

STATE OF MAINE  
CUMBERLAND, ss

BUSINESS AND CONSUMER COURT  
Location: Portland  
Docket No.: BCD-RE-14-01 ✓

OCEANIC INN, INC. and ARMAND VACHON,	)
	)
Plaintiffs,	)
	)
v.	)
	)
SLOAN'S COVE, LLC,	)
	)
Defendant	)
	)
and	)
	)
PETER FESSENDEN, Chapter 13 Trustee, and JEFF CORBIN	)
	)
Parties-in-Interest	)
	)

***ORDER ON AMENDED MOTION FOR SUMMARY JUDGMENT OF  
DEFENDANT SLOAN'S COVE***

Pursuant to M.R. Civ. P. 56, Defendant Sloan's Cove, LLC [Sloan's Cove] has filed an Amended Motion for Summary Judgment on Count I of the complaint of Plaintiffs Oceanic Inn, Inc. ["Oceanic"] and Armand Vachon, alleging breach of contract, and on Sloan's Cove's counterclaim for declaratory judgment. Sloan's Cove's motion does not seek summary judgment on Count IX of the Complaint, for accounting.

At Plaintiffs' request, their obligation to respond to Sloan's Cove's motion was deferred pursuant to M.R. Civ. P. 56(f) in order for Plaintiffs to take certain discovery. Plaintiffs have now filed an Opposition to the Motion and Sloan's Cove has filed a reply memorandum.

## *BACKGROUND*

This Order is based on the following facts, most of which are undisputed, with disputed facts noted.

Plaintiff Armand Vachon is the principal and sole shareholder of Oceanic, a Maine corporation. Sloan's Cove is a Maine limited liability company wholly owned by Pauline Beale, Vachon's sister. For several years, Vachon and Beale have been involved in litigation surrounding the probate of their mother's estate, of which Beale is the personal representative. The relationship between brother and sister is contentious.

The real estate at issue in this case is a 15-unit motel, pub and café, collectively doing business as the Oceanic Inn and located at 43 West Grand Avenue in Old Orchard Beach. The real estate is assessed by the Town for approximately \$650,000, and Vachon estimates its replacement value to be in the range of \$1.5 million.

Prior to 2007, Oceanic owned the real estate and Vachon was the principal of Oceanic and operated the motel, pub and café business for many years. However, sometime around 2006-07, when Vachon, according to his affidavit, was having emotional problems, his mother and stepfather, Georgette Proulx and Gerald Proulx, became involved as principals in the Oceanic corporation and evidently operated the business for a time. The details of their involvement are not clear in the record. They apparently had their own operating entity, Proulx Real Estate Investment, LLC.

In 2006, Oceanic, acting through Georgette and Gerald Proulx, executed a mortgage and note on its real property in Old Orchard Beach in favor of TD Banknorth, N.A. Proulx Real Estate Investment, LLC was also involved in the transaction. In 2007, Oceanic conveyed the real estate to the Proulx's, who immediately conveyed it to Mr. Vachon, both deeds being

dated April 6, 2007. From these events, it can be inferred that Vachon had returned to an active role in operating the Oceanic Inn.

In November 2009, TD Banknorth, N.A. assigned the note and mortgage to Sloan's Cove pursuant to a settlement agreement to satisfy Oceanic's debts. The settlement agreement called for Oceanic and Vachon to make interest only payments to Sloan's Cove for three years and then a balloon payment.

As part of the settlement and consistent with Vachon's ownership of the real estate, Sloan's Cove and Armand Vachon entered into an Allonge and Modification Agreement dated November 12, 2009. Pursuant to express terms of the Allonge and Modification Agreement, Vachon became the sole obligor under the note, and acknowledged and ratified the mortgage, waiving all defenses to its enforceability.

All interest only payments due under the settlement were paid in a timely fashion to Sloan's Cove, but in November of 2012, Oceanic and Vachon were unable to make the balloon payment when it became due.

Meanwhile, Vachon and his sister, Pauline Beale, the principal of Sloan's Cove, were also involved in litigation for years regarding the conservatorship of their mother and then regarding her estate. Vachon has been represented in the conservatorship and estate litigation by attorney John Campbell. According to Vachon's affidavit and Plaintiffs' Statement of Additional Material Facts, one of the issues in the conservatorship/estate litigation has been Beale's claim that Vachon had wrongfully induced the Proulx to convey the Oceanic Inn real estate to him in 2007:

[Beale and her attorneys] had claimed falsely that I had taken advantage of my mother and stepfather and that the Oceanic Inn should be considered to be not my property but the property of Oceanic Inn, Inc. which stock was owned by my mother and step father.

Vachon Affidavit ¶ 8 (emphasis in original).

In November 2012, when Vachon missed the balloon payment due to Sloan's Cove under the 2009 settlement agreement, Vachon and Oceanic, of which Vachon was once again the sole shareholder, retained attorney Joseph Goodman to represent them. For reasons not clear in the record, Vachon apparently never informed attorney Goodman that he, not Oceanic owned the real estate.<sup>1</sup> Attorney Joseph Goodman believed that Oceanic owned the property and was still liable on the note and mortgage.

In December of 2012, attorney Goodman on behalf of Oceanic filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code and listed Sloan's Cove as its only secured creditor. The purpose of the filing was to invoke the automatic stay and allow Oceanic time to formulate a plan to pay its debts without apprehension of foreclosure. Oceanic proposed a plan with the Bankruptcy Court to resolve its debt, but Sloan's Cove objected, and the case was ultimately dismissed. Throughout the proceeding, Sloan's Cove and Oceanic, as well as the bankruptcy court, treated the real estate as owned by Oceanic rather than Vachon individually.

During 2012 and well into 2013, attorneys for the three parties to this case were in frequent communication. By then, Sloan's Cove was represented by attorneys Daniel Cummings and John Bonneau.

Sometime during the summer of 2013, Sloan's Cove decided to exercise its power of sale pursuant to the mortgage now held by it. In an internal e-mail dated August 8, 2013, attorney Cummings asked a corporate/real estate paralegal in his law firm to ascertain ownership of the real estate for purposes of foreclosing on the mortgage. The paralegal responded the same day, advising that Vachon was the record owner, and that there was a "Clerk's Certificate on record claiming a fraudulent transfer," *see* Exhibit A to Campbell Affidavit.

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<sup>1</sup> Vachon's affidavit says that his observation of the 2012-13 bankruptcy proceeding indicated that "everyone was treating the Inn as being the property of the corporation . . ." Vachon Affidavit ¶¶ 8, 16. It never, however, says that he did not know, or had forgotten, that he owned the Inn real estate.

There is nothing in the record to indicate that Sloan's Cove's attorneys had actual knowledge of who or what owned the real estate prior to August 8, 2013, whereas Vachon and Beale plainly knew that Vachon owned it because his ownership was an issue in the litigation with Beale.

On August 19, 2013, attorney Cummings on behalf of Sloan's Cove, sent two documents and a cover letter via registered mail, addressed to Armand Vachon and mailed to Vachon at the Oceanic property rather than to Vachon's home address. The cover letter was addressed to Armand Vachon. One of the two documents was a notice of mortgagee's sale of real estate pursuant to the power of sale provisions of the mortgage and note granted by Oceanic to TD Bank and now held by Sloan's Cove. The other document was titled Notice of Intention to Foreclose and Liability for Deficiency After Foreclosure of Mortgage, and it was addressed to both Vachon and Oceanic. Both documents indicated that Sloan's Cove intended to foreclose on the mortgage given by Oceanic to TD Banknorth, N.A. pursuant to the power of sale provisions of the mortgage, and to hold the sale September 13, 2013.

Although Vachon refused to sign for Sloan's Cove's August 19 mailing, there is no dispute that he and Oceanic received actual notice of Sloan's Cove's intent to exercise the power of sale. Prior to the sale, Sloan's Cove recorded the notice of sale in the York County Registry of Deeds and caused it to be published in the Portland Press Herald for three successive weeks.

Attorney Cummings for Sloan's Cove and Attorney Goodman for Vachon and Oceanic were in communication regarding possible alternatives to the sale up to the morning of September 13. During those communications, Attorney Cummings suspected that attorney Goodman was under the mistaken belief that Oceanic rather than Vachon owned the real estate, and never told attorney Goodman that he had learned that Vachon rather than Oceanic owned the real estate.

The day before the scheduled September 13 sale, attorney Cummings asked the paralegal in his firm to update ownership of the real estate, and she reported back that record ownership remained with Vachon.

As scheduled in the notice of sale, Attorney Cummings conducted the power of sale foreclosure auction on behalf of Sloan's Cove on September 13, 2013. Attorney Cummings is not an auctioneer licensed by the State of Maine. The auction was held at 55 West Grand Avenue, Old Orchard Beach, a very short distance from the real estate being auctioned.

In an attempt to stop the auction, Oceanic filed a second voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code, again listing Sloan's Cove as the only creditor, and alerting Sloan's Cove of the filing before the auction began. Attorney Cummings alerted the bidders at the auction that a bankruptcy case had been filed, but stated he anticipated he would be able to consummate a sale. He also clarified that only real estate and fixtures to the real estate were being sold, and that no personal property (other than fixtures attached to the real estate) would be sold.

Three prospective buyers registered and paid the required \$25,000 deposit to bid, and two of the three actually bid. Bidding started at \$345,000, and the two bidders bid the price upward. The winning bid of \$455,000 was submitted by Jeff Corbin. After the sale, Corbin executed a purchase and sale agreement, and satisfied Sloan's Cove of his ability to close on the purchase.

Plaintiffs filed suit in York County Superior Court on September 24, 2013. The case was approved for transfer to the Business and Consumer Docket on October 24, 2013. As a result of the uncertainty caused by this litigation, Corbin has requested to defer the closing on his purchase, and Sloan's Cove has granted him multiple extensions of the closing deadline.

### STANDARD OF REVIEW

For Sloan's Cove to obtain summary judgment on Count I of the complaint and on its counterclaim for declaratory judgment, it must establish that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. M.R. Civ. P. 56(c); *Levine v. R.B.K. Caly Corp.*, 2001 ME 77, ¶4, 770 A.2d 653.

An issue of "fact exists when there is sufficient evidence to require a fact-finder to choose between competing versions of the truth at trial." *Inkell v. Livingston*, 2005 ME 42, ¶4, 869 A.2d 745 (quoting *Lever v. Acadia Hosp. Corp.*, 2004 ME 35, ¶2, 845 A.2d 1178). Any ambiguities "must be resolved in favor of the non-moving party." *Beaulieu v. Aube Corp.*, 2002 ME 79, ¶2, 796 A.2d 683 (citing *Green v. Cessna Aircraft Co.*, 673 A.2d 216, 218 (Me. 1996)).

Summary judgment is appropriate on issues such as motive or intent "if the non-moving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Dyer v. Dept. of Transp.*, 2008 ME 106, ¶14, 951 A.2d 821 (quoting *Vives v. Fajardo*, 472 F.3d 19, 21 (1st Cir. 2007)) (quotations omitted).

To survive a motion for summary judgment on a claim as to which the non-moving party has the burden of persuasion, the non-moving party must make out a *prima facie* case on each element of the claim that the motion puts into contention. See *Quirion v. Geroux*, 2008 ME 41, ¶9, 942 A.2d 670 (negligence claim); *Reliance Nat'l Indem. v. Knowles Indus. Servs., Corp.* 2005 ME 29, ¶9, 868 A.2d 220 (subrogation); *Ripsett v. Bemis*, 672 A.2d 82, 84 (Me. 1996) (defamation).

The allocation of the burden of persuasion merits brief discussion. Plaintiffs have the burden to prove their breach of contract claim in Count I, including their claims of failure to act in good faith and failure to engage in fair dealing. Who has the burden on Sloan's Cove's declaratory judgment counterclaim to validate the foreclosure sale is less clear. In the court's

view, Sloan's Cove has the burden on its counterclaim to make a *prima facie* showing that its power of sale foreclosure was compliant with the power of sale provision of the mortgage and also the power of sale statutes. See 14 M.R.S. §§ 6203-A *et seq.*; 33 M.R.S. § 501-A. To defeat Sloan's Cove motion, as it relates to Sloan's Cove's declaratory judgment counterclaim, Plaintiffs do not need to overcome that *prima facie* showing, but they do have to demonstrate a genuine issue of material fact as to whether Sloan Cove's foreclosure procedure was valid.

### *DISCUSSION*

In moving for summary judgment on Count I of the complaint and on its declaratory judgment counterclaim, Sloan's Cove is essentially asking the court to declare that the power of sale foreclosure, as conducted, was valid and effective.

Count I of the complaint is styled as a breach of contract claim, but, as this court has already observed in its Order on Sloan's Cove's Motion to Dismiss, the alleged breach consists of Sloan's Cove's allegedly wrongful and improperly conducted power of sale foreclosure. For that reason, Sloan's Cove's characterization of Count I and its declaratory judgment counterclaim as each being the mirror image or "flip side" of the other is mostly, but not entirely, correct. It is only partly correct because Plaintiffs' breach of contract claim reaches more broadly than the Defendant's counterclaim, in that some of the alleged breaches predate the foreclosure that the counterclaim seeks to validate.

The breaches of contract alleged in the complaint are:

- Failure to provide payoff information on request;
- Failure to act in good faith and with fair dealing;
- Failure to hold a commercially reasonable auction;
- Failure to notice the sale of the property properly; and
- Failure to conduct of power of sale foreclosure in compliance with statutory requirements and/or on commercially reasonable terms.

(Compl. ¶¶ 69-76.)



Of these, only the first, relating to payoff information, and potentially the second, failure to act in good faith and with fair dealing, relate to matters occurring prior to Sloan's Cove's power of sale foreclosure procedure. The others all relate to the conduct of the power of sale foreclosure itself. Accordingly, this analysis focuses, first, on issues predating Sloan Cove's initiation of the power of sale foreclosure, and second, on the foreclosure process.

1. Issues Prior to the Foreclosure

In their Opposition, Plaintiffs focus at some length on the conflict between Vachon and his sister and on other alleged wrongdoing by Vachon's stepfather. In the court's view, none of the issues in the Beale-Vachon dispute is material to this case. Whatever the issues between Plaintiff and his sister or his stepfather, the following facts are undisputed:

- Sloan's Cove succeeded to TD Banknorth's rights under the note and the mortgage;
- Vachon in the Allonge and Modification Agreement, consented to Sloan's Cove becoming his creditor on the note and mortgage;
- Vachon in the Allonge and Modification Agreement acknowledged and ratified the note and mortgage in the hands of Sloan's Cove and agreed that they were enforceable against him; and
- Vachon has not made the balloon payment he agreed to pay.

By statute, the validity of a power of sale in a mortgage granted by a corporation is not affected by the subsequent transfer of the mortgaged real estate to an individual. *See* 14 M.R.S. § 6203-A ("Any power of sale incorporated into a mortgage is not affected by the subsequent transfer of the mortgaged premises from the corporation, partnership, including a limited partnership, limited liability company or trustee of the trust to any other type of organization or to an individual or individuals."). Thus, Sloan's Cove was entitled to enforce the note and mortgage against Vachon, and nothing in the record before the court raises an issue about lack

of good faith and fair dealing, prior to the events surrounding the foreclosure, which are addressed below.

Regarding Sloan's Cove's actions during the 2012-13 Oceanic bankruptcy proceeding, Plaintiffs attempt to generate issues of good faith and fair dealing by arguing that Sloan's Cove blocked Oceanic's efforts to have a plan of reorganization approved, including acquiring unsecured debt so as to block a "cram down" approval. Because these allegations relate to Oceanic and not to Sloan Cove's claims against Vachon, and also because any objection to Sloan Cove's tactics could presumably have been, and may have been, raised in the Bankruptcy Court, they do not suffice to raise a genuine issue here.

As to Sloan's Cove's alleged failure or refusal to provide payoff information, assuming that the refusal did occur as alleged, Vachon has not made any showing by affidavit or otherwise that, had such information been provided, he could or would have made payment of the amount due on the note. Thus, assuming further that a refusal to provide payoff information is a breach of contract, this was not a breach that caused any damage or harm. A breach of contract that does not result in any harm or loss is not actionable. *See Tobin v. Barter*, 2014 ME 51, ¶10, 89 A.3d 1088 ("In order to obtain relief for a breach of [ ] contract, the plaintiff must [ ] demonstrate that the defendant breached a material term of the contract, and that the breach caused the plaintiff to suffer damages.").

For these reasons, the court concludes that Plaintiffs have not made a *prima facie* showing that Sloan's Cove committed any breach of contract prior to initiating the foreclosure process, and thus that Sloan's Cove is entitled to summary judgment on the pre-foreclosure aspect of the Plaintiffs' breach of contract claim in Count I.

2. Issues Relating to the Foreclosure

With regard to Sloan's Cove's power of sale foreclosure, the Plaintiffs raise numerous issues, any one of which, they claim, is sufficient to invalidate the foreclosure and thus defeat Sloan Cove's motion, both as to Count I of Plaintiffs' Complaint and to the declaratory judgment counterclaim.

Regardless of the type of foreclosure, Maine law requires strict compliance with the governing statutes. See *KeyBank Nat. Ass'n v. Sargent*, 2000 ME 153, ¶ 36, 758 A.2d 528 ([I]n order to effect a legal foreclosure all steps required by the statute must be strictly performed") (citing *Winter v. Casco Bank and Trust Co.*, 396 A.2d 1020, 1024 (Me.1979)). However, the Law Court has suggested that in a foreclosure by civil action, the "strict compliance" doctrine is limited to the procedures leading to a foreclosure judgment and not to the procedure of the sale itself. *KeyBank*, 2000 ME 153, ¶ 38, 758 A.2d 528 (holding "any error in the *sale* process should not serve as grounds to set aside the foreclosure *judgment* itself. The "strict compliance" doctrine is limited to those procedures leading to the foreclosure judgment") (emphasis in original); see also *First Tracks Investments, LLC v. Sunrise Schoolhouse, LLC*, BCD-CV-11-31 (Bus. & Consumer Ct. Apr. 13, 2012).

In contrast, as this court stated in *First Tracks*, "the [Law Court's] stated rationale for not requiring strict compliance in the post-judgment foreclosure sale procedure is that, in a foreclosure by civil action, the mortgagee's right of redemption has already expired when the foreclosure sale takes place." *Id.* (citing 14 M.R.S.A. § 6323(1)) ("[A]ll rights of the mortgagor to possession terminate when the right of redemption expires."). However, in a power of sale foreclosure "the sale itself operates to terminate the mortgagor's rights in the

property.”<sup>2</sup> *Id.* “When the challenge is to the procedures used to conduct the foreclosure sale, the proper analysis for the trial court is whether it would be equitable to set aside the sale given the procedures that were employed by the mortgagee.” *KeyBank*, 2000 ME 153, ¶ 38, 758 A.2d 528 (citing *Farm Credit of Aroostook v. Sandstrom*, 634 A.2d 961, 962-63 (Me. 1993)) (noting that action to set aside foreclosure sale “presumably rel[ies] on the equitable power granted to the court in actions to foreclose mortgages”).

The Plaintiffs have raised four issues concerning the equities and commercial reasonableness of the subject sale. They allege: (1) Attorney Cummings, who presided over the sale, was not a licensed auctioneer; (2) the notice of the sale was presented to Vachon in his personal capacity and not to the corporate entity; (3) Corbin, the highest bidder, has been allowed too much time to close; and (4) the sale price was unreasonable, in that Sloan’s Cove failed to sell the personal property along with the real estate, a step that would have enhanced the value of the real estate to prospective bidders. The court addresses each of these issues in turn below.

*i. Failure to Procure a Licensed Auctioneer*

In this case, attorney Cummings conducted the power of sale foreclosure auction on behalf of Sloan’s Cove on September 13, 2013. The Plaintiffs contend that the sale was inequitable as attorney Cummings is not a licensed auctioneer under the laws of the State of

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<sup>2</sup> In Maine, power of sale foreclosure is governed by 14 M.R.S § 6203-A. Under the statute, any holder of a mortgage on real estate that is granted by a corporate entity may, upon breach of condition, foreclose a mortgage and sell the subject real estate. However, prior to sale:

[N]otice [must be] published once in each of 3 successive weeks, the first publication to be not less than 21 days before the day of the sale in a newspaper of general circulation in the town where the land lies and which notice must prominently state the street address of the real estate encumbered by the mortgage deed, if any, and the book and page number of the mortgage.

*Id.* Further, [t]he person selling shall, within 30 days after the sale, cause a copy of the notice as published and the person's affidavit . . . stating the person's acts, or the acts of the person's principal or ward, to be recorded in the registry of deeds for the county where the land lies.” 14 M.R.S. § 6203-B.

Maine. Pursuant to 32 M.R.S. § 285, “[a] person in this State who engages in the business of auctioneering, professes or advertises to be an auctioneer or advertises the sale of real, personal or mixed property by auction shall hold a valid auctioneer’s license.” Thus, the Plaintiffs contend that because attorney Cummings failed to hold a valid auctioneer licenses, the auction sale should be set-aside as void. (Pl.’s Opp. Mot. 15.)

At the outset, it must be noted that the Plaintiffs’ argument finds no support in the Maine power of sale foreclosure statute, which provides that any person acting in the name of the holder of the mortgage may exercise the power of sale. The “Statutory Power of Sale” provision at 33 M.R.S. § 501-A states: “ [U]pon any default in the performance . . . the mortgagee or . . . [his or her] attorney, may sell the mortgaged premises . . . by a public sale on or near the premises then subject to the mortgage.” *See also* 14 M.R.S. § 6203-A.

Although the Maine Law Court has not specifically decided the issue, the Superior Court has held that a foreclosure pursuant to a power of sale conducted by an attorney who was not a licensed auctioneer does not invalidate the sale. *See Ramsey v. Pepperrell Bank & Trust*, No. CV-05-234, 2007 WL 1523496 (Me. Super., Yor. Cty., Jan. 11, 2007) (noting “any penalty the attorney might face due to his lack of a license does not generate a cause of action for ‘wrongful foreclosure’ . . . and does not affect the overall validity of the sale”). Moreover, Massachusetts, among other jurisdictions, has long held that “[t]he fact that the auctioneer at the sale had not an auctioneer’s license does not invalidate the sale.” *Flynn v. Curtis & Pope Lumber Co.*, 139 N.E. 533, 536 (1923); *Williston v. Morse*, 51 Mass. 17, 21 (1845) (“An auction sale by one not licensed as an auctioneer will not avoid the conveyance to an innocent purchaser without knowledge that the auctioneer was not licensed, although it may render the seller liable to a penalty.”); *Gorman v. Berg*, 141 A. 179 (R.I. 1928) (statute requiring auctioneer to be licensed does not invalidate auction sale by unlicensed auctioneer); *Associates Discount*

*Corp. v. Lunsford*, 204 Va. 1, 128 S.E.2d 924 (1963) (statute requiring auctioneers to be licensed did not affect validity of vehicle sale conducted by creditor's employee who did not hold license). See also 7A C.J.S. *Auctions and Auctioneers* § 47 ("A sale at auction is generally not invalid because it is conducted by a person not licensed as an auctioneer, even though the act of selling subjects such person to a penalty.")<sup>3</sup>

Further, the Maine licensing statute offers a remedy that extends to setting aside the foreclosure sale. Penalties for failing to procure an auctioneering license prior to conducting a sale are governed by the provisions of Title 10, section 8003-C. Said section provides both criminal and civil penalties. The civil penalties include "a fine of not less than \$1,000 but not more than \$5,000 for each violation." Additionally:

The Attorney General may bring an action in Superior Court to enjoin any person from violating subsection 4, whether or not proceedings have been or may be instituted in District Court or whether criminal proceedings have been or may be instituted, and to restore to any person who has suffered any ascertainable loss by reason of that violation any money or personal or real property that may have been acquired by means of that violation and to compel the return of compensation received for engaging in that unlawful conduct.

10 M.R.S. 8003-C (5). Thus, there is no private cause of action under the licensing statute to justify this court in setting aside the foreclosure sale.

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<sup>3</sup> Other commercial foreclosure statutes in Maine expressly authorize an attorney to auction property without mention of the licensing statute. For example, 33 M.R.S. § 595(1)(2)(b), which governs the foreclosure of commercial timeshares states:

The foreclosure sale must be by public auction, conducted by an auctioneer or attorney licensed to practice in the State. At the discretion of the auctioneer or attorney, the reading of the names of the time-share owners, if more than one, the description of time-share estates, if more than one, and the recording information, if more than one instrument, may be dispensed with.

(emphasis added). Note, the foreclosure of a commercial timeshare is not conducted pursuant to a court order and there is no exemption provided in the licensing statute for such sale. Thus, it can be inferred that the legislature specifically intended attorneys to have the ability to exercise a power of sale on behalf of his or her clients in the commercial timeshare foreclosure setting.

Based on the statutory provisions authorizing an attorney to conduct the foreclosure sale, and also because attorney Cummings was a duly authorized attorney of the mortgagee and because there is no private cause of action under 32 M.R.S. § 285, this court will not set aside the foreclosure sale on the ground that the sale was not conducted by a licensed auctioneer.

*ii. Issues Concerning Notice*

Plaintiffs contend that the Defendant did not comply with the notice provision of 14 M.R.S. § 6203-A(1) which requires:

A copy of the notice [to] be served on the mortgagor or its representative in interest, or may be sent by registered mail addressed to it or the representative at its last known address, or to the person and to the address as may be agreed upon in the mortgage, at least 21 days before the date of the sale.

Plaintiffs further contend that the notice provided in this case “was intended only for Mr. Vachon as owner, but it did not reveal anything about him being the owner and was not sent to [Vachon’s] home address.” (Pl.’s Opp. Mot. 17.) The court finds that notice was sufficient in this case. The notice was sent to a post office box that is used by both Oceanic and Vachon individually. The notice was addressed to Vachon and, although Vachon refused to sign, there is no dispute that Vachon had notice of Sloan’s Cove’s intent to foreclose by power of sale. Further, contrary to the Plaintiffs’ contention, the above statute does not specify that the notice must be provided to an individual’s home address.

Plaintiffs’ contention that the Defendant had an obligation to present the Plaintiffs with information explaining that Vachon, a named Plaintiff, was the owner of the subject property is without merit. “The mere record of a valid mortgage gives constructive notice to all. All are presumed to know its contents, for any one interested can obtain knowledge by examining the

record.”<sup>4</sup> *Globe Slicing Mach. Co. v. Casco Bank & Trust Co.*, 154 Me. 59, 63, 142 A.2d 30, 32 (1958) (quoting *Thurlough v. Dresser*, 98 Me. 161, 56 A. 654 (1903)). Thus, all interested parties are presumed to have had constructive notice of the true owner of the property at all points in time during this litigation. A quick review of the mortgage instrument and accompanying documents would have dispelled any confusion.

*iii. Failure to Default Corbin for Not Closing in a Timely Manner*

Plaintiffs argue that the Defendant owes a fiduciary duty to enforce the terms of the sale. In this case, Corbin has not yet closed on the property after purchasing it at the power of sale foreclosure auction. However, the Law Court has long held that a lender owes a fiduciary duty to a borrower, only in very limited circumstances. *Stewart v. Machias Sav. Bank*, 2000 ME 207, ¶11, 762 A.2d 44 (“Standing alone, a creditor-debtor relationship does not establish the existence of a confidential or fiduciary relationship”) (quoting *First NH Banks Granite State v. Scarborough*, 615 A.2d 248, 250 (Me. 1992)). Rather to establish such relationship, “a party must demonstrate diminished emotional or physical capacity or the letting down of all guards and bars.” *Id.*

In this case, the record compels the conclusion that Plaintiffs have been adverse to Defendant in this and the Vachon-Beale litigation for years. Because the narrow circumstances under which a fiduciary duty may be established are entirely absent in this case, the court will not analyze the conduct of the sale under a fiduciary standard.

Further, the pendency of Plaintiffs’ challenge to the foreclosure sale has justified the extensions of the deadline for Corbin to close on his purchase of the real estate. Sloan’s Cove

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<sup>4</sup> “But a record is not constructive notice of more than the record itself discloses. Third persons are chargeable with notice of no more than they can ascertain from the record or from being put upon their inquiry by the record.” *Thurlough v. Dresser*, 98 Me. 161, 56 A. 654, 655 (1903).



has indicated that Corbin will close upon the completion of this litigation, when he can obtain adequate title insurance. (Def.'s Rep. Mot. 9.)

*iv. Inadequate Sale Price*

Plaintiffs argue that the sale price procured by the foreclosure auction was grossly inadequate as the Defendant did not arrange to sell the contents of the hotel together with the land and the ultimate sale price was almost \$200,000 below the appraised value. (Pl.'s Opp. Mot. 8, 29.) The Law Court has held "price inadequacy is generally an insufficient basis on which to challenge the reasonableness of a sale unless other factors exist, such as fraud, unfairness, or other irregularity." *Bar Harbor Bank & Trust v. Woods at Moody, LLC*, 2009 ME 62, ¶ 20, 974 A.2d 934; *First Tracks Investments, LLC v. Sunrise Schoolhouse, LLC*, BCD-CV-11-31 (Bus. & Consumer Ct. Apr. 13, 2012).

In this case, while the sale price was below the assessed value, the sale yielded a \$100,000 surplus. Further, pursuant to the power of sale statute:

[U]pon . . . default . . . in performance . . . the mortgagee . . . may sell the mortgaged premises or such portion thereof as may remain subject to the mortgage in case of any partial release thereof, either as a whole or in parcels, together with all improvements that may be thereon, by a public sale on or near the premises then subject to the mortgage, or, if more than one parcel is then subject thereto, then on or near one of said parcels, or at such place as may be designated for the purpose in the mortgage, first complying with the terms of the mortgage and the statutes relating to the foreclosure of mortgage by the exercise of a power of sale.

33 M.R.S. § 501-A. This indicates that the mortgagee has some discretion as to what is sold at the auction. Thus, even assuming the premise of the Plaintiffs' argument that including the personality in the sale would have enhanced the foreclosure sale price for the real estate, the court will not set aside the sale based on an inadequate sale price.

*3. The Overall Equities*

The foregoing sections of this Order have analyzed the validity of Sloan's Cove's foreclosure in light of each of the Plaintiffs' objections separately, and has concluded that none

of the Plaintiffs' objections, in and of itself, supports setting aside the sale. However, it is also necessary for the court to assess the Plaintiffs' objections together, as a totality, for purposes of deciding, "whether it would be equitable to set aside the sale given the procedures that were employed by the mortgagee." *KeyBank Nat. Ass'n v. Sargent*, 2000 ME 153, ¶ 38, 758 A.2d 528; *see also Farm Credit of Aroostook v. Sandstrom*, 634 A.2d 961, 962-63 (Me. 1993).

Here, Sloan's Cove's filings affirmatively demonstrate that it complied with the express requirements of the power of sale foreclosure statute. Although an attorney rather than an auctioneer conducted the sale, the result was a winning bid higher than the amount owed. The information on who owned the property was a matter of record and easily ascertainable. Sloan's Cove had no obligation to assist Vachon in stopping the sale, which was his avowed objective, by reminding him that he owned the property.

As to the issue of an equitable basis for setting aside the sale, the court does not see the equities tilted in favor of the Plaintiffs, and also does not see any genuine issue of material fact that would preclude summary judgment. Accordingly, the court will grant Sloan's Cove's motions for summary judgment as to Count I of the Complaint and as to the Counterclaim.

4. *Sloan's Cove's Request for Certification Under M.R. Civ. P. 54(b)*

Sloan's Cove has also moved that any judgment on its favor on Count I of the Complaint and on the Counterclaim be certified as final pursuant to Rule 54(b) of the Maine Rules of Civil Procedure. "Rule 54(b) requires a trial court to make an express determination that there is no just reason to delay the entry of a final judgment on a claim." *Key Bank of Me. v. Park Entrance Motel*, 640 A.2d 211, 212 (Me. 1994). In determining whether there is "no just reason for delay" Maine courts consider:

[T]he relationship between adjudicated and unadjudicated claims, the likelihood that the reviewing court will face the same issues more than once, the possibility that future action by the trial court will render moot the need for review, whether immediate appeal

will expedite the trial process, and miscellaneous factors such as the *res judicata* effect of a final judgment and economic and solvency considerations.

*Fleet Nat. Bank v. Gardiner Hillside Estates, Inc.*, 2002 ME 120, ¶ 13, 802 A.2d 408.

The Law Court has further held that a final judgment should be entered “only in limited and special circumstances . . . . Because there is a strong policy against piecemeal review of litigation, there must be a good reason for the certification.” *Guidi v. Town of Turner*, 2004 ME 42, ¶ 9, 845 A.2d 1189. Thus, the court must “determine whether the facts of this case constitute such an unusual circumstance.” *Id.* ¶ 10.

In this case, Count IX of the Plaintiffs’ Complaint, requesting an accounting, remains. At this stage, the court needs to know more about the scope and timeframe for the accounting in order to determine whether Rule 54(b) certification is appropriate. An accounting that can be presented expeditiously argues against Rule 54(b) certification; an extensive accounting proceeding could argue in favor of such certification. Accordingly, the court defers action on Sloan’s Cove’s Rule 54(b) request until at least a further conference of counsel.

#### CONCLUSION

For the reasons stated, the court concludes that Defendant Sloan’s Cove is entitled to summary judgment on both Count I of the Complaint and the Counterclaim. The entry will be: Defendant’s Amended Motion for Summary Judgment is granted, except with regard to Rule 54(b) certification. Judgment for Defendant against Plaintiffs on Count I of the Complaint and on the Counterclaim.

The Clerk will schedule a conference of counsel on the remaining claim.

Pursuant to M.R. Civ. P. 79, the clerk is hereby directed to incorporate this Order into the docket by reference.

Dated October 15, 2014



A. M. Horton, Justice  
Business & Consumer Court

Entered on the Docket: 10-17-14  
Copies sent via Mail  Electronically