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

REPLY BRIEF OF APPELLANT WELLS FARGO BANK, N.A.

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ARGUMENT

The key flaw in the argument the Benoits advance is their failure to acknowledge that when they surrendered the property in bankruptcy they surrendered it, not just to the trustee, but also to the secured creditor, Wells Fargo. That matters for this reason: while an asset that is surrendered *to the trustee* is "abandoned to the debtor" by the trustee at the end of the bankruptcy case, 11 U.S.C. § 554(c), the property at issue here was also surrendered to the secured creditor, Wells Fargo. Even if the trustee abandoned their interest in the property to the Benoits at the conclusion of the bankruptcy case, that does not mean Wells Fargo did so too.

As Wells Fargo explained in its opening brief, "Surrender" in section 11 U.S.C. § 521(a)(2) means "to make the collateral *available* **to the secured creditor**—*viz*., to cede [the debtor's] possessory rights in the collateral . . . ." *In re Pratt*, 462 F.3d 14, 19 (1st Cir. 2006) (citations and footnotes omitted, italics in original, bold added). Section 521 addresses "surrender" in two places: sections 521(a)(4) and 521(a)(2). Section 521(a)(4) deals with the "surrender to the trustee" of estate property. While section 521(a)(2) does not expressly indicate to whom the "surrender" it provides for is made, it must be read to deal with surrender of property to the secured creditor rather than to the trustee to avoid rendering sections

521(a)(2) and (a)(4) redundant. *See In re Failla*, 838 F.3d 1170, 1175 (11th Cir. 2016) ("Reading 'surrender' to refer only to the trustee of the bankruptcy estate renders section 521(a)(2) superfluous with section 521(a)(4). Under the surplusage canon, no provision should needlessly be given an interpretation that causes it to duplicate another provision . . . . Because section 521(a)(4) already requires the debtor to surrender all of his property to the trustee so the trustee can decide, for example, whether to liquidate it or abandon it, section 521(a)(2) must refer to some other kind of surrender.") (citation and quotation marks omitted).

A case the Benoits themselves rely on agrees that section 521(a)(2) must be read to provide for surrender to the secured creditor rather than to the trustee:

> [I]nterpreting "surrender" in section 521(a)(2) as the same as the "surrender" required by section 521(a)(4) would render part of section 521(a)(2) superfluous. Therefore, although it is unusual to give the same word different meanings in two subsections of the same statutory section, "surrender" in section 521(a)(2) must not mean just "surrender" to the trustee under section 521(a)(4).

In re Ryan, 560 B.R. 339, 348 (Bankr. D. Haw. 2016), *vacated on other grounds and remanded*, 2018 WL 1938512 (B.A.P. 9th Cir. Jan. 4, 2018). It makes good sense that section 521(a)(2), which deals with "debts that are secured by property of the estate," envisions the surrender of the

encumbered property to the holder of the security interest. *See Failla*, 838 F.3d at 1175–76 ("[A] debtor who decides to surrender his collateral must surrender it to *both* the trustee and the creditor. The debtor first surrenders it to the trustee, [11 U.S.C.] § 521(a)(4), who decides whether to liquidate it, *id.* § 704(a)(1), or abandon it, *id.* § 554. If the trustee abandons it, then the debtor surrenders it to the creditor, *id.* § 521(a)(2).") (emphasis in original); *see also id.* at 1176 ("The word 'surrender' in section 521(a)(2) is used with reference to the words 'redeem' and 'reaffirm,' and those words plainly refer to creditors."); *In re Boodrow*, 126 F.3d 43, 48 (2d Cir. 1997) (cited by the Benoits) (["S]urrender [under section 521(2)(A)] requires a debtor to return the collateral *to the creditor*.") (emphasis added).

According to the Benoits, the property was "abandoned back to the debtor" under section 554(c) at the end of the bankruptcy case. (Red Br. 2.) But while *the trustee* may have "abandoned" it, the property was surrendered, not just to the trustee, but also to the secured creditor, Wells Fargo. Wells Fargo never abandoned the property. Section 554(c) has no bearing on the status of the property vis-à-vis Wells Fargo.

The Benoits also make much of the provision at the end of section 521(a)(2) (sometimes called the "hanging paragraph" due to its placement in the statutory text) that "nothing in subparagraphs (A) and (B) of this

paragraph [on surrender of property to secured creditors] shall alter the debtor's or the trustee's rights with regard to such property *under this title* . . . ." 11 U.S.C. § 521(a)(2) (emphasis added). The problem is that when the Benoits quote this language from section 521(a)(2) they omit the last three words: "under this title." *See* Red Br. 2, 13, 17. That is important because the issue here is not whether the Benoits' surrender of the property to Wells Fargo affects their rights "under this title"—that is, under the bankruptcy code—but instead whether it affects their right to contest a foreclosure action under state law against a property they previously surrendered in bankruptcy. The Eleventh Circuit explains:

> The hanging paragraph in section 521(a)(2) . . . does not give the debtor the right to oppose a foreclosure action. The hanging paragraph states that "nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)." 11 U.S.C. § 521(a)(2). The key words for purposes of this dispute are "under this title." The hanging paragraph means that section 521(a)(2) does not affect the debtor's or the trustee's *bankruptcy* rights. Section 521(a)(2) does not affect the trustee's bankruptcy rights because a debtor must first surrender property to the trustee—who liquidates it or abandons it—before surrendering it to the creditor. *See id.* § 521(a)(4). And section 521(a)(2) does not affect the debtor's bankruptcy rights because a creditor is still subject to the automatic stay and cannot foreclose on the property until the trustee decides to abandon it. The hanging paragraph spells out an order of operations. It does not mean that a debtor who declares he will surrender his property can then undo his surrender after the bankruptcy is over and the creditor initiates a foreclosure action.

Failla, 838 F.3d at 1177–78 (emphasis in original). This reasoning is sound.

Wells Fargo cited *Pratt* in its opening brief for the proposition that "[s]urrender" in section 521(a)(2) means "to make the collateral *available* **to the secured creditor**—*viz*., to cede [the debtor's] possessory rights in the collateral . . . ." 462 F.3d at 19 (citations and footnotes omitted, italics in original, bold added). The Benoits try to distinguish *Pratt* on the ground that it deals with "secured *personal* property" (Red Br. 11, emphasis in original), not real property, but they do not explain why the difference between real and personal property should matter in this context, or why the analysis of surrender in *Pratt* should be limited to personal property.

The Benoits argue that *Failla*—which holds that "surrender" under section 521 is both to the trustee and to the secured creditor—was "Wrongly Decided" (Red Br. 11), because (they claim) the word "surrender" should mean same thing in subsection 2 as it means in subsection 4. *Id*. at 12–13. But under the reading advanced here "surrender" does mean the same thing in the two subsections; the difference is just that in subsection 4 its object is the trustee, whereas in subsection 2 its object is the secured creditor. Using the same verb to mean the same thing with different objects does not violate the principle that "identical words within a statute [should] have the same meaning." Red Br. 13.

The Benoits note that the Collier treatise disagrees with the Eleventh Circuit's analysis in *Failla*. (Red Br. 14–15.) But the passage they cite from Collier is unpersuasive:

> The duty to make the property available to the creditor arises only if the creditor has a right to take the property. A creditor that has no right to repossess the property or to foreclose on it does not gain such a right because a debtor states an intention to surrender.

Red Br. 14 (quoting Collier). This reasoning is unpersuasive because it posits that a debtor in bankruptcy cannot surrender property to a secured creditor unless the secured creditor first meets the technical requirements to foreclose under state law. That premise makes little sense: while the secured creditor must prosecute a successful foreclosure action under state law to complete the process of taking possession of the property, the fact that the secured creditor has not yet done so should not prevent a debtor from surrendering a property to a secured creditor in bankruptcy.

In *In re Ryan*, which the Benoits discuss in their brief (Red Br. 15–16), the court erred in assuming that for a surrender of property in bankruptcy to preclude opposition to a subsequent foreclosure action on the property, the bankruptcy code would have to expressly spell out that consequence of a surrender. 560 B.R. at 350 ("If Congress intended that 'surrender' would have the far-reaching consequences described in *Failla*,

Congress could and would have said so.”). The Benoits do not explain why opposition to a subsequent foreclosure is inconsistent with surrender of the property in bankruptcy only if the inconsistency is expressly provided for in the bankruptcy code. On the contrary, judicial estoppel is an equitable doctrine, and the Benoits cite no authority suggesting that it only applies to inconsistencies that are spelled out in statute. *Ryan* also suggests that “[d]ebtors may have perfectly legitimate reasons to defend a foreclosure case post-discharge” (*id.*)—but the Benoits identify no such reasons here.

Seeking to downplay the significance of what they did in the bankruptcy case, the Benoits declare that their statement of intention to surrender the property “merely gives notice of an intent. It serves as a notice, not any substantive position.” (Red Br. 16.) The distinction the Benoits urge the Court to draw between a notice and a substantive position is not a meaningful one, as the Benoits’ own account makes clear: “the debtor lets the trustee and creditors know that they do not intend to redeem or reaffirm, and that the default option of surrender to the trustee will be maintained.” (Red Br. 17.) In other words, the debtor gives notice *of the taking of a substantive position* (surrender). *In re Boodrow,* cited by the Benoits, is not to the contrary: in saying that “521(2) appears to serve primarily a notice function,” the court was not distinguishing between

giving notice and taking a substantive position, but just noting that the options for the debtor listed in 521(a)(2) did not rule out the existence of additional alternatives. 126 F.3d 43, 51 (2d Cir. 1997) ("521(2) appears to serve primarily a notice function, not necessarily to restrict the substantive options available to a debtor who wishes to retain collateral securing a debt."). The same is true of *In re Price*, also cited by the Benoits—the point the court was making was not that giving notice of surrender is different than taking a position, but rather that debtors are not necessarily limited to the options section 521 lists. 370 F.3d 362, 375 (3d Cir. 2004) ("[W]e read the statutory language of section 521 on its own and in the context of the Code, as setting forth a notice provision that does not limit a debtor's substantive retention options to the three stated therein.").

The Benoits claim that they did not "take a position" in the bankruptcy with respect to the property. (Red Br. 19.) That is wrong even on the Benoits own terms. According to the Benoits, "[t]o take a 'position' for judicial estoppel purposes means to make a specific factual or legal assertion that impacts a court proceeding." *Id*. That is exactly what the Benoits did: they made a legal assertion (that they were surrendering the property) that impacted the bankruptcy proceeding. The suggestion that "[a] debtor's providing a Statement of Intention to surrender under

521(a)(2) is not a factual or legal position, and it affects no one's rights" (Red Br. 20) is unconvincing: a statement of intention to surrender property is the assertion of a factual and legal position that affects the debtor's and creditor's rights.

The Benoits write that any position they may have taken in the bankruptcy court is "Easily Reconciled with Putting the Mortgagee to its Proof," because "[a] stated intention to choose 'surrender' of an asset, only says that the debtor does not want, or is not able, to reaffirm or redeem." (Red Br. 21.) That is incorrect: as explained above, to "surrender" collateral under 521(a)(2) means "to make the collateral *available* **to the secured creditor**—*viz.*, to cede [the debtor's] possessory rights in the collateral . . . ." *In re Pratt*, 462 F.3d at 19 (citations and footnotes omitted, italics in original, bold added). The Benoits cite cases where "a narrow, irreducible, contention is made, and then an irreconcilable change of tune" (Red Br. 21)—but that is precisely what happened here when the Benoits surrendered the property in bankruptcy, but then asserted the right to contest a foreclosure action on the very same property.

As for the characterization of the surrender of the property in the bankruptcy court as "a mere filing with the clerk" that was not "acted on" (Red Br. 27), the Benoits received a discharge in bankruptcy based on their

submissions to the bankruptcy court. That discharge is an "action" (Red Br. 28) based, *inter alia*, on the Benoits' surrender of the property.

Wells Fargo relied on the Benoits' notice that they had surrendered the property in bankruptcy when it elected to avoid the burden of seeking to claim the property in the bankruptcy proceeding, and instead to let that proceeding run its course before filing a foreclosure action in state court. The Benoits, after having surrendered the property in bankruptcy, should not be permitted to stand in the way of Wells Fargo doing what state law requires it to do to reclaim the property.

The Benoits' final argument is that even if they had not been permitted to participate in the foreclosure action, the trial court would still have found Wells Fargo's section 6111 notice deficient. But the Benoits make Wells Fargo's point for them when they observe that "[t]his deficiency [failure to itemize amounts due] was highlighted *during cross-examination* when Well Fargo's witness acknowledged that the itemization was not included in the notice." (Red Br. 29, emphasis added.) That is precisely the problem: the issue with the section 6111 notice was revealed during a cross-examination that never should have happened. The Benoits' insistence that the issue with the notice "would have been identified by the court" (Red Br. 30) even if the Benoits had not raised it is baseless speculation.

At the very end of their brief the Benoits—who did not file a notice of cross-appeal—slip in a request that the Court "clarify" that although its order specifically says the dismissal of the foreclosure action is "without prejudice," it nevertheless "'preclude[s] any future claim for the outstanding balance due on the note as of the date of the judgment.'" (Red Br. 30–31 (quoting *J.P. Morgan Mortg. Acquisition Corp. v. Moulton*, 2024 ME 13, ¶ 12).) Because a dismissal that is without prejudice cannot preclude future claims, this request for "clarification" amounts to a cross-appeal by the Benoits of the trial court's decision to dismiss the foreclosure action without prejudice. Under the guise of a request to "clarify," then, the Benoits are asking that "without prejudice" in the trial court's order be changed to "with prejudice." But the Benoits did not file a notice of cross-appeal. They therefore cannot seek changes to the judgment. *See* Me. R. App. P. 2C(a)(1) ("If the appellee seeks any change in the judgment that is on appeal, the appellee must file a cross-appeal to preserve that issue.").

CONCLUSION

For the reasons given here and in their opening brief, the Benoits should have been judicially estopped from contesting the foreclosure by challenging Wells Fargo's evidence and cross-examining its witnesses, and the trial court erred in letting them do so. Because the Benoits surrendered

their interest in the property to Wells Fargo, the Court should remand with instructions that the trial court enter judgment for Wells Fargo on its foreclosure claim and determine its damages.

In the alternative, the Court could allow Wells Fargo to issue a new section 6111 notice and file a new foreclosure action without being precluded under *J.P. Morgan Mortg. Acquisition Corp. v. Moulton*, 2024 ME 13, ¶ 12, 314 A.3d 134, from recovering the unaccelerated balance due on the note as of the date of the trial court's judgment. The trial court's decision to let the Benoits defend against Wells Fargo's foreclosure action has created a situation where an error has been made that may be hard to remedy with the existing section 6111 notice. Because the Benoits defended the foreclosure action and cross-examined Wells Fargo's witnesses, the trial judge has been made aware of the issues with Wells Fargo's section 6111 notice that the Benoits identified. A new trial with the same notice would therefore be problematic, as the trial judge cannot be expected to unlearn what he learned about the notice from the Benoits' cross-examination. And if the case were assigned to a new judge that judge would presumably know the history of the case.

For Wells Fargo to have the opportunity to pursue its foreclosure action without interference by the Benoits requires not just a new trial, but

a new section 6111 notice. If the Court does not remand with instructions that the trial court enter judgment for Wells Fargo, it should order that Wells Fargo be permitted to file a new foreclosure action with a new section 6111 notice, and that if Wells Fargo prevails in that new action it may recover the full amount the Benoits owe, including the unaccelerated balance due as of the date of the trial court's judgment, notwithstanding the general rule stated in *Moulton*, 2024 ME 13, ¶ 12. This would not be inequitable to the Benoits, who have made no payments on their loan since 2005, and it would preserve Wells Fargo's right to foreclose without the Benoits interfering. *See Kennebec Fed. Sav. & Loan Ass'n v. Kueter*, 1997 ME 123, ¶ 7, 695 A.2d 1201, 1203 (action under the foreclosure statute is an "inherently equitable proceeding").

September 23, 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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