STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. HAN-24-170

WELLS FARGO BANK, N.A.,

Plaintiff/Appellant,

v.

LINDA C. BENOIT ET AL.

Defendants/Appellees.

ON APPEAL FROM THE HANCOCK
COUNTY SUPERIOR COURT

BRIEF OF APPELLANT WELLS FARGO BANK, N.A.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

On May 28, 2004, Todd and Linda Benoit executed a promissory note in the original amount of $573,200.00 (the "Note"). Appendix ("A.") 22. To secure the Note, Benoit executed a mortgage to Olympus Mortgage Company recorded in the Hancock County Registry of Deeds in Book 3957, Page 145 (the "Mortgage"), encumbering real property located at 3 Youngs Point Road, Corea, Maine (the "Property"). A. 22. Plaintiff Wells Fargo Bank, N.A. (2004-WCW2) a/k/a Wells Fargo Bank, N.A., as Trustee for Park Place Securities, Inc., Asset-Backed Pass-Through Certificates, Series 2004-WCW2 ("Wells Fargo") subsequently received an assignment of the Mortgage. A. 40.

The Note required initial monthly payments of principal and interest in the amount of $4,488.92 beginning August 1, 2004. A. 22; Trial Ex. 2 (Ex. D to Plaintiff's Post-Trial Brief, ¶ 3.) The Mortgage also includes a promise to pay principal and interest due under the Note and an obligation to pay taxes and insurance. Trial Ex. 3 (Ex. B to Plaintiff's Post-Trial Brief, ¶ 3.) No payments have been made on the Mortgage since May 2005. A. 223 ("[T]here's been no payments made after 2005."); Trial Ex. 11 (Ex. G to Plaintiff's Post-Trial Brief).

On October 14, 2005, the Benoits filed a voluntary petition under Chapter 7 of the Bankruptcy Code. A. 51. The petition lists the Property on Schedule D, and names Countrywide Home Loans (the loan servicer at the time) as a creditor holding a secured claim. A. 58. In the petition the Benoits stated their intention to surrender the Property. A. 83. On March 1, 2006, the Bankruptcy Court issued a discharge. A. 93.

Wells Fargo filed the foreclosure complaint that gives rise to this appeal in 2017. A. 38. In 2022 Wells Fargo filed a motion in *limine* arguing that because the Benoits had surrendered the Property in bankruptcy they were judicially estopped from contesting the foreclosure. A. 44.

In its order granting Wells Fargo's motion in *limine* the trial court laid out the facts relevant to its judicial estoppel analysis:

> Defendants had previously filed, Chapter 7 Bankruptcy proceedings. The specific property[] which is the subject of the pending foreclosure proceedings, was identified as an asset which the individual debtors, Todd Benoit and Linda Benoit indicated was property they intended to surrender as part of those bankruptcy proceedings. Both Benoits were subsequently granted a bankruptcy discharge in those same proceedings.

A. 19. The trial court then quoted from the decision in *Federal National Mortgage Association v. Robert Weinberg* RUMDC-RE-16-33 (Apr. 27, 2019) (Horton, J., by designation) (A. 285) to explain why the doctrine of judicial estoppel barred a borrower that had surrendered the mortgaged

property in bankruptcy (as the Benoits did here) from contesting the foreclosure:

> [b]ased on the undisputed fact that [the debtor] obtained a discharge in bankruptcy from liability on the note and mortgage on which this foreclosure action is based, the court concludes that the three elements of judicial estoppel are satisfied: (1) [the debtor's] surrender of the mortgaged property in exchange for a discharge in bankruptcy is plainly inconsistent with his opposition to the foreclosure in this case; (2) for this court to entertain his opposition would create the perception of inconsistent court determinations, suggesting that either the bankruptcy court or this court was misled, and (3) to allow [the debtor] to avoid liability on the loan yet retain the loan collateral would create obvious unfairness and detriment.

A. 19–20 (quoting *Weinberg* at 8 (A. 292)).

Returning to the Benoits, the trial court concluded that the reasoning in *Weinberg* was persuasive, and held that "although [Wells Fargo] is still required to meet its burden to prove that it is entitled to a foreclosure judgment, in terms of meeting all of the elements of a real estate foreclosure, the [Benoits] are hereby judicially estopped from contesting the foreclosure action by raising any defenses, affirmative defenses, or presenting any claim or counterclaim as part of the trial." A. 20.

At the beginning of the trial counsel for Wells Fargo argued that the language in the trial court's order precluding the Benoits from "raising any defenses would include a prohibition on [the Benoits] objecting to evidence," and would "also prevent the Defense from cross-examining our

witness." A. 153. If the Benoits were judicially estopped from contesting the foreclosure, Wells Fargo reasoned, they should not be permitted to do things at trial in an effort to stop it from happening. The trial court disagreed:

> I do not take the narrowest of readings that the Plaintiff's position would suggest. I do believe that there will be the opportunity to challenge those affirmative obligations[] Plaintiff is still required to meet in establishing the right to the foreclosure and the foreclosure remedies.

A. 153. The Benoits were permitted to object to evidence at trial and to cross-examine Wells Fargo's witness. A. 154–246.

One exhibit the Benoits were permitted to challenge was Wells Fargo's Section 6111 notice. A. 248. One of the elements a foreclosure plaintiff is required to prove is "evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements . . . ." *HSBC Bank v. Gabay*, 2011 ME 101, ¶ 10, 28 A.3d 1158, 1164. The statutory requirements are found in 14 M.R.S. § 6111 (notice of mortgagor's right to cure). The requirements for the notice of default include "[a]n itemization of all past due amounts causing the loan to be in default and the total amount due to cure the default," and "[a]n itemization of any other charges that must be paid in order to cure the default . . . ." 14 M.R.S. § 6111(1-A)(B&C). Under cross-examination by the Benoits' counsel

at trial, Wells Fargo's witness, in the trial court's view, "was unable to indicate how much of the total figure of $636,595.63 would have been principal and how much would have been interest," and the figure of $636,595.63 "was not documented in any of the documents offered at trial, but rather came from a computation made by the 'MSP system.'" A. 23–24. The trial court noted that, "[i]n response to the specific question posed by Defendants' counsel, '[b]ut there's no itemization of the principal and the interest here, [in Exhibit 16] right?', the Plaintiff's witness answered, 'Correct.'" A. 24. The trial court went on to cite additional amounts that in its view were not properly itemized in the notice. A. 24. All of these issues surfaced during the Benoits' challenge to Wells Fargo's exhibit (the Section 6111 notice) and cross-examination of its witness. The trial court determined that Wells Fargo's Section 6111 notice "was not a valid notice as required by § 6111," and dismissed Wells Fargo's complaint on that ground. A. 26. Wells Fargo appealed.

STATEMENT OF THE ISSUE PRESENTED

Did the trial court err in rejecting Wells Fargo's argument that the Benoits, after having abandoned the Property in bankruptcy, were judicially estopped from contesting the foreclosure at trial by challenging Wells Fargo's evidence and cross-examining its witnesses?

ARGUMENT

Because the Benoits declared their intention to surrender the Property in their 2005 bankruptcy proceeding, and subsequently received a bankruptcy discharge, the Benoits were judicially estopped from contesting this foreclosure action. The trial court agreed to a point, granting Wells Fargo's motion in *limine* on the issue. But for judicial estoppel to have meaning in this context, the Benoits should not have been permitted to challenge Wells Fargo's evidence and cross-examine its witnesses at trial.

I. The trial court correctly ruled that judicial estoppel applies.

Judicial estoppel "'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *Maine Educ. Ass'n v. Maine Community College System Bd. Of Trustees*, 2007 ME 70, ¶ 16, quoting *New Hampshire v. Maine*, 532 U.S. 742, 749. "'Unlike the doctrine of issue preclusion, judicial estoppel does not require that the issue have been actually litigated in the prior [phase of the] proceeding.'" *Id.* at ¶ 16 (quoting *Thorne v. Howe*, 466 F.3d 173, 181 (1st Cir. 2006). The three factors that guide the judicial estoppel inquiry are:

> (1) whether the party's later position is clearly inconsistent with its earlier position; (2) whether the party succeeded in persuading a court to accept that party's earlier position, so that

> judicial acceptance of an inconsistent position in a later proceeding would create the perception of inconsistent court determinations, suggesting that either the first or second court was misled; and (3) whether an unfair advantage or detriment would be created.

Id. at ¶ 18.

A. The Benoits' position in the trial court is clearly inconsistent with their position in the bankruptcy court.

The positions the Benoits have taken in the bankruptcy court and in the trial court are clearly inconsistent. The Bankruptcy Code required the Benoits, as individual chapter 7 debtors with secured consumer debts, to file a statement of intention to either retain or surrender items of their property that secured their debts within 30 days of filing their bankruptcy petition. 11 U.S.C. § 521(a)(2)(A). The Benoits filed their statement of intention to surrender the Property at the same time as their bankruptcy petition. A. 83.

The First Circuit has explained the options the Benoits had with respect to the Property that secured their debt to Wells Fargo:

> Subsection 521(a)(2) . . . contemplates three distinct debtor prerogatives: reaffirmation, redemption, or surrender. Where the debtor wishes to retain the collateral, he may either "reaffirm" his agreement to repay the prepetition debt under renegotiated terms acceptable to the secured creditor, or "redeem" the collateral by paying its current fair market value to the secured creditor. . . . Likewise, the Code contains provisions which fix the amount at which the debtor will be entitled to redeem the collateral unilaterally, which in some

> circumstances may not reflect its current fair market value at redemption. Where the debtor decides not to reaffirm, or the parties cannot negotiate a reaffirmation, or redemption is not economically feasible, the debtor has but one option: "surrender" the collateral.

In re Pratt, 462 F.3d 14, 17–18 (1st Cir. 2006) (citations and footnotes omitted). "Surrender" means "to make the collateral *available* to the secured creditor—*viz.*, to cede [the debtor's] possessory rights in the collateral . . . ." *Id.* at 19; *see also In re Canning*, 706 F.3d 64, 69 (1st Cir. 2013) (same); *In re Metzler*, 530 B.R. 894, 896 (Bankr. M.D. Fla. 2015) (the term "surrender" means that the debtors must "relinquish any rights in the secured property—including the right of possession—and make it available to the secured creditor."). That mean "a debtor cannot take an overt act that impedes a secured creditor from foreclosing its interest in secured property." *Id.* "A surrender, by definition, leaves the mortgagee free to exercise its rights in the collateral." *In re Brown*, 563 B.R. 451, 456 (D. Mass. 2017).

It was clearly inconsistent for the Benoits to surrender the Property in one court, and then contest Wells Fargo's foreclosure action with respect to the same Property in a different court by challenging its evidence and cross-examining its witnesses. The first requirement for judicial estoppel is therefore met.

B. Judicial acceptance of the Benoits' opposition to the foreclosure in the trial court after they surrendered the Property in the bankruptcy court would create the perception of inconsistent determinations suggesting that one of the courts was misled.

The second requirement for judicial estoppel is that the Benoits "succeeded in persuading [the bankruptcy] court to accept [their] earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception of inconsistent court determinations, suggesting that either the first or second court was misled . . . ." *Maine Education Ass'n*, 2007 ME 70 at ¶ 18. That the Benoits succeeded in persuading the bankruptcy court to accept their earlier position is evident from the fact that they received a discharge in bankruptcy after surrendering the Property. And judicial acceptance of their contesting of Wells Fargo's foreclosure on the same Property the Benoits surrendered in bankruptcy would create the perception of inconsistent determinations, suggesting that either the bankruptcy court or the trial court was misled: either the Benoits surrendered their interest in the Property (as they led the bankruptcy court to believe), or they retained an interest in it (as they led the trial court to believe by contesting the foreclosure at trial). One court or the other appears to have been misled. As the Eleventh Circuit explained in the leading case on this issue:

> Debtors who surrender property must get out of the creditor's way. [I]n order for surrender to mean *anything* in the context of § 521(a)(2), it has to mean that . . . debtor[s] . . . must not contest the efforts of the lienholder to foreclose on the property. Otherwise, debtors could obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender and enjoy possession of the collateral indefinitely while hindering and prolonging the state court process.

In re Failla, 838 F.3d 1170, 1177 (11th Cir. 2016) (citation and quotation marks omitted). It is precisely the sort of inconsistency and having it both ways that the doctrine of judicial estoppel is designed to prevent.

The "surrender" of a property in bankruptcy "requires debtors to drop their opposition to a foreclosure action" with respect to the property. *Id.* at 1176. That is because "equity will not permit" a debtor to challenge a foreclosure on "the same property that he surrendered in the Bankruptcy Court in exchange for the discharge of his debts." *Ibanez v. U.S. Bank Nat. Ass'n*, 856 F. Supp. 2d 273, 275 (D. Mass. 2012). Here is how a Maine court, citing the Eleventh Circuit's reasoning in *Failla*, put the point in granting a motion *in limine* to preclude a discharged mortgagor from contesting a foreclosure action:

> In effect, the debtor's acceptance of a discharge from liability on the loan obligation operates to deprive the debtor of standing to oppose the lender's recovery of the loan collateral. Thus, it would be utterly inconsistent for a debtor who has been granted a discharge from liability on a secured loan in the bankruptcy court to oppose later the lender's efforts to foreclose on the collateral in state court.

Federal National Mortgage Ass'n v. Weinberg, Me. Dist. RUMDC-RE-16-033 at 5 (Mar. 27, 2019) (Horton, J., by designation) (A. 289). Several other district courts have granted motions in *limine* prohibiting a discharged debtor from contesting a foreclosure. *See* A. 95–115 (*U.S. Bank Trust N.A. v. Coll*, Me. Dist. SPRDC-RE-19-84 (Aug. 26, 2020) (Sutton J.), *U.S. Bank National Ass'n. v. Breton*, Me. Dist. BRIDC-RE-19-14 (Sept. 22, 2020) (French, J.), *FNMA v. Jackson*, Me. Dist. WESDC-RE-19-47 (Sept. 28, 2020) (Raimondi, J), *FNMA v. Powers*, Me. Dist. SOPDC-RE-19-51 (Oct. 14, 2020) (Ham-Thompson, J.), *U.S. Bank N.A. v. Lynch*, Me. Dist. SPRDC-RE-20-01 (Dec. 8, 2020) (Driscoll, J.), *FNMA v. Kerfoot*, Me. Dist. BELDC-RE-19-51 (Dec. 15, 2020) (Walker, J.), *MTGLQ Investors, L.P. v. Ditaranto*, Me. Dist. BELDC-RE-19-42 (Dec. 15, 2020) (Walker, J.), *FNMA v. Burt*, Me. Dist. LEWDC-RE-19-109 (Dec. 22, 2020) (Orem, J.), *Deutsche Bank National Trust Co. v. Torras*, Me. Dist. LINDC-RE-20-011 (Feb. 5, 2021) (Stitham, J.), *Ditech Financial v. Koster*, Me. Dist. BIDDC-RE-19-44 (Apr. 22, 2021) (Mulhern, J.).

C. Letting the Benoits have it both ways would give them an unfair advantage to Wells Fargo's detriment.

The third requirement for judicial estoppel is also met, as letting the Benoits first surrender the Property in exchange for the benefit of a discharge in bankruptcy, and then turn around and contest a foreclosure action against the same property by challenging Wells Fargo's evidence and cross-examining its witnesses at trial, would give the Benoits the unfair advantage of being able to have it both ways, by enjoying the benefit of surrendering the Property when it suited their purposes, but then acting as if they retained an interest in the Property when *that* suited their purposes. This would cause Wells Fargo to experience the unfair detriment of having to deal with a defendant in their foreclosure action that retained no legally cognizable interest in the Property. As the court in *Failla* succinctly put the point, "[i]n bankruptcy, as in life, a person does not get to have his cake and eat it too." *Id*. at 1178; *see also id*. ("Concerns about fairness are not in tension with this outcome. During the bankruptcy proceedings, the Faillas declared that they would surrender the property, that the mortgage is valid, and that Citibank has the right to foreclose. Compelling them to stop opposing the foreclosure action requires them to honor that declaration.").

The trial court correctly ruled that the analysis in *Weinberg* was "directly on point," and that based on the reasoning in *Weinberg* the relief Wells Fargo sought—an order barring the Benoits from contesting the foreclosure at trial—was "fully warranted." A. 20; *see also* A. 19–20 (quoting *Weinberg* for the proposition that "(1) [the debtor's] surrender of the mortgaged property in exchange for a discharge in bankruptcy is plainly inconsistent with his opposition to the foreclosure in this case; (2) for this court to entertain his opposition would create the perception of inconsistent court determinations, suggesting that either the bankruptcy court or this court was misled, and (3) to allow [the debtor] to avoid liability on the loan yet retain the loan collateral would create obvious unfairness and detriment."). So far, so good.

II. The trial court erred in letting the Benoits contest the foreclosure by challenging Wells Fargo's evidence and cross-examining its witnesses.

The trial court was right to rule that judicial estoppel applied. Where it erred was in letting the Benoits nevertheless contest the foreclosure on Property they had surrendered in bankruptcy by challenging Wells Fargo's evidence and cross-examining its witnesses at trial.

The trial court granted Wells Fargo's motion in *limine* and ordered that Wells Fargo was "judicially estopped from contesting the foreclosure action by raising any defenses, affirmative defenses, or presenting any

claim or counterclaim as part of the trial." A. 20. At trial, however, when counsel for Wells Fargo expressed the view that the trial court's order included "a prohibition on objecting to evidence," and would "prevent the Defense from cross-examining our witnesses," the trial court disagreed, declaring that the Benoits would have "the opportunity to challenge" Wells Fargo's evidence. A. 153. On that point the trial court erred. That is because, "[i]n effect, the debtor's acceptance of a discharge from liability on the loan obligation operates to deprive the debtor of standing to oppose the lender's recovery of the loan collateral." *Weinberg*, Me. Dist. RUMDC-RE-16-033, at 5 (A. 289). Having surrendered the Property in bankruptcy, the Benoits should not have been permitted to defend against the foreclosure at trial.

The doctrine of judicial estoppel "rests on the principle that, after a party successfully asserts one position during a legal proceeding, that party is barred from asserting a contrary position at a later stage of the proceeding." *In re Child of Nicholas P.*, 2019 ME 152, ¶ 16, 218 A.3d 247, 252. The doctrine thus "prohibit[s] parties from deliberately changing positions according to the exigencies of the moment." *Id.* (quotation marks omitted). By challenging Wells Fargo's evidence and cross-examining its witnesses at the foreclosure trial, the Benoits unmistakably asserted a

position that was contrary to the position they took in the bankruptcy proceeding where they surrendered their interest in the Property. In participating in and seeking to influence the outcome of the trial of Wells Fargo's foreclosure against a property the Benoits had surrendered their interest in, they acted in a way that is contrary to the principles on which judicial estoppel rests. *Id.*; *see also Lewis v. Innova Inv. Grp., LLC*, 279 So. 3d 876, 877 (Fla. Dist. Ct. App. 2019) ("Borrowers . . . who have surrendered real estate in their bankruptcy cases, cannot subsequently contest a mortgage foreclosure action involving that property.") (citing cases); *Ibanez*, 856 F. Supp. 2d at 276 ("Ibanez's surrender of his claim . . . in the Bankruptcy Court is . . . fatal to his claims in this court. . . . [E]ven were there a claim, it does not belong to Ibanez."); *Brown*, 563 B.R. at 456 ("A surrender, by definition, leaves the mortgagee free to exercise its rights in the collateral.").

The Maine Rules of Civil Procedure expressly provide for the scenario where a foreclosure action is tried without the defendant's participation. Under Rule 55(b)(3), "[n]o default 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 plaintiff has strictly complied with the service and notice requirements

of 14 M.R.S. § 6111 and these rules, and (ii) the plaintiff has certified proof of its 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." Me. R. Civ. P. 55(b)(3). Just as Wells Fargo would be required to prove the elements of its claim without their participation at trial if the Benoits had defaulted, the trial court should have required Wells Fargo to prove the elements of its claim here—but without the Benoits' participation. Instead, as the Eleventh Circuit has put it, the Benoits were allowed to "obtain a discharge in bankruptcy based, in part, on their sworn statement to surrender" the Property, and then turn around and "enjoy possession of the [Property] indefinitely while hindering and prolonging the state court process" to extinguish rights they had already surrendered. *In re Failla*, 838 F.3d at 1177 (quotation marks omitted). The trial court should not have let the Benoits, after having surrendered their relevant rights, act to hinder and prolong Wells Fargo's foreclosure action.

CONCLUSION

The Benoits stated their intention to surrender the Property in bankruptcy and shortly thereafter received the benefit of a discharge. They should therefore have been judicially estopped from contesting the foreclosure by challenging Wells Fargo's evidence and cross-examining its

witnesses at trial. The trial court erred in letting the Benoits participate in the trial as they did.

July 18, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Adam J. Shub, attorney for Appellant Wells Fargo Bank, N.A., certify that I have, on this date, emailed and mailed (by U.S. mail) two copies of this brief to the attorneys listed below:

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