

No. Yor-26-44

SUPREME JUDICIAL COURT OF MAINE
Sitting as the Law Court

Estate of Noman Cloutier

Appellant

v.

Community Loan Servicing LLC

Appellee

**On Appeal from the Biddeford District Court, Maine, No. BIDDC-
RE-2019-62**

BRIEF OF THE APPELLANT

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I. Introduction

The Estate of Norman Cloutier appeals a judgment of foreclosure on the grounds that the trial court erred in finding that Community Loan Servicing, LLC, owned the mortgage in question. The final mortgage assignment in the chain of assignments was signed under a power of attorney, which 1) does not, on its face, apply to the loan in question, and 2) was never recorded in any Maine registry of deeds. On the latter issue, whether and to what extent proof of a power of attorney's terms must appear in the registry of deeds alongside the conveyance being signed under that power of attorney is a question of first impression for the Court. The issue comes up regularly in foreclosure actions. On the first issue, the question is the rather more routine matter of sufficiency of the evidence.

II. Statement of Facts

On February 27, 2007, Norman Cloutier borrowed \$550,000.00 from Business Credit Corp., a New York corporation, evidenced by an adjustable rate promissory note (the "Note") and secured by a mortgage on the commercial property at 205 Saco Avenue, Old Orchard Beach (the

"Mortgage"), recorded in the York County, Maine Registry of Deeds at Book 15101, Page 123. (Note, App. at 101; Mortgage, App. at 111).

The Mortgage was assigned from Business Credit Corp. to Bayview Loan Servicing, LLC ("Bayview") on February 27, 2007. (Mortgage Assignment, App. at 141). Bayview subsequently changed its name to Community Loan Servicing, LLC. (Transcript, 60:01-60:05, App. at 207) (the Bayview/Community entity will be referred to as CLS from now on). The loan went into default beginning with the payment due April 1, 2019. (Transcript, 59:11-59:16, App. at 206). The Mortgage was assigned from CLS to Manufacturers and Traders Trust Company, also known as M&T Bank (M&T), on August 21, 2019. (Assignment, App. at 143).

M&T filed a foreclosure complaint against Mr. Cloutier on October 3, 2019, with CLS named as a party-in-interest. (Complaint, App. at 16). Following a Suggestion of Death filed June 14, 2022, Mr. Cloutier's estate (the "Estate") was substituted as a party on July 1, 2022, with Holly Norman, Personal Representative of the Estate of Norman Cloutier, replacing Mr. Cloutier as the defendant. (Docket, App. at 7).

On June 6, 2023, the Mortgage was assigned from M&T to CLS with CLS signing the assignment as "attorney-in-fact" for M&T.

(Assignment, App. at 144). The assignment was recorded in the York County Registry of Deeds, but the power of attorney was not recorded with the instrument, and there is no proof that it was recorded in any Maine registry of deeds. On September 1, 2023, CLS moved to be substituted as the plaintiff in place of M&T. (Docket, App. at 7). That motion was granted without a hearing and with no opposition filed on November 1, 2023. *Id.*

At trial, when pressed on CLS's authority to assign the mortgage, CLS produced a limited power of attorney (LPOA) dated October 4, 2017, purporting to grant CLS the power to convey the contested, final assignment. (LPOA, App. at 145). The LPOA makes repeated reference to a "2011 Default Management Agreement" (2011 DMA) and applies only to certain loans defined in the 2011 DMA. *Id.* at 146. Specifically,

[t]his Limited Power of Attorney is given pursuant to a certain Default Management Agreement by and between M&T and [CLS] dated as of September 30, 2011 (the "Agreement"). Now therefore, M&T does hereby constitute and appoint [CLS] the true and lawful attorney-in-fact of M&T and in M&T's name, place and stead with respect to each Defaulted Loan that is in a loss mitigation or other workout status, in foreclosure and/or bankruptcy or is classified as real estate owned (REO) and serviced by Bayview pursuant to the Agreement for the following, and only the following purposes.

Id.

The 2011 DMA was not introduced into evidence, and there was no evidence of its contents introduced at trial. The trial court entered judgment of foreclosure in favor of CLS in the amount of \$958,303.44, finding, in relevant part, that CLS owned the Cloutier Mortgage (Judgment, App. at 12). This appeal followed.

III. Statement of Issues Presented

- 1) Whether the trial court erred in finding that CLS owned the mortgage by concluding that the June 6, 2023, assignment of the Mortgage from M&T to CLS effectively conveyed the Mortgage to CLS, where CLS signed the assignment as M&T's attorney-in-fact under a power of attorney that was not recorded in any registry of deeds in the State of Maine.
- 2) Whether the trial court erred in finding that CLS owned the mortgage by concluding that the June 6, 2023, assignment of the Mortgage from M&T to CLS effectively conveyed the Mortgage to CLS, then the LPOA, on its face, applies only to loans serviced by CLS under a 2011 Default Management Agreement, which is not part of the record.

IV. Summary of Argument

The Court erred in finding that Community Loan Services, LLC (CLS) owns the mortgage and had standing to foreclose. CLS is not the original mortgagee, and the mortgage assignment to CLS fails for two independent reasons

First, the record does not establish that the limited power of attorney (LPOA) presented to show that CLS could convey the Cloutier Mortgage applies to the Cloutier Mortgage. The LPOA grants authority only over loans serviced under a 2011 Default Management Agreement (DMA); the DMA is not in evidence, and we do not know its terms. CLS tried to bridge that gap with lay opinion testimony from its witness who said that, in his opinion, the LPOA authorized the assignment, but that testimony was insufficient and inadmissible. The witness had no role in procuring the LPOA and offered no testimony about the terms of the missing DMA.

Second, the assignment was executed by a party purporting to act as attorney-in-fact under a limited power of attorney (LPOA) that was never recorded in Maine. One trial court has said, plainly, that "[w]hen a power of attorney is utilized to convey or mortgage real estate, to be

effective the power of attorney must be acknowledged by the principal as if it were a deed, and be recorded in the registry of deeds." *U.S. Bank, N.A. v. Carney*, 2018 Me. Super. LEXIS 10, at *5–6. That rule follows from the structure of Maine's recording system, is reflected in 33 M.R.S. § 353-A(4) and the Maine Title Standards, and was applied correctly in the Maine Superior Court in *Carney*. Because the LPOA was never recorded in Maine, the assignment did not convey the Mortgage.

The Estate asks that the judgment be vacated and the case remanded with instructions to dismiss for lack of standing.

IV. Argument

The 2023 mortgage assignment from M&T to CLS does not convey the mortgage, and CLS does not have standing.

CLS did not prove ownership of the mortgage, and so, lacks standing to foreclose. The trial court erred in finding that CLS owns the mortgage. Standing is a threshold requirement that every plaintiff must establish. *Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A.3d 700 ("Every plaintiff seeking to file a lawsuit in the courts must establish its standing to sue, no matter the causes of action asserted."). Standing is a

question of law that the Court reviews de novo. *Id.* The trial court's underlying factual findings are reviewed for clear error. *Homeward Residential, Inc. v. Gregor*, 2017 ME 128, ¶ 14, 165 A.3d 357.

In foreclosure, standing is governed by statute. 14 M.R.S. § 6321 (authorizing "the mortgagee or any person claiming under the mortgagee" to seek foreclosure). "[S]tanding to foreclose involves the plaintiff's interest in both the note and the mortgage." *Bank of Am., v. Greenleaf*, 2014 ME 89, ¶ 9, 96 A.3d 700. Where the plaintiff is not the original mortgagee, ownership of the mortgage must be proved through a valid assignment, or chain of assignments, from the original mortgagee to the plaintiff.

CLS is not the original mortgagee, and the evidence presented at trial fails to establish that CLS owns the mortgage. The matter should have been dismissed for lack of standing, and the Estate asks that this Court vacate the judgment for CLS and remand the case to the trial court for dismissal for lack of standing.

1. **CLS does not have standing because there is no competent evidence in the record to support a finding that the limited power of attorney alleged to empower the mortgage assignment to CLS applies to the loan in question.**

The LPOA does not, on its face, cover the Cloutier Loan. So, the evidence at trial does not support a finding that CLS had authority under the LPOA to convey the mortgage.

The interpretation of a written instrument is a question of law for the court. *Acadia Ins. Co. v. Buck Constr. Co.*, 2000 ME 154, ¶¶ 8-9, 756 A.2d 515 ("Whether a contract is unambiguous and, if unambiguous, its interpretation is a question of law."); *Am. Prot. Ins. Co. v. Acadia Ins. Co.*, 2003 ME 6, ¶ 11, 814 A.2d 989. An agent's authority under a power of attorney is limited to the document.

"[T]he action of a purported agent is of no legal effect if the action exceeds the authority granted by the principal." *Estate of Frost*, 2016 ME 132, ¶ 19, 146 A.3d 118; *Casco N. Bank, N.A. v. Edwards*, 640 A.2d 213, 215 (Me. 1994). There is no competent evidence in the Record showing that CLS had the legal authority to assign the mortgage, so the assignment is of no legal effect.

The LPOA that CLS claims gave it the power to assign the Cloutier Mortgage was limited to the terms and definitions of a certain "Default Management Agreement." The LPOA says:

This Limited Power of Attorney is given pursuant to a certain Default Management Agreement by and between M&T and [CLS] dated as of September 30, 2011 (the "Agreement"). Now therefore, M&T does hereby constitute and appoint [CLS] the true and lawful attorney-in-fact of M&T and in M&T's name, place and stead with respect to each Defaulted Loan that is in a loss mitigation or other workout status, in foreclosure and/or bankruptcy or is classified as real estate owned (REO) and serviced by Bayview pursuant to the Agreement for the following, and only the following purposes.

(LPOA, App. at 146).

The Default Management Agreement referenced in the LPOA is not part of the record. The LPOA grants CLS authority only over loans that are "Defaulted Loan[s]" serviced by CLS "pursuant to the Agreement," and, without the DMA, nothing in the record shows that the Cloutier Loan meets either condition. There is no evidence, competent or otherwise, in the record that the Cloutier Loan was serviced by CLS under the 2011 DMA, or that it qualifies as a "Defaulted Loan" as that term is defined in the 2011 DMA, or when the POA was executed in 2017. Because there is nothing in the record to

show that the LPOA applies to the Cloutier Loan, the trial court's finding that CLS owns the Mortgage was clear error. Without authority under the LPOA, CLS's execution of the assignment "is of no legal effect" (Estate of Frost, 2016 ME 132, ¶ 19, 146 A.3d 118); the Mortgage did not pass to CLS, and CLS lacks standing.

a. Mr. Cooper's opinion that the LPOA applies to the Cloutier loan is not competent evidence of the LPOA's legal scope.

CLS offered their corporate witness's opinion to bridge the gap between the LPOA and the Cloutier loan. That testimony does not support the trial court's erroneous finding that CLS owns the mortgage for two independent reasons: 1) it was an inadmissible lay opinion on the legal effect of a written instrument (Rule 701), and 2) it was offered without any grounding in personal knowledge (Rule 602).

The Parties' testimony and objections on the question of the scope of the LPOA and whether the LPOA applies to the 2023 assignment were as follows:

Q: (by Attorney Shaeffer, for CLS): Is it your understanding that Community Loan Servicing, formerly known as Bayview Loan Servicing, LLC, had a power of attorney relationship with M&T?

A: (by Mr. Cooper, the only witness for CLS): Yes.

Q: So if Bayview executed an assignment of mortgage in which M&T was the assignor, would — would it have properly been able to do it pursuant to a power of attorney?

A: Yes.

Q: And Your Honor, I'm — again, I'm blanking on the particular case, but I know for a fact that there is case law in Maine that that testimony alone is sufficient.

THE COURT: Do you have any further objection, Mr. Goodman?

MR. GOODMAN (for Cloutier): Yes, Your Honor.

THE COURT: What is —

MR. GOODMAN: There's nothing that this witness has told us that ties the power of attorney to the — to this loan.

(Transcript, 26:02-26:20, App. at 173).

Q: And is it your testimony as an employee at Community Loan Servicing that it had a power of attorney to execute this particular assignment of mortgage?

A: Yes.

MR. GOODMAN: Objection as to foundation. I'm not sure how he would know that.

THE COURT: Well, he just testified that he knew that. So he's entitled to testify to that. If you want to inquire further — Mr. Schaefer, if you want to inquire further, that's fine, but —

MR. SCHAEFER: I'm — I'm fine, Your Honor.

(*Id.*, 27:15-27:25, App. at 174).

Q: And the limited power of attorney from M&T to Bayview Loan Servicing dated October 4th, 2017, did that authorize Community Loan Servicing, LLC f/k/a Bayview Loan Servicing, LLC, to execute an assignment of mortgage on June 6th, 2023?

MR. GOODMAN: Objection, Your Honor. That calls for a legal conclusion.

MR. SCHAEFER: Your Honor, he literally just asked for that testimony from the witness.

THE COURT: Yeah, overruled.

THE WITNESS: My opinion is yes.

(*Id.*, 32:03-32:13, App. at 179).

On cross-examination, Mr. Cooper testified:

Q: Were you working at M&T Bank, or did you have any involvement in the procurement of the power of attorney that was shown to the Court today?

A: No, sir.

Q: Okay. And looking at the power of attorney, can you point specifically to anything . . . in the power of attorney that was presented to the Court, that would indicate . . . C5 was tied to this loan in — in any way?

A: I did not see the — that document, sir.

(*Id.*, 55:12-55:22, App. at 202).

Q: And can you point to anything on this power of attorney that — that links this power of attorney to my client's loan?

A: No, I cannot.

(*Id.*, 60:18-60:21, App. at 207).

i. A lay witness's opinion on the legal effect of a written instrument is not competent evidence.

The admission of Cooper's testimony, over the Estate's objection, is reviewed for abuse of discretion. *State v. Gibb*, 2023 ME 4, ¶ 11, 288 A.3d 811; *State v. Mills*, 2006 ME 134, ¶ 8, 910 A.2d 1053. Discretion "is

considered abused . . . if the ruling arises from a failure to apply principles of law applicable to a situation resulting in prejudice." *Mills*, 2006 ME 134, ¶ 8 (quoting *State v. Bennett*, 658 A.2d 1058, 1062 (Me. 1995)). Independently, the trial court's finding that CLS owns the mortgage — to the extent it rests on Cooper's testimony — is reviewed for clear error, because testimony that has no probative value as a matter of law cannot support a factual finding on review.

To the extent Mr. Cooper was testifying as to his opinion, under M.R. Evid. 701, lay opinion must be rationally based on the witness's perception and helpful to a clear understanding of his testimony or to the determination of a fact in issue. A lay witness's opinion on the legal effect of a written instrument satisfies neither requirement: it is not based on perception, and it is not helpful because construction of the instrument is for the court, not the witness.

The testimony was not based on Cooper's perceptions. The LPOA was produced for the first time at trial (Transcript, 23:17-23:24; App. at 170), and he "had nothing to do with the procurement of this limited power of attorney" (Transcript, 58:3-58:7; App. at 205). There was also no evidence or testimony suggesting that he had ever seen or been aware

of the terms of the 2011 DMA that the LPOA incorporates. It was not helpful: the document's legal effect was for the court to construe from its text. *Acadia Ins. Co. v. Buck Contr. Co.*, 2000 ME 154, ¶¶ 8-9, 756 A. 2d 515. To the extent the Court relied on Mr. Cooper's opinion in finding that CLS owned the mortgage, it erred and committed clear error in such reliance.

- ii. **Even if Cooper's testimony could support a finding about the scope of the LPOA and the Cloutier Loan, there was no foundation for his testimony; it was properly objected to, and it should have been excluded.**

Mr. Cooper's statement that the LPOA applied to the Cloutier mortgage was not, as far as the record shows, based on personal knowledge. "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." M.R. Evid. 602.

Mr. Cooper testified that he did not know about the LPOA's procurement. He also never said he knew anything about the 2011 DMA that the LPOA relied upon or that he had seen the LPOA before it was shown to him at trial. Mr. Cooper had no basis to opine that the LPOA authorized Community Loan Servicing to execute the June 6, 2023,

assignment of the Cloutier mortgage. Admitting that testimony over the Estate's foundation objection was a failure to apply Rule 602 and was therefore an abuse of discretion. *State v. Mills*, 2006 ME 134, ¶ 8, 910 A.2d 1053.

2. The 2023 mortgage assignment from M&T to CLS does not convey the mortgage, or standing to foreclose, because it was signed under a power of attorney that was not recorded in any registry of deeds in Maine.

The assignment from M&T to CLS was signed by CLS, purporting to act as M&T's attorney-in-fact under a Limited Power of Attorney (LPOA) during the foreclosure litigation in 2023. (Mortgage Assignment, App. at 144). That LPOA, however, was not recorded in any Maine registry of deeds. The Estate contends that this means the assignment is ineffective to convey the mortgage. Whether a power of attorney must be recorded in a Maine registry of deeds for an assignment of mortgage signed under that power of attorney to be effective is a question of law the Court reviews de novo. *Estate of Snow*, 2014 ME 105, ¶ 13, 99 A.3d 278; see also *Bank of Am., v. Greenleaf*, 2014 ME 89, ¶ 7, 96 A. 3d 700.

"When a power of attorney is utilized to convey or mortgage real estate, to be effective the power of attorney must be acknowledged by the

principal as if it were a deed, and be recorded in the registry of deeds." *U.S. Bank, N.A. v. Carney*, 2018 Me. Super. LEXIS 10, at *5–6 (citing Maine Real Estate Law and Practice §§ 10:10, 24:20 (2d ed. 2007)).

Carney was cited favorably by Judge Torresen in *Carrington Mortgage Services, LLC v. Gionest*, No. 2:16-cv-00534 (D. Me. Mar. 19, 2020), but the question has not otherwise been addressed by the Maine courts. The rule *Carney* articulates is correct and follows from the structural function of Maine's recording system. Maine real estate ownership runs through the local registries of deeds. Ownership questions in this state — who holds what interest in what land — are answered by what the registry shows. See 33 M.R.S. § 201-B(5) (recording provisions "shall be liberally construed to effect the legislative purpose of enhancing the marketability of the title to real property by eliminating the possibility of interests under certain unrecorded or late recorded deeds"); 33 M.R.S. § 162 ("[t]here can be no estate created in lands greater than a tenancy at will, and no estate in them can be granted, assigned or surrendered unless by some writing signed by the grantor or maker or his attorney").

A deed signed by an agent is of no legal effect unless the agent's authority is also of record, except under limited circumstances. See 33

M.R.S. § 353-A(4) (discussed below). When the power of attorney is not in the Maine deed record, the deed record does not actually show a conveyance. It shows a piece of paper that purports to convey, contingent on a separate document.

The Legislature codified the *Carney* rule long ago. 33 M.R.S. § 353-A addresses title defects and in subsection 4 addresses the specific defect at issue here — a conveyance executed by an agent where "no power of attorney authorizing and empowering [the] agent or attorney to make the conveyance . . . appears of record" — and provides that the defect is cured only after the deed has been recorded for at least twenty years and the grantees have in the meantime "occupied, claimed or treated [the property] . . . as their own":

A deed or other instrument for the conveyance of real property, or any interest in the real property executed by a person or persons purporting to act as the agent or attorney of the grantors or their spouses, that has been recorded for at least 20 years in the registry of deeds of the county or district in which the real property is located is valid even if no power of attorney authorizing and empowering an agent or attorney to make the conveyance or execute and deliver the deed or instrument appears of record, but the real property has in the meantime been occupied, claimed or treated by the grantees or their heirs, successors or assigns as their own property.

33 M.R.S. § 353-A(4). The statute's long cure period and its substantive possession condition only make sense if the Legislature understood the underlying defect to be a substantive defect— to render the conveyance ineffective absent the cure. There would be no need to enact a twenty-year-plus-possession cure for a defect that did not impair the conveyance in the first place. § 353-A(4) thus presupposes the *Carney* rule: a deed signed by an agent without a recorded power of attorney is defective, and only the passage of a long time plus adverse-possession-style use of the property can heal it.

The Maine Title Standards also align with the *Carney* rule. For a conveyance executed under a power of attorney, "[t]he document or a copy of the document must be recorded in a Registry of Deeds in Maine," and "[t]he best practice is to record the power of attorney document or a copy of the document in the Registry of Deeds for the county in which the property which is conveyed pursuant to the power of attorney is located." Me. Title Standard No. 302, Recommendation A (App. at 220). The Standards govern what title examiners may rely on, but title-examiner reliance is the day-to-day operational expression of the same principle that drives the *Carney* rule and § 353-A(4): the registry is the

place where Maine real estate ownership is determined, and a conveyance executed under a power of attorney requires the power of attorney to be in that registry.

The record does not show that the LPOA with which CLS purported to assign the Mortgage from M&T to itself was recorded in any Maine registry of deeds. Under the rule articulated in *Carney*, the June 6, 2023, assignment from M&T to CLS did not convey the Mortgage. Without the Mortgage, CLS is not a "mortgagee or any person claiming under the mortgagee" within the meaning of 14 M.R.S. § 6321 and lacks standing. The Estate asks that the judgment be vacated and that the case be remanded with instructions to dismiss for lack of standing.

VI. Conclusion

Based on the foregoing, the Estate of Norman Cloutier asks that this Court vacate the trial court's judgment for CLS and remand with instructions to dismiss for lack of standing.

Date: June 2, 2026

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, John Z. Steed, hereby certify that on June 2, 2026, I caused a true and accurate copy of the foregoing Brief of the Appellant and accompanying Appendix to be served upon counsel for the Appellee by electronic mail, addressed as follows:

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