MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court docket number Pen-24-436

U.S. BANK, N.A.

Plaintiff/Appellee

v.

RICHARD JEWETT

Defendant

UNIFUND CCR PARTNERS

Party-in-Interest/Appellant

ON APPEAL FROM NEWPORT DISTRICT COURT

Superior Court Docket No. NEWDC-RE-18-62

REPLY BRIEF FOR APPELLANT

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I. APPELLANT UNIFUND CCR PARTNERS HAS THE RIGHT TO DEFEND AGAINST THE FORECLOSURE ACTION.

A. APPELLEE U.S. BANK, N.A. CONSENTED BELOW TO APPELLANT'S RIGHT TO DEFEND AGAINST THE FORECLOSURE ACTION.

In its Trial Brief, Party-in-Interest/Appellant Unifund CCR Partners [hereinafter "Unifund"] argued in section A, pp. 1-4, that it had the right of defense to the foreclosure action (A. 166-169). In particular, Unifund stated at ¶5:

> Note that the Law Court in *Grosse*[1] extended the junior mortgagees' right of defense to the entire "foreclosure action". In this case, Unifund's defenses include (1) the amount due on the promissory note, (2) whether Plaintiff satisfied the conditions of 14 M.R.S. § 6111 for acceleration of the balance due under the promissory note and filing its action for foreclosure, and (3) whether Plaintiff has a higher priority than Unifund.

In its responsive Post Trial Reply Brief, at page 2, Plaintiff/Appellee U.S. Bank, N.A.[2] [hereinafter the "Bank"] acknowledged Unifund's rights:

> A. Unifund Defending itself. On the first day of trial, Unifund via counsel argued that it had the right to present a defense, and Plaintiff advised the Court that it did not disagree. Therefore Plaintiff has no reply to this section of the PII Brief. Unifund, however, does remark in its footnote (bottom of page 4) that the "standing" issues raised at

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1 *Casco Northern Bank v. Estate of Grosse*, 657 A.2 778 (Me. 1995). (This footnote did not appear in the original text).

2 This shortened name for Plaintiff/Appellee conforms to the style used by the Clerk of the Law Court.

> trial are not being pursued here. Thus, Unifund's challenges are argued solely associated with balances and the demand letter (and the last argument, if Plaintiff fails, how does that affect Unifund). (A. 181).

B. THE BANK NOW DISPUTES UNIFUND'S RIGHT OF DEFENSE.

Before the Law Court, the Bank devotes the majority of its Brief, at pp. 12-18, attempting to relegate Unifund's right to defend to a restricted area entitled "Priority". Inexplicably, the Bank makes no mention of its consent below to the full extent of Unifund's claimed defenses[3]. Notably, the Bank assigns no error to the trial court's thorough analysis of Unifund's defenses and did not appeal from the decision below that upheld Unifund's objection to the Bank's compliance with 14 M.R.S, § 6111. In light of these oversights, the Bank may not now mount an attack.

C. UNIFUND HAS STANDING.

At trial, the Bank joined in Unifund's claimed right to defend against the foreclosure action. In opposition to Unifund's appeal from the trial court's disposition, the Bank takes a contrary position. Therefore, The Bank's conduct compels the invocation of the doctrine of "judicial estoppel" and more particularly

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[3] The Bank's Brief does attempt to obfuscate the declarative holding in *Grosse* that "As parties in interest pursuant to 14 M.R.S.A. § 6321 (Supp. 1994), the [junior mortgagees] have the right to defend against the Bank's foreclosure action." *Supra* at 781. The Bank's Brief, at p. 14, prefers to eliminate the full stop at the end of that sentence with the phrase "[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*."

of the doctrine of "invited error", thereby barring the Bank's stratagem. See *Maine Appellate Practice* (Sixth Edition), Alexander, D., § 402(b) (2022).

Because the Bank took no cross-appeal, it does not advocate for any change in the trial court's judgment. It does not argue, and indeed cannot argue[4], that Unifund's alleged lack of standing[5] to press its defenses at trial requires the Law Court to reverse and remand to the trial court with an instruction to enter judgment for the Bank. The Bank accepts the trial court's dismissal of the foreclosure action.

Indeed, the Bank does not argue in its Brief that Unifund's alleged lack of standing prevents Unifund from challenging the trial court's disposition of the foreclosure action by "Dismissal without Prejudice". Any such theoretical challenge has been waived. See *Maine Appellate Practice* (Sixth Edition), Alexander, D., § 404, ¶3 (2022).

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[4] Rule 2C(a)(1), M.R. App. P. See *Maine Appellate Practice* (Sixth Edition), Alexander, D., Comments to Rule 2C, p.61 (2022).

[5] The Bank once mentions the term "standing" in its Brief, at p. 9: ". . . only defendants have the proper standing to challenge the *amount of the debt*, when a claim for liability has been made." At p. 18, the Brief ironically quotes the *Sidelinger* decision for the proposition that "**[a] junior mortgagee logically may be able to challenge the amount to which a plaintiff is entitled**, **given the impact the plaintiff's recovery has on a junior mortgagee's ability to recover anything.** Here, however, as explained further below, Carey failed to introduce any evidence showing his interest in the real estate. He therefore lacks standing to challenge the plaintiff's case." *1900 Capital Trust III v. Sidelinger*, 2021 U.S. Dist. LEXIS 123878, fn. 1. (emphasis supplied). The Bank does not dispute that Unifund claims an interest in the mortgaged premises. Also ironically, the Bank's Brief decries Unifund's incursion into the privity of contract between the Bank and Defendants Jewett when the Law Court's decision in *Grosse* permitted the parties-in-interest to challenge the formation of the contract between the lender and borrower.

II. THE BANK DOES NOT UNDERSTAND THE *FINCH* RULE OF DECISION.

The Appellee's Brief devotes its first argument to defending the trial court's disposition of the foreclosure action by "Dismissal Without Prejudice." Plainly the Appellee does not understand the *Finch*[6] Rule of Decision because its argument proceeds without once mentioning the second prong of this Rule: that the doctrine of claim preclusion will bar recovery by a lender for the unaccelerated amounts due under the note that "*could have been litigated* in conjunction with a foreclosure action even where the foreclosure claim itself *could not have been litigated* because of a section 6111 violation" (emphasis in original). *Id*. n.12.

The Bank studiously ignores the fact that the trial court's decision conflicts with *Finch* because the relief granted below is substantially less concrete and remunerative than that called for by the *Finch* Rule of Decision[7]. This fact is demonstrated in Section III of Appellant's Brief.

Instead, the Bank fancifully supposes that the trial court handling a hypothetical renewed foreclosure action by the Bank against Defendants Jewett may provide the relief that the trial court below declined to provide.

Unifund's proposed disposition of "Judgment for Defendants" will be interpreted and understood in light of the *Finch* Rule of Decision. *Id*. n.18. There will be no confusion, especially given the Law Court's explanation of its holdings

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[6] *Finch v. U.S. Bank, N.A.*, 2024 ME 2, 307 A.2d 1049

[7] It bears repeating that the greater the financial relief provided to Defendants Jewett, the more the equity in the property increases to support Unifund's interest in the premises.

in this appeal. What would cause confusion and consternation is allowing a "Dismissal Without Prejudice" to remain extant in this case.

III. THE BANK CONCOCTS THE SPECTRE OF AN ADVISORY OPINION.

The Bank labors under a misconception that the *Finch* Rule of Decision may only have preclusive effects if the Bank brings a further foreclosure action against Defendants Jewett. As discussed in Section II of Appellant's Brief, "where a court's decision results in claim preclusion as to a creditor's claim that a defendant is indebted to it, that defendant no longer owes the debt." (p.18). In other words, the effects of claim preclusion are immediate, not hypothetical.

The Bank of course would prefer that the preclusive effects resulting from the application of the *Finch* Rule of Decision not take effect, if at all, unless and until a future foreclosure action is commenced. As the Bank freely admits, that event may never happen. However, there are circumstances where the amount of the debt owed to the Bank may come into question before that event, such as by a sale of the real estate or with a refinancing of the Bank's mortgage encumbrance.

In those events, if the Bank's approach to the issue corresponds to the argument it puts before the Law Court in its Brief, the Bank may well deny that the amount owed to it has been reduced in the slightest by the preclusive effects of the *Finch* Rule of Decision. Certainly, that will be the case if the Law Court does not vacate the trial court's Dismissal Without Prejudice.

CONCLUSION

The foregoing discussion demonstrates that the Bank's opposition to Unifund's arguments on appeal is entirely without merit.

Further, given the Bank's opposition, it is more evident that the Law Court's remand to the trial court should include a provision for a factual determination by the trial court of the amount remaining due to the Bank as of the date of the ultimate Judgment for Defendants, taking into account the provisions of the note and mortgage.

Respectfully Submitted,

Date: July 7, 2025

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