STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-378

KATHERINE FRATELLO,

Appellant,

-- v --

RUSSELL MANN,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT (CUMBERLAND)

APPELLANT'S REPLY BRIEF

Jeffrey Bennett, Esq. #7223
Attorney for Appellant
Legal-Ease, LLC P.A.
Two City Center, 4th Floor
Portland, Maine 04101
T: (207) 805-0055
F: (207) 805-0099
Service@legal-ease.com

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SUMMARY OF CASE

This is a suit for default on a promissory note ("Note"). Plaintiff Katrina Fratello ("Fratello") loaned Defendant Russell Mann ("Mann") $60,000.00. The first payment was due on October 15, 2023. (A. 28). On September 29, 2023, Mann gave Fratello a check for $3,500.00 (A. 34) which represented the first Note payment of $799.04 plus the repayment of an additional sum that Fratello had previously loaned Mann. (A. 110-111). Mann's check was unusual in that it was made payable to "Katrina Fratello *or* Russell Mann". (*emphasis supplied*) (A. 34). At this point the parties' versions of what happened diverge. Fratello contends that neither her bank nor Mann's issuing bank would honor Mann's uniquely drawn check without Mann's presence. (A. 111, Par. 6). Mann contends that Fratello's position on that issue was a ruse, and so he refused to appear at either bank[1].

As of November 15, 2023, Mann had failed to provide security (a requirement under Par 6 of the note, A. 26). On November 15, 2023, Fratello's counsel sent a notice of such failure along with a mortgage to be signed by Mann together with a Notice of Default, Right to Cure and Demand for Payment (Default Notice). (A. 37-41). Mann did not sign or return the mortgage. (A. 111, Par. 9). Mann did nothing in

[1] After the lawsuit was filed, Mann's bank ultimately honored the check. However, Mann has not made any Note payments since. See ft. nt. 2, *infra.*

response to the Default Notice, notwithstanding the language in the Notice of Important Rights accompanying the Default Notice stating that if he disputed any portion of the debt, Mann should do so within 30 days, or the debt would be deemed valid. (A. 45, Par. 3). Fratello received no response and on January 5, 2024, filed suit to collect on the Note.

Mann filed a single count counterclaim alleging breach of contract based on Fratello's Default Notice. (A. 61, Par. 169-175). Fratello moved to dismiss Mann's counterclaim on the basis that the Default Notice (A. 43-45) was protected petitioning activity. The trial court denied Fratello's Special Motion to Dismiss, and this appeal followed.

The issue before this Court is whether the Default Notice sent by Fratello to Mann, upon which his counterclaim (A. 61) is based, constitutes protected petitioning activity. Importantly, Fratello followed her Default Notice with the actual filing of this lawsuit. Mann's counterclaim rests on the following specific allegations with reference to the counterclaim paragraph numbers:

> 169. On November 15, 2023, Fratello unlawfully sent a **"Notice of Default"** and demand for payment (hereinafter "Default Letter").
>
> 170. The Default Letter inaccurately stated that Defendant owed two payments to Fratello in the amount of 1,598.08.
>
> 171. The Default Letter unlawfully assessed a $100 late fee.
>
> 172. The Default Letter unlawfully assessed attorney's fees and costs in the amount of $3,220.
>
> (A. 60-61.)

The entirety of Mann's material allegations in his counterclaim appear in these four paragraphs[2].

1. FRATELLO'S DEFAULT NOTICE IS PROTECTED PETITIONING ACTIVITY

In support of his claim that Fratello's Default Notice is not protected petitioning activity, Mann cites *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, 202 A3d 1189 (2019). In contrast to this case, in *Hearts* the communication constituted defamation, was published to third parties and was not a mandatory precondition to the filing of a lawsuit. In this case, Fratello's Default Notice was a notification required by the terms of the Note, was sent only to Mann and was a mandatory pre-suit notification that is a required precondition to enforcement of a promissory note[3]. In addition, Fratello followed her service of the mandatory pre-suit Default Notice with the actual filing of her Complaint.

[2] Mann admits in his Brief P. 11 that he has not made any Note payments since September of 2023, thus he is sixteen payments in default as of the date of this Brief. These facts should foreclose Mann's argument that Fratello's Default Notice and Complaint lack a basis in law or fact.

[3] The Default Notice was a mandatory pre-condition to filing suit and is a required element of Fratello's claim to enforce the Promissory Note. (A.27). (Note at ¶ 11). See 9-A M.R.S. § 510 and 511 (Par. 1, 2); see also 14 M.R.S. §6111.

To be protected the law requires that a complaint be filed after service of a pre-suit notice because in the absence of a complaint, a pre-suit notice does not "stimulate the consideration of an issue by a judicial body." *Pollack v. Fournier,* 2020 ME 93, at ¶¶ 18-19. Thus, initially, Fratello's Default Notice, which was followed by the filing of a complaint, does qualify as protected petitioning activity

2. FRATELLO IS NOT EXPANDING THE SCOPE OF THE ANTI-SLAPP STATUTE

Mann argues that Fratello's appeal is dangerous and will foreclose any future counterclaim in a breach of contract action without being subject to an anti-SLAPP motion to dismiss. Mann's hyperbolic argument ignores the point that his counterclaim is based solely on Fratello's service of the mandatory pre-suit Default Notice. No other type of claim or counterclaim, other than one premised on protected petitioning activity, is implicated by Fratello's Special Motion to Dismiss. Mann fails to appreciate that a counterclaim based on a mandatory pre-suit notification that precedes the actual filing of a complaint is foreclosed in all contexts no matter if the claim is based in contract or in tort or in equity. *Pollack v. Fournier,* 2020 ME 93, ¶¶ 18-19; *14 M.R.S.A § 556*. The anti-SLAPP statue protects all "petitioning activities" in all contexts. *Id.* Enforcing the anti-SLAPP statute in this case is not an expansion of existing law nor does it set any precedent, nor does it set a dangerous precedent.

3. MANN'S COUNTERCLAIM IS BASED UPON THE DEFAULT NOTICE AS EXPRESSLY STATED IN HIS COUNTERCLAIM

Mann alleges that on appeal, Fratello has failed to contradict Justice Lipez's conclusion that Mann's counterclaim was not based on Fratello filing her complaint. Mann's argument misleads. Mann's counterclaim is expressly and exclusively based on Fratello's service of the Default Notice, as stated at paragraphs 169 – 172 of the counterclaim. This fact was found by Justice Lipez. *Order on Special Motion to Dismiss, page 5* ("Mr. Mann's breach of contract claim…. centers on conduct that predates the filing of the Complaint") (A, 9-13). That Justice Lipez made other findings is immaterial.

4. FRATELLO'S DEFAULT NOTICE HAS FACTUAL SUPPORT AND BASIS IN LAW AND MANN HAS NOT SUFFERED ACTUAL DAMAGES.

Mann incorrectly claims that Fratello's Default Notice lacks support in fact and law arguing that "every contract or duty within Maine's Uniform Commercial Code (U.C.C.) imposes an obligation of good faith in its performance and enforcement" and failure to act with good faith can constitute a breach of contract, citing *Chartier v. Farm Family Life Ins. Co*., Docket No. Cum-14-202, 5 (Me. 2015) which holds (P. 6) that:

> "Good faith" is defined as "honesty in fact and the observance of reasonable commercial standards of fair dealing." 11 M.R.S. § 1-1201(20) (2014). Thus, good faith according to title 11 contains components of both actual honesty and an objective component of

> commercial reasonableness. *Niedojadlo v. Cent. Me. Moving & Storage Co.,* 1998 ME 199, ¶ 9, 715 A.2d 934.

Mann's argument fails because Fratello's Default Notice is judged against a standard of "honesty in fact". See *e.g. FDIC v. S. Prawer & Co*., 829 F. Supp. at 439, 446-447 (D. Me. 1993); 11 M.R.S.A. § 1-1201(20). Fratello, after having Mann's uniquely drawn check dishonored by not only *her* bank but also by *Mann's* issuing bank, and having Mann refuse to cooperate by appearing at either bank after being placed on notice of his own bank's dishonor of his check, sent her Default Notice. (A. 111, ¶ 6). Under these facts, Mann contributed to and caused Fratello's uncertainty for his unlikelihood of payment and/or provision of the mortgage and, therefore, Mann cannot claim that Fratello's service of her Default Notice was totally lacking in good faith or any factual support.

Mann also has not incurred any actual damages attributable to the Default Notice. He has not paid attorneys' fees or late fees or default interest, nor has he paid the Note, and he will not have to do so unless he loses this lawsuit. Until then, Fratello's declaration of acceleration of the Note, late fees and default interest are just that – a declaration.

5. FRATELLO'S PETITIONING ACTIVITY HAS REASONABLE FACTUAL SUPPORT AND ARGUABLE BASIS IN LAW

Mann alleges that Fratello cites the wrong standard under which this Court reviews this case. Although Fratello did state that there were three steps involved,

under *Gaudette v. Davis,* 2017 ME 86, ¶ ¶5-12, 160 A.3d 1190 (*Gaudette I)*, the third step no longer applies. Regardless, under *Thurlow*, the first two steps do apply. In reviewing this case, it is still necessary for Mann to present a *prima facie* case that Fratello's petitioning activities are devoid of any reasonable factual support or any arguable basis in law, and this Mann cannot do.

Mann's argument is based on two falsehoods - (i) that Mann was not required to provide security, and (ii) that Mann did make the initial Note payment in accordance with the terms of the Note.

i. Mortgage

Fratello's Default Notice (A. 42-46) declared that Mann failed to execute and provide security as required by Paragraph 6 of the Note. (A. 36 – 41). Mann claims the Note does not require him to provide security, and that he only needs to provide security after a default has already occurred. Mann's interpretation of paragraph 6 of the Note is patently unreasonable. The *only* reasonable interpretation of Paragraph 6 of the Note is that Mann was required to secure the Note with his real estate and motor vehicle. (A. 29). Although the language of Note ¶ 6 is inartful, the intent drawn from the four corners of the Note is unmistakable.

Under Maine law, "a promissory note is a contract." *QAD Investors v. Kelly*, 2001 ME 116, 1 13, 776 A.2d 1244, 1248. Ordinary rules of contract construction apply. *Id*. When a contract is unambiguous, the interpretation of the contract is a question of law for the court. *Id.* (citing *Acadia Ins. Co. v. Buck Constr. Co*., 2000

ME 154, 1 8, 756 A.2d 515, 517). Contracts are interpreted "in accordance with the intention of the parties, which is to be ascertained from an examination of the whole instrument." *Dow v. Billing,* 224 A.3d 244, 249 (Me. 2020) (quoting *Am. Prot. Ins. Co. v. Acadia Ins. Co.,* 814 A.2d 989, 993 (Me. 2003)). "All parts and clauses must be considered together [so] that it may be seen if and how one clause is explained, modified, limited or controlled by the others." *Id.* (quoting *Am. Prot. Ins.,* 814 A.2d at 993). Ultimately, contracts are construed "to give effect to the plain meaning of the words used in the contract and avoid rendering any part meaningless." *Id.* (citing *Scott v. Fall Line Condo. Ass'n,* 206 A.3d 307, 311 (Me. 2019)). If a contract "contains an ambiguity that cannot be resolved from the four corners of the document, [only then does] the interpretation of the ambiguous language becomes a question for the factfinder to resolve by taking extrinsic evidence." *Id*. (citing *In re Estate of Barrows*, 913 A.2d 608, 613 (Me. 2006)). Contractual language is ambiguous if it is "reasonably susceptible of different interpretations." *Williams v. Williams*, 161 A.3d 710, 713 (Me. 2017) (quoting Am. Prot. Ins., 814 A.2d at 993).

Mann's interpretation of Paragraph 6 of the Note is patently unreasonable because the word "security" in Paragraph 6 of the Note clearly has only one meaning for Mann's real estate, a ***mortgage***. Under Maine law, as concerns real estate in secured transactions, there is only one form of security; *to wit*: a mortgage.

Further, Mann's argument that he did not owe security unless or until he first defaulted is also patently unreasonable (and illogical). No reasonable lender

anticipates or expects that a borrower will provide security after a default. Indeed, after a default many borrowers are unable to provide security because their financial position has changed negatively. Further, and as is demonstrated in this case by Mann, borrowers in default often take extraordinary steps to avoid paying their lenders and to protect their real estate from encumbrances and foreclosure. The phrase in paragraph 6 of the Note, "in the event of a default by borrower, this Note shall be secured with the following property," clearly and unmistakenly contemplated a contemporaneous mortgage on Mann's real estate (and a security interest in Mann's motor vehicle). This is reinforced by reference to Exhibit A to the Note, which is the property description for Mann's real estate. (A. 27-32). Additionally, Paragraph 1 of the Note and the title of the Note, both repeat that it is a Maine "Secured" Note (quotation marks supplied). *Id.* Without question, the mutual intent of the parties' contemplated contemporaneous security for the Note.

ii. Payment

Fratello's Default Notice that Mann failed to pay the Note according to its terms also had reasonable factual support and an arguable basis in law. Mann's check was unusual in he made it payable to "Katherine Fratello *or* Russell Mann". (*emphasis supplied*) (A. at 34). Both Fratello's bank and Mann's issuing bank refused to honor the check without Mann being present. (A 111, ¶ 6). Regardless of Mann now claiming this was a "ruse", it is undisputed that Mann refused his cooperation and did not appear at the either bank and this resulted in his check being dishonored

and his payment being late. Mann's failure to cooperate after being placed on notice that his uniquely drawn check had been dishonored by two banks, including his own issuing bank, is sufficient factual and legal support for Fratello's service of her Default Notice. See *Diversified Foods, Inc. v. First Natural Bank of Boston,* 605 A. 2nd 609, 613-614 (Me. 1992); See also *Peoples Heritage Savings Bank v. Recoll Management, Inc.,* 814 F. Supp. 159, 168-169 (D. Me. 1993).

6. THE SPECIAL MOTION TO DISMISS IS NOT AN ABUSE OF PROCESS

Mann incorrectly argues that Fratello's Special Motion to Dismiss is an abuse of process. *Leighton v. Lowenberg*, 290 A.3d 68 (Me. 2023) specifically defines abuse of process and states (pp. 73-74) that the elements necessary to sustain an abuse of process claim are (1) "a use of the process in a manner not proper in the regular conduct of the proceedings" and (2) "the existence of an ulterior motive." *Nadeau v. State*, 395 A.2d 107, 117 (Me. 1978); see also *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 38, 41 A.3d 551 (same). The term "process" does not refer to "the legal process generally" but rather to "the instruments by which courts assert their jurisdiction and command others to appear, act, or desist." Restatement (Third) of Torts: Liab. for Econ. Harm § 26 cmt. b (Am. L. Inst. 2020). "In short, 'process' generally means orders that are issued by courts at the behest of one of the parties, or that are otherwise backed by judicial authority." *Id.* "The most common forms of such process are subpoenas, warrants, and writs of garnishment or attachment." *Id*. § 26

cmt. c; see also *Campbell, 1998 ME* 70, ¶ 7, 708 A.2d 283. Fratello's pursuit of her Special Motion to Dismiss is neither a use of process nor an abuse of process.

Mann's additional argument that Fratello is intentionally prolonging this case and wrongfully causing cost is counter-intuitive and wrong-headed. Fratello loaned and is without $60,000.00. The Note is currently unsecured. The longer this case prolongs, the greater her risk of non-payment. Fratello only seeks by her Special Motion to Dismiss to narrow the issues before the trial court by dismissing Mann's meritless counterclaim. *Pollack v. Fournier*, 2020 ME 93, at ¶¶ 17-19. Dismissing Mann's meritless counterclaim will ultimately save time and reduce cost, especially during discovery and at trial.

DATED in Portland, Maine on the 4th day of February 2025.

Respectfully Submitted,
Katherine Fratello,
By counsel,

_____

Jeffrey Bennett, Esq. #7223
Legal-Ease, LLC P.A.
Two City Center, 4th Floor
Portland, Maine 04101
T: (207) 805-0055
F: (207) 805-0099
Service@legal-ease.com

CERTIFICATE OF SERVICE

I hereby certify that on January 4th, 2025, I served true copies of the above Appellant's Reply Brief, by providing electronic copies to Defendant's Counsel:

Matthew Bowen, Esq.
matthew.h.bowen.law@gmail.com

_____
Jeffrey Bennett, Esq., #7223