focus attention upon the standing of the plaintiff to bring its foreclosure action, both by forcing some extra sets of eyes upon the key documents, and also by slowing down the process sufficiently to permit the underlying documents to be thoroughly and timely reviewed.

Prior to the implementation of the Foreclosure Diversion Program, the typical foreclosure plaintiff would commence the action, and shortly after issue was joined, would file a motion for summary judgment. All of this while the defendants were attempting to raise the money for an attorney and to decide whether the funds would be better expended for (what was considered to be) the inevitable bankruptcy filing.

In addition to the diversion program, the courts now evaluate motions for summary judgment with a checklist,[2]

which creates a uniform review of the matters required to be proven by the plaintiff. This checklist and the Diversion Program, are collectively akin to new sets of grates on a meat-grinder, or a sewage treatment plant, changing significantly, in either case, the ultimate product.

The Plaintiff's Burden

In *Chase Home Fin. LLC v Higgins*[3] (Higgins), the Law Court listed the elements necessary to obtain a judgment of foreclosure:

- the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any;
- properly presented proof of ownership of the mortgage note and the mortgage, including all assignments and endorsements of the note and the mortgage;
- a breach of condition in the mortgage;
- the amount due on the mortgage note, including any reasonable attorney fees and court costs;
- the order of priority and any amounts that may be due to other parties in interest, including any public utility easements;
- evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements;
- after January 1, 2010, proof of completed mediation (or waiver or default of mediation), when required, pursuant to the statewide foreclosure mediation program rules; and
- if the homeowner has not appeared in the proceeding, a statement, with a supporting affidavit, of whether or not the defendant is in military service in accordance with the Servicemembers Civil Relief Act.[4]

This article focuses upon three broad categories of these cases: those with (1) standing issues, (2) procedural non-compliance with Rule 56, and (3) evidentiary issues. A number of the recent cases address several of these issues.

Standing

It is elementary that the plaintiff in a mortgage foreclosure case should be the owner of the mortgage and note. However, the untidiness and

sloppiness with which many of these mortgages have been treated is simply breathtaking. The carelessness often begins immediately upon the closing, when the mortgage originator transfers the mortgage into the pipeline of securitization. Thereafter, perhaps as long as the borrower continues making payment on the note secured by the mortgage, any infirmities in the assignment process seem not to float to the surface. When the mortgage is transferred to a new entity to process the foreclosure, the sins of the past residing in the documentation too often go unregarded. Let's take a look at a recent case.

In *Kondaur Capital Corporation v Hankins*,[5] the original mortgage and note were given by Hankins to Option One Mortgage Corporation; and attached to the note was an allonge showing Kondaur Capital Corporation as payee. In 2006, Option One assigned the mortgage and note to Deutsche Bank National Trust Company. In 2007, a loan modification agreement was executed by Hankins and Liquidation Properties, Inc., which then began a foreclosure action. However, only later did Deutsche Bank assign the mortgage and the note to Liquidation Properties, which subsequently assigned the mortgage and note to Kondaur.

It was not problematic for the Law Court to conclude that Liquidation Properties lacked standing when it commenced the foreclosure.[6] Ultimately, however, the Law Court upheld the trial court's substitution of parties to cure that problem.[7]

Other courts may not be so quick to allow substitution. In litigating mortgage foreclosure cases, both sides need to look at the chain of assignments and make certain that the plaintiff owns both the mortgage and the promissory note the mortgage secures.[8] If a mortgage is assigned, but the note is not also assigned to the same assignee, the assignee of the mortgage holds the mortgage in trust for the holder of the note.[9]

The trail of assignments in the case of securitized mortgage lending often proves treacherous.

Summary Judgment Procedure

Rule 56(j) is specific as to the procedure to be followed in foreclosure cases:

> (j) Foreclosure Actions. No summary judgment shall be entered in a foreclosure action filed pursuant to Title 14, Chapter 713 of the Maine Revised Statutes except after review by the court and determination that (i) the service and notice requirements of 14 M.R.S. § 6111 and these rules have been strictly performed; (ii) the plaintiff has properly certified proof of ownership of the mortgage note and produced evidence of the mortgage note, the mortgage, and all assignments and endorsements of the mortgage note and the mortgage; and (iii) mediation, when required, has been completed or has been waived or the defendant, after proper service and notice, has failed to appear or respond and has been defaulted or is subject to default. In actions in which mediation is mandatory, has not been waived, and the defendant has appeared, the defendant's opposition pursuant to Rule 56(c) to a motion for summary judgment shall not be due any sooner than ten (10) days following the filing of the mediator's report.

In reviewing a judgment entered upon a summary judgment (as opposed to a trial) the Law Court will review the summary judgment record only, which means that the complete record in support of the judgment of foreclosure must reside within the framework of the Rule 56(h) statements of material fact (SMF).[10] For this reason, if there are facts required to be established under *Higgins*, they must be included in the SMF.[11] For example, the fact that the existence or plaintiff's ownership of the mortgage and note have been admitted in the defendant's answer will not itself cure the failure to aver this (and cite the admission found in the pleadings) within the SMF. Similarly, a generalized objection or denial by the defendants without filing a separate SMF with record citations, will not serve to generate issues of material fact that will forefend summary judgment.[12] A dispute between the competing SMFs, or a deficiency in proof, unsupported by a responsive SMF cannot be resolved by filing only a responsive memorandum of law.[13] In *HSBC Bank, Trustee v. Gabay*,[14] the Court reiterated its prior statements concerning the need not only to file a SMF, but also to include in the statement citations to the record, saying that this rule "is no mere technicality to make summary judgment practice more difficult . . . ."[15] In that case, the state of the summary judgment record left issues of ownership of the note, description of the mortgaged property, order of priority among parties in interest, costs and attorneys fees unsupported by citations to the record.[16]

Even if a fact is asserted in the SMF, if it is not supported by a specific citation to record material, the court may not consider it.[17] Although standing can be raised at any point in the proceeding, even upon appeal, whether or not raised below (see note 3), for purposes of summary judgment, the issue of lack of standing still must find support in the record, either in the defendant's SMF or in the plaintiff's failure to include the entire chain of ownership of the mortgage in its own SMF.

Evidentiary Matters

Not only must the Rule 56 motion be supported by the averments in the SMF, but the specific citations to record material must refer to evidence that is admissible under the Rules of Evidence.[18] In foreclosure cases, this often implicates the competency of the witness (or affiant), and the applicability of the business records exception to the hearsay rule. In the world of securitized mortgage loan obligations, there is regularly a distinction between the owner of the mortgage and note, on the one hand, and the servicer, on the other. This can raise issues as to who is testifying (whether by affidavit or in person) as to the payment history on a note. Bear in mind that Me. R. Evid. Rule 602 provides that:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness. . . .

Between the owner of the note and mortgage and the servicer, there usually will be some witness available who is competent to testify to the

payment or non-payment of the note and the amount due. Discovery by the plaintiff may establish some facts as admissions by the defendants, but the exact amount due might not be known even to the borrowers themselves. Many borrowers do not even know who owns their mortgage, or are unable to distinguish between the owner and the servicer.

Hearsay, defined in Me. R. Evid. 801(c), is generally inadmissible under Me. R. Evid. 802, but may become admissible as an exception under Rules 803 or 804.[19] The business records exception resides in Rule 803(6):

> Records of Regularly Conducted Business. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902 (11), Rule 903 (12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Resort to the business records exception to the hearsay rule, whether established in an affidavit or through live testimony, implicates at least six discrete issues: (a) was the record made at or near the time by, or from information transmitted by, a person with knowledge?; (b) was it kept in the course of a regularly conducted business?; (c) was it the regular practice of the business to make the record?; (d) is the witness or affiant the custodian ?; (e) is he or she an "other qualified witness?"; and, (f) does the source of information or circumstances of preparation indicate a lack of trustworthiness?

In *HSBC Mortg. Servs. v. Murphy,*[20] the court defined a qualified witness, other than the person who was the custodian, as "one who was intimately involved in the daily operation of the [business] and whose testimony showed the firsthand nature of his knowledge[.]"[21] This is, in foreclosure litigation, a two-edged sword. Although it appears to set a high bar for the qualification of a witness or affiant, it nonetheless provides plaintiffs' counsel with guidance as to who will be a qualified witness.

In *Murphy*, the court found that the inconsistencies in the affidavits made them inherently untrustworthy and therefore denied the plaintiffs' motion for summary judgment. In the case of one of the affidavits, it was purportedly dated, signed, and notarized prior to the date as of which it purported to recount the amount the borrowers owed.[22] In *Beneficial Maine Inc. v. Carter*,[23] the affiant was not an employee of the owner of the mortgage, but rather was an employee of the servicer, HSBC.

The court said:[24]

> The affiant whose statements are offered to establish the admissibility of a business record on summary judgment need not be an employee of the record's creator... For instance, if the records were received and integrated into another business's records and were relied upon in that business's day-to-day operations, an employee of the receiving business may be a qualified witness. In such instances, records will be admissible pursuant to the business records exception to the hearsay rule, M.R. Evid. 803(6), if the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information.[25]

The court went on to explain the foundational elements with respect to the producer and recipient of the business information, in order for such testimony to be admissible:

- the producer of the record at issue employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business;
- the producer of the record at issue employed regular business practices for transmitting them to the receiving business;
- by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes;
- the record at issue was, in fact, among the receiving business's own records; and,
- the receiving business relied on these records in its day-to-day operations.[26]

Because the affidavit did not set forth the basis for the affiant's knowledge of (1) the producer's practices for creating, maintaining, and transmitting the records at issue; (2) the receiving party's practices in obtaining and maintaining the producer's records for the receiving party's own use; or, (3) the receiving party's integration of the producer's records into its own records, the plaintiff had failed to establish that the affiant was a "custodian or other qualified witness" who could provide trustworthy and reliable information about the regularity of the creation, transmission, and retention of the records offered.[27]

Carter tells us that a foreclosure may require two affidavits for proceeding on a motion for summary judgment, or at least two witnesses for trial – one from the party providing the information to the servicer, and the other from the servicer – although there may be instances in which a single affidavit will suffice. The court said,

> In such instances, records will be admissible pursuant to the business records exception to the hearsay rule, M.R. Evid. 803(6), if the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information.[28]

Thus, if the affiant works for the receiving business, but has sufficient personal knowledge as to the regular practices of the business generating the data transmitted to his or her employer, the single affidavit (or single witness at trial) may be sufficient to lay a suitable foundation under the business records exception. I suspect that such sole affiants/witnesses are likely to be few and

far between, given the dispersion of roles among mortgage servicers and holders.

Miscellaneous Issues

There are a few other issues that bear mention. 14 M.R.S. §6111 requires a Notice of Right-to-Cure in residential foreclosure cases and the plaintiff must demonstrate compliance with that statute. Similarly, Me. R. Civ. P. 93(c)(4) requires that the financial forms for the mediation process be served with the complaint.

Even if the principal borrower defaults by failing to file a responsive pleading, the rules still apply as between or among the other parties-in-interest, if there are other or subordinate mortgages or liens, and the plaintiff has the obligation to prove the order of priority of the respective interests.

Moreover, Notice of Right-To-Cure sent to one of two co-borrowers may be insufficient under 14 M.R.S.A. §6111(1), which requires it to be sent "to the mortgagor and any cosigner against whom the mortgagee is enforcing the obligation secured by the mortgage at the last known addresses of the mortgagor and any cosigner that the mortgagor…" (emphasis added).

In *Federal National Mortgage Ass'n v. Bradbury*,[29] an appeal by the defendant who had succeeded in getting the trial court to dismiss the foreclosure without prejudice, the Law Court affirmed the trial court's decision not to impose contempt sanctions upon the plaintiff, although the court, in the face what the Law Court referred to as "fraudulent evidentiary filings"[30] had required the Plaintiff to pay the defendant's attorney fees for an affidavit made in bad faith. Justice Levy, in dissent, argued that the lower court should at least have held a hearing on the issue of contempt.

The case of *Bank of New York, Trustee v Richardson*,[31] is noteworthy not because of the dismissal of the appeal by the Law Court for want of a final judgment (there remained counterclaims not yet adjudicated), but because of the trial court's dismissal with prejudice of the complaint where the foreclosing lender failed to show up for and participate in the thrice-scheduled mediation.

Conclusion

I am told that when Maine had strict common law pleading, prior to the adoption of the Rules of Civil Procedure in 1959, the bar invested a great deal of effort in filing demurrers to declarations, as well as pleas in abatement or pleas in bar, since many lawyers were simply unable to properly allege all the elements of their cause of action, or couldn't distinguish between trespass, trespass on the case, trover or conversion. When one reads the cases that have been recently decided, it appears that, intentionally or not, the courts have returned us to the era of strict pleadings, at least within the realm of judicial foreclosures. This comment should not suggest that I view this is as inappropriate, since Maine jurisprudence has always adhered to a rule of strict construction against a forfeiture[32] and foreclosure of a mortgage is certainly a major forfeiture. Thus, this trend is definitely consistent with the history of Maine law.

Since there appears to be no shortage of foreclosure cases pending in the pipeline, we can anticipate further developments and refinements in this area of law. Just as important, many of these cases, even though focused on the foreclosure process, are not based upon the *foreclosure-specific* statutes and court rules, so they may guide further development of summary judgment practice in other areas of the law.

Robert S. Hark practices in Portland, focusing on civil litigation, commercial law and transactions and municipal law. He can be reached at (207) 773-500 or rhark@harklawoffice.com.

1. This collective *corpus juris* issuing from the Law Court does not reflect the cases that are being voluntarily dismissed by the plaintiffs, in the face of either losing a summary judgment motion or risking a trial, at which the plaintiff might simply lose the case.

2. A copy of the checklist appears in the Appendix to this Article.

3. 2009 ME 136, 985 A.2d 508.

4. *Id.* ¶ 11, 985 A.2d at 510-511.

5. 2011 ME 82, 25 A.3d 960. See also, *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 2, 2 A.3d 289,292 (also holding that MERS lacked standing bring the foreclosure complaint). In *Deutsche Bank Nat'l Trust Co. v. Raggiani*, although the plaintiff produced an assignment to it at the summary judgment hearing, the assignment was not a part of the summary judgment record (the plaintiff's statement of material facts cited only the allegation in the complaint that it held title to the mortgage, and this was denied by defendants). 2009 ME 1202, ¶ 6, 985 A.2d 1, 3.

6. Although not raised before the District Court, standing can be raised at any point in the proceeding, including on appeal.

7. 2011 ME 82, ¶ 15, 25 A.3d at 963.

8. For instance, a mortgage given to TD Banknorth but foreclosed by TD Bank requires the plaintiff to prove that the plaintiff is the owner. *T.D. Bank, N.A., v. Kelley,* 2011 Me. Super. LEXIS 92 (Me. Super. May 17, 2011).

9. *Averill v. Cone*, 149 A. 297, 299 (1930). See also *Jordon v. Cheney*, 74 Me. 359, 361 (1883) (cited by the Law court in *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 11, 2 A.3d 289, 295).

10. *HSBC Mortg. Servs. v. Murphy*, 2011 ME 59, ¶ 8, 19 A.3d 815, 819. See also *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 22, 2 A.3d 289, 299; *Salem Capital Group, LLC v. Litchfield*, 2010 ME 49, ¶ 4, 997 A.2d 720, 721; *Deutsche Bank Nat'l Trust Co. v. Raggiani*, 2009 ME 120, ¶¶ 5,7, 985 A.2d 1, 3; *Camden Nat'l Bank v. Peterson*, 2008 ME 85 ¶ 26, 948 A.2d 1251, 1258.

11. *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 25, 2 A.3d 289, 300.

12. *JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 5, 10 A.3d 718, 719.

13. *Higgins*, 2009 ME 136, ¶ 8, 985 A.2d at 510.

14. 2011 ME 101, 28 A.3d 1158.

15. *HSBC*, 2011 ME 101, ¶17, 28 A.2d 1158,1165-1166.

16. *HSBC*, 2011 ME 101 at ¶¶ 18-27.

17. *Bar Harbor Bank & Trust v. Woods at Moody, LLC*, 2009 ME 62, ¶ 17, 974 A.2d 934, 939

18. Rule 56(e) M.R.Civ.P.: …shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein … (emphasis added).

19. The exceptions in Rule 804 apply only where the declarant is unavailable.

20. 2011 ME 59, ¶ 10, 19 A.3d 815, 820.

21. *Id.* quoting Bank of Am., N.A. v. Barr, 2010 ME 124, ¶ 19, 9 A.3d 816, 821.

22. *Murphy*, 2011 ME 59, ¶ 12, 19 A.3d

at 821.

23. 2011 ME 77, ¶ 7, 25 A.3d 96, 100.

24. It is noteworthy that the Law Court was employing a bifurcated standard of review, where the foundational requirements were reviewed for clear error and the ultimate question of admissibility (assuming the foundational requirements were upheld) were reviewed for abuse of discretion. *Beneficial Maine, Inc. v Carter*, 2011 ME 77, ¶ 9, 25 A.3d at 102-103, citing *Bank of Am., N.A. v. Barr*, 2010 ME 124, ¶ 17, 9 A.2d 816, 820.

25. Beneficial Maine, Inc. v Carter, 2011 ME 77, ¶ 13, 25 A.3d at 101-102.

26. Beneficial Maine Inc., 2011 ME 77, ¶ 14, 25 A.3d 96, 102.

27. *Beneficial Maine, Inc.*, 2011 ME 77, ¶ 15, 25 A.3d 96, 102-103.

28. *Beneficial Maine Inc.*, 2011 ME 77, ¶ 13, 25 A.3d 96,101-102.

29. 2011 ME 120, 32 A.3d 1014; There is a related case, which is not itself a foreclosure case, wherein the United States District Court for the District of Maine has certified a question to the Law Court, *Bradbury v. GMAC Mortg.*, 780 F.Supp. 2d 118 (D.Me. 2011), 2011 U.S. Dist. LEXIS 62448 (D. Me. June 17, 2011).

30. *Federal National Mortgage Ass'n*, 2011 ME 120, ¶ 7.

31. 2011 ME 38, 15 A.3d 756.

32. *Hann v. Merrill,* 305 A.2d 545, 547 (Me. 1972); *Rubin v. Josephson*, 478 A.2d 665, 670 (Me. 1984); *Capitol Bank & Trust Co. v. Waterville*, 343 A.2d 213, 218 (Me. 1975).

Appendix

After review, the court concludes that the following requirements for a summary judgment of foreclosure have been met:

	Compliant	Non-compliant or unclear
Service: Proof of service on all defendants and parties in interest.		
Jurisdiction: Case brought in the court division where the property (or any part of it) is located. See §6321.		
Mortgage: Proof of existence of the mortgage, book and page number, and adequate description of property (including street address if any on first page of complaint).		
Properly presented proof of ownership of the mortgage, including any assignments or endorsements.[3]		
Note: Properly presented proof of ownership of the mortgage note, including all assignments and endorsements.[4]		
Breach: A breach of condition in the mortgage.		
Amount Due: The amount due on the mortgage note, including any reasonable attorney fees and court costs.[5]		
Priority: The order of priority and amounts due to other parties in interest, including any public utility easements.		
Notice: Evidence that all steps mandated by14 M.R.S. § 6111 to provide notice to mortgagor were strictly performed.		
M.R. Civ. P. 56: All facts relied upon in support of summary judgment are properly set forth in Rule 56(h) statements and properly supported in the record.		
Mediation: If required by M.R. Civ. P. 93(for cases filed after Dec. 31, 2009) or court order, proof mediation has been completed or validly waived (by action or by default).		
SCRA: If defendant has not appeared in the action, a statement, with supporting affidavit, of whether the defendant is in military service as required by the Servicemember's Civil Relief Act, 50 U.S.C. app. §521.		