STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Pen-24-436

U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR MANUFACTURED HOUSING CONTRACT SENIOR/SUBORDINATE PASS-THROUGH CERTIFICATE TRUST 2000-4

Plaintiff/Appellee

v.

UNIFUND CCR PARTNERS
Party-in-Interest/Appellant

ON APPEAL FROM THE NEWPORT DISTRICT COURT
DOCKET NO. NEWDC-RE-18-62

BRIEF OF APPELLEE U.S. BANK NATIONAL ASSOCIATION, AS TRUSTEE, FOR MANUFACTURED HOUSING CONTRACT SENIOR/SUBORDINATE PASS-THROUGH CERTIFICATE TRUST 2000-4

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STATEMENT OF FACTS

Appellee U.S. Bank National Association, as Trustee, for Manufactured Housing Contract Senior/Subordinate Pass-Through Certificate Trust 2000-4 ("USBT") adopts Appellant Unifund CCR Partners LLC's ("Unifund") Statement of the Facts and Procedural History with one (1) exception.

Unifund incorrectly refers to USBT as "U.S. Bank, N.A." on the cover of its Brief ("Blue Br.")(Blue Br. cover), however, USBT's proper name and identity is as set forth in the preceding paragraph, and USBT also suggests that portions of the statement of facts and procedural history are not relevant or pertinent to the issues on appeal, for example, paragraphs 2, 3, 9, 13, 14, 15. (Blue Br. 5-7).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The trial court did not err in dismissing the foreclosure action without prejudice after finding the 14 M.R.S. § 6111 notice invalid.

2. A party-in-interest may defend against a foreclosure action but the nature and extent of that defense is limited and Unifund has overreached in this case.

3. Unifund is seeking an advisory opinion and relief from this Court for events that have not occurred, and may never occur, and which would also usurp the authority of a *future* trial court if and when it hears the case.

SUMMARY OF THE ARGUMENTS

In its thirty-two-page Judgment (A. 17-49) dismissing the case without prejudice, the Trial Court (a) ordered USBT pay Defendants Richard S. Jewett[1] and Shirley A. Jewett (collectively the "Jewetts" or individually "Mr. Jewett" or "Mrs. Jewett", respectively) their attorney's fees and costs incurred in defending USBT's foreclosure action (A. 49);[2] (b) denied any award of attorney's fees and costs to USBT for prosecuting the present foreclosure action and from recovering the same in any subsequent foreclosure action (A. 48-49) and (c) precludes USBT from recovering any late charges or interest from the filing date of the Complaint for Foreclosure (September 24, 2018) through the date of dismissal on July 25, 2024, which dismissal was entered on the docket on July 29, 2024 (A. 48).[3]

The conditions in the Judgment of Dismissal set forth in the preceding paragraph were based on the Court's finding that USBT had "not met its burden. . . and has therefore failed to demonstrate that the notice's demand for $25,092.33 was 'the precise amount' the Jewetts were to pay to cure their default" (A. 47). Citing to

[1] Richard S. Jewett did not appear for any of the proceedings in the trial Court, but did file an answer, *pro se*, in 2018. Upon information and belief, Richard S. Jewett and Shirely A. Jewett are divorced and he no longer has any involvement with the real estate.

[2] Upon information and belief, neither Defendant was represented by counsel at any point during the pendency of this action. Also, following the Judgment, neither of the Jewetts filed an affidavit of expenses incurred and therefore it is the opinion of USBT that such fees to be paid by it would be zero dollars ($0.00).

[3] This is a span of almost six (6) years.

Finch v. U.S. Bank, N.A., the lower court concluded that "if a court determines a foreclosure plaintiff's notice is deficient under §6111, the court must dismiss the complaint without prejudice." 2024 ME 2, ¶¶ 39, 51, 307 A.3d 1049, 1069. (A. 47).

This Court has recited the "settled principle of claim preclusion" that "a judgment based on the plaintiff's failure to comply with a precondition to the commencement of the action is not given preclusive effect because plaintiff's claim cannot be litigated if the plaintiff is not entitled to bring the suit." *Finch* at ¶ 29, 307 A.3d 1061. However, Unifund argues that "*Finch* suggests the proper disposition of a foreclosure action in a case like this is 'Judgment for Defendant' " (Blue Brief 22, citing *Finch* n.18), and Unifund claims "[t]here is no need for elaboration on whether the Judgment is with prejudice…or without prejudice…" (Blue Brief 22). Unifund would have this Court find reversible error in the lower court's clearly stated remedy of "dismissal without prejudice," and asks this Court to endorse an outcome where the judgment lacks clarity as to the rights of the litigants by being silent as to the manner of the dismissal. *See id*.

USBT would instead argue that clarity in judgments is essential to ensure that rights of the parties are understood and to avoid wasting time, money, and judicial resources subsequently litigating the meaning of an earlier judgment that could have been prevented by mere explanation or "elaboration" of a court's intent in the original judgment.

Next, Unifund mentions, in passing, that Unifund "may defend against the foreclosure action." (Blue Br. 10, footnote 1). USBT agrees that a Party in Interest must not necessarily remain mum during a foreclosure proceeding, however being a party to a foreclosure case solely because it is the holder of an equitable interest in the property (equity of redemption), such challenge is limited to determining its relative priority. *Casco N. Bank, N.A. v. Estate of Grosse*, 657 A.2d 778, 781. However, such defense does not expand to the broader challenges which might be mounted by defendants on the personal obligation,[4] who are the parties to the transaction giving rise to the debt and the mortgage. *See KeyBank, N.A. v. Elizabeth E. Keniston, et. al.*, 2023 ME 38, ¶ 13, 18, 298 A.3d 800, 804, 806. As such, only defendants have the proper standing to challenge the *amount of the debt*, when a claim for liability has been made. *See id.* Unifund's arguments should be evaluated solely as it relates to the priority of its interest in the property.

Lastly, Unifund is asking this Court to opine on the *future calculation of the amount* that might, or might not, be due should a new foreclosure be filed. Action of this nature is not only unripe as no operative events have come to pass that would require this Court to dictate USBT's acts in a future matter, it also seeks to strip a future trial Court, should there ever be one, of its ability to evaluate the facts and

[4] The Jewetts did not challenge any of USBT's case at the trial Court, or file an appeal from any aspect of the lower court's judgment of dismissal. They have yet to appear in this appeal.

circumstances which brings the case before it at that *later* time. The *future* status is not, and cannot be, known now, so relief in this regard should be denied as unripe and beyond the scope because it seeks an advisory opinion.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

This Court "review[s] a trial court's factual findings underlying a judgment of foreclosure for clear error, and . . . review[s] questions of law *de novo*." *Wilmington v. Berry*, 2020 ME 95, ¶15, 237 A.3d 167, quoting *Wells Fargo Bank, N.A. v. Burek*, 2013 ME 87, ¶ 17, 81 A.3d 300 (internal citations omitted).

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT THE PROPER RESULT WAS DISMISSAL WITHOUT PREJUDICE

Unifund's contention to the contrary notwithstanding (Blue Br. 13, Section B), the Trial Court's dismissal of USBT's foreclosure action without prejudice was the proper result suggested by this Court's holding in *Finch* once the trial court had determined that USBT's 14 M.R.S. § 6111 notice was not compliant (A. 47 (as to the determination), A. 85 (the notice)). This Court's direction in *Finch* on the issue of a dismissal without prejudice was clear as it applies to these facts, that "[w]hen a court finds that a lender's notice of default, acceleration, and right to cure fails to comply with section 6111, the court should treat the lender's foreclosure claim as prematurely commenced, without proceeding further . . ." *Finch* at ¶ 51, 1069.

Unifund fails to explain how entering a "Judgment for Defendants" in the foreclosure action aligns with this Court's direction in *Finch* that where the lenders' § 6111 notice is found to be defective, the action has been "prematurely commenced" and should proceed no further. *See Finch* at ¶ 51, 1069 ('plaintiff's claim cannot be

litigated if the plaintiff is not entitled to bring the suit'), *J.P. Morgan Mortgage Acquisition Corp. v. Moulton*, 2024 ME 2, ¶ 12, 314 A.3d 134, 137-138 (confirming the principle that claim preclusion does not apply where the basis for the dismissal was a non-compliant § 6111 notice). A judgment entered for *either* a plaintiff or a defendant in a foreclosure action is an incongruous result to an action that has been prematurely commenced. *See id.* Therefore, the trial court correctly concluded USBT was not entitled to bring its foreclosure action in the first instance and the proper result was dismissal without prejudice. *See id., Finch* n.18 (A. 47).

Unifund attempts to further bolster its argument that *Finch* does not contemplate dismissal without prejudice due to "the scope of such dismissal" (Blue Br. 14, line 2) by claiming that after a dismissal of that type a "plaintiff will be able to commence a further foreclosure . . . inclusive of all amounts due . . ." (Blue Br. 15, lines 6-7). However, Unifund's argument presumes a trial court in some future foreclosure action will ignore or deviate from the holdings in *Finch* and *Moulton* by allowing the mortgagee to advance claims which *Finch* and *Moulton* disallow[5]. *See Finch* at ¶ 51, 1069; *Moulton* at ¶ 12, 137-138.

III. A PARTY IN INTEREST IN A FORECLOSURE CAN MEANINGFULLY PARTICIPATE IN THE CASE, BUT CHALLENGES ARE LIMITED TO ITS RELATIVE PRIORITY

[5] Moreover, the trial court's Judgment already contains specific prohibitions on the amounts USBT may not recover (A. 48-49).

Mr. Jewett initially answered in the foreclosure action but never involved himself further. Mrs. Jewett appeared on the trial dates but did not object to any trial exhibits, the amount of the debt stated in the section 6111 notice, the amount of the total due entered as evidence by USBT, she did not testify at trial or question USBT's witness, and she has not participated in this appeal (A. 3-16).

Unifund, the holder of a lien on the property junior in priority to USBT's mortgage, has disputed a debt not owed by Unifund, but by the Jewetts. Further, Unifund does not represent the Jewetts, and Unifund has made no arguments to support its authority to raise claims on behalf of the Jewetts.

This Court, some three (3) decades in the past, visited the issue of non-owner, non-borrowers in a foreclosure. *Grosse* 657 A.2d 778. In *Grosse*, interested parties Clyde and Ekaterine Crowe (the "Crowes") held two mortgages granted by the Grosses, one dated and recorded senior, and one dated prior but recorded junior, to the foreclosing mortgagee's (the "bank") mortgage, on the property being foreclosed. *Id.* at 779. The Crowes appealed the District Court's award of summary judgment in favor of the bank, which judgment held that the bank was in priority position over both of the Crowes' mortgages. *Id.* at 779-780. The Crowes argued in their appeal that there was a genuine issue of material fact relative to the validity of the Grosse's execution of the bank's note and mortgage. *Id*. The court in *Grosse* explained the basis for inclusion of the Crowes in the foreclosure action, were as

parties in interest pursuant to 14 M.R.S. § 6321. It concluded that "[a]s parties in interest . . . the Crowes have the right to defend against the Bank's foreclosure action [and i]ndependently, they are entitled to litigate the *validity of the mortgage* given to the Bank in order to determine its relative *priority*." *Id*. at 781 (emphasis added). Nothing in the Court's decision in *Grosse* gives a junior lienholder or party in interest the right to challenge the *debt owed on the mortgage* being foreclosed. 657 A.2d 778.

Grosse is supportive of the holding that a party in interest may defend against the foreclosure "to litigate the validity of the mortgage given [being foreclosed] to determine its relative priority." *Id.* at 781. Although the facts in *Grosse* are slightly different from this case because the Grosses failed to appear or defend in that action, in this case, Mrs. Jewett did appear and attended the trial affording her the opportunity to defend her own claims against USBT. *See id.* Notwithstanding whether Mrs. Jewett had appeared or not, when a defendant does not challenge or object to the amounts due, a party in interest should be precluded from raising that defendant's defenses *as to the amount of the debt. See id.* This argument is supported by *Grosse* insofar as the *Grosse* Court only reversed the trial court on the narrow issue of relative priority of the mortgages. *See id.*

Even more so here, where Mrs. Jewett fully participated in the foreclosure action and attended trial, she was the proper party to raise a defense in USBT's proof of the amount owed, not Unifund. *See id.*

In Maine, foreclosure is a creature of statute. *See Keniston* ¶ 12, 804 (quotations omitted); *Fuller v. WVMF Funding, LLC,* 2024 US Dist. Lexis 228375, *11. Although parties in interest are included due to their interest in the property, the underlying foundation for proceeding with foreclosure is still based on the terms and remedies in a note or mortgage, which lies in the contractual rights of the parties. *See Finch* at ¶ 28, 35, at 1061, 1063-1064; 14 M.R.S. § 6322. "It goes without saying that a contract cannot bind a nonparty." *Guerretie v. Dyer*, 2014 Me. Super. LEXIS 79, *7, *quoting E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S. Ct. 754, 764, 151 L. Ed. 2d 755 (2002). Likewise, a party in interest cannot assert defenses to enforcement of a contract to which it is not a party. *See Restatement (Second) of Contracts,* § 302.

This Court has held in both *Keniston* and *Alley*, that a "person with an interest in the property is unable to [defend] effectively as to the nonpayment on the note because the person is not—and, as here, may never have been—a party to the note…" *Keniston*, ¶ 13, quoting *MTGLQ Investors, L.P. v Alley*, 2017 ME 145, 166 A.3d 1002.

Additionally, in discussing rights of non-parties to a contract, this Court held in *Devine v. Roche Biomedical Lab.,* that there must be clarity and definiteness that the contracting parties intended to give third parties an enforceable benefit. *See* 659 A.2d 868, 870 (Me. 1995). The Note and Mortgage in this case includes no such intent. *See id.*

The *Devine* Court explained, "courts must be careful to distinguish between the consequences to a third party of a contract breach and the intent of a promisee to give a third party who might be affected by that contract breach the right to enforce performance under the contract." *Id*. Further, *Devine* explained that the focus of the analysis for determining the rights of non-parties "must be on the nature of the contract itself," and not the consequences of the breach on the non-party. *Id.* at 870.

Although Unifund's interest in the property would be affected by the consequences of USBT's foreclosure, the nature of USBT's Note and Mortgage is a contract between a lender and borrower and does not confer any rights to *any* non-parties. *See id.*

This Court should be similarly careful to distinguish the rights of a party in interest to defend a foreclosure by virtue of their interest in the property, such as lien priority articulated in *Grosse*, from the right of a *defendant* to assert defenses against enforcement of the Note and Mortgage, such as the amount of the debt. *See Devine* at 870, *Grosse* at 781. Unifund may defend its interest in the property, but only the

Jewetts had the right to assert defenses against enforcement of the Note and Mortgage, object to or refute the testimony of USBT's witness, or the amount of the obligation she owed. *See id.*

Additionally, 14 M.R.S. § 6322, states the Court "shall determine whether there has been a breach of condition in the plaintiff's mortgage, the amount due thereon, including reasonable attorney's fees and court costs, *the order of priority and those amounts,* if any, that may be *due to other parties* that may appear." (emphasis added).

As it relates to parties in interest, 14 M.R.S. § 6322 infers that the court's authority as to parties in interest is to determine the relative *priority of the parties* in interest *and the amounts owed to them*. Therefore, there is also no statutory right granting a party in interest the ability to challenge the *amount of the debt* owed on the Note and Mortgage. *See id.*

In a 2021 case in the United States District Court for the District of Maine, a dispute arose regarding a junior lienholder and his priority of position as against several other liens that were on the property. *1900 Capital Trust III v. Sidelinger*, 2021 U.S. Dist. LEXIS 123878, ¶ 3. In that case, the junior lienholder failed to demonstrate his titled interest in the property, and thus the Court declined to include him in the list of parties that might be entitled to surplus proceeds. *Id*. at fn. 1.

The *Sidelinger* Court took particular notice of the statutory requirements associated with "priority" and "amounts" that might be due to parties that appeared, opining that "the appearance requirement suggests an active role for junior mortgagees in determining *priority*." *Id.* (emphasis added). What is more telling, however, is what the Court did *not* say: that junior lienholders, such as Unifund, are made a part of foreclosure for arguments *beyond* its priority relative to other liens.[6]

For all the foregoing reasons, Unifund's defense of the foreclosure does not extend *beyond* its priority relative to other liens.[7]

IV. UNIFUND IS SEEKING AN ADVISORY OPINION AND/OR IS SEEKING RELIEF THAT IS NOT RIPE FOR ADJUDICATION

This Court has explained that a "justiciable controversy is a claim of *present* and fixed rights, as opposed to hypothetical or *future* rights, asserted by one party against another who has an interest in contesting the claim." *Flaherty v. Muther*, 2011 ME 32, ¶ 87, 17 A.3d 640, 662. The *Flaherty* Court stated that if, indeed, an issue is not justiciable, then any attempt by the court to adjudicate the issue would

[6] At trial, Unifund's only evidence of its balance owed was an affidavit by its counsel, Attorney Greenberg. USBT's counsel objected to the affidavit as hearsay as no documents or records of Unifund were offered or admitted. Trial Day 1 ("T-1"), transcript, pg. 17, lines 7-8, and pg. 18 line 25. The Court overruled the objection. T-1, pg. 22, line 24. Eventually, after arguments, Unifund's counsel and USBT's counsel agreed, on the record, that Unifund's entire claim would be for the face amount of the writ: $6,179.72.

[7] Unifund has never claimed that its lien has priority over USBT's and did not assert this anywhere in its brief (Blue Br. Generally).

result in an advisory opinion, which "we have no authority to render except on solemn occasions, as provided by the Maine Constitution." *Id.*[8]

This Court has addressed ripeness extensively. In *Utsch v. Dep't of Env't Prot.*, this Court explained how an appellant failed the two-pronged approach to ripeness, finding there was "no certain or immediate legal problem . . . [and the] allegations are too uncertain as to the extent that future quarrying activity . . ." 2024 ME 10, ¶ 25, 314 A.3d 125, 133 (internal citations omitted). In the case, Utsch sought restrictions on noise levels that *might* be generated by future mining work at a quarry that was not then in operation. *See id.* In declining to rule on the issue, this Court said that the case "concern[ed] future adverse consequences that may or may not occur." *Id*.

As in *Utsch,* Unifund is asking this Court to issue an advisory opinion as to the validity of future claims against the Jewetts or against the Property, or both, that USBT may or may not bring in the future (Blue Br. 19-21). For example, reasons that USBT might not bring a future foreclosure could include: (a) sale of the Jewett's loan to another entity which would make its own determinations as to remedies following a breach; (b) USBT might choose to forego enforcement through foreclosure for business reasons; (c) the Jewetts may sell the property and satisfy the

[8] The case refers to Me. Const. art. VI, § 3, "when required by the Governor, Senate or House of Representatives." *Id*.

mortgage; or (d) the Jewetts may choose loss mitigation (workout) options to avoid a future foreclosure.

Even if another foreclosure is brought in the *future*, the facts and circumstances on that future date, as well as the caselaw and regulatory landscape at that time, might have changed, thus making any *current* ruling on what USBT can or cannot collect against the Jewetts, entirely speculative.

This Court addressed ripeness specifically in a foreclosure context. In a 2015 foreclosure, *U.S. Bank v. Tannenbaum*, 2015 ME 141, 126 A.3d 734, the homeowner appealed a judgment in his favor where the trial court had reserved to the parties the right to relitigate issues in a future foreclosure action. *Id*. at ¶ 1, 735. In *Tannenbaum,* this Court vacated only that part of the lower court's opinion reserving to the parties the right to relitigate all issues, finding any ruling on the potential *res judicata* effect of the current foreclosure action, is best made by the court hearing any future foreclosure action based "on the circumstances at that time." *Id.* at ¶ 10, 737. Thus, the *Tannenbaum* Court determined the *res judicata* effect of the lower court's judgment as one "not ripe for review because the plaintiff has not filed a second action [and t]hus the contours of any potential future action are unknowable . . ." *Id*. at fn. 3 (additional citations omitted).

Consistent with this Court's holding in *Finch* and *Tannenbaum,* USBT's foreclosure action was premature in the first instance, due to the defective § 6111

notice, and the preclusive effect of any claims made in USBT's instant foreclosure action are best reserved to the court that hears a second foreclosure action, should one be brought, "based on the circumstances at that time." *See Finch* at ¶ 51, 1069; *Tannenbaum* at ¶ 10, 737.

For the same reasons, this Court should reject the invitation by Unifund to remand the case to the lower court to parse through amortization tables and estimated calculations for the purpose of rendering an advisory opinion on what amounts USBT *might* be precluded from collecting in a *future* foreclosure. *See id.* (Blue Br. 20, line 1 to Blue Br. 21, 2).

CONCLUSION

The trial court's dismissal of USBT's foreclosure action without prejudice is appropriate under this Court's holdings in *Finch* and *Moulton.* Unifund has not advanced a credible argument for any alternative disposition of USBT's foreclosure claim.

As a party in interest, Unifund may defend the foreclosure as to its interest in the property, but such defenses are limited to issues of priority relative to other liens. Further, because Unifund is not a party to the Note and Mortgage, and the nature of the contract provides no enforceable benefit to non-parties, Unifund is precluded from raising defenses to performance or breach of the contract.

Lastly, this Court should deny Unifund's request to remand the case to the lower court for the purpose of having that court render what would clearly be an advisory opinion on amounts USBT might be precluded from collecting in a hypothetical, future foreclosure action.

For all the reasons stated above, this Court should not disturb the trial court's dismissal of USBT's foreclosure action without prejudice.

Dated at South Portland, Maine, this 10th day of June, 2025.

By: _____

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CERTIFICATE OF SERVICE

I, Carrie Folsom, Esq., hereby certify that on June 10, 2025, I caused one (1) electronic copy of Appellee U.S. Bank National Association, as Trustee, for Manufactured Housing Contract Senior/Subordinate Pass-Through Certificate Trust 2000-4's Brief to be served upon Appellant and all other parties represented by counsel, as follows:

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I hereby further certify that on the date hereafter written, I mailed two (2) copies of Appellee U.S. Bank National Association, as Trustee, for Manufactured Housing Contract Senior/Subordinate Pass-Through Certificate Trust 2000-4's Brief to the following via United States mail, first class, postage prepaid, to each party's last known address, as follows:

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