

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**

REPLY BRIEF OF THE APPELLANT

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I. INTRODUCTION

The Estate appeals a judgment of foreclosure on a single ground: Community Loan Servicing, LLC (CLS) never proved its standing to foreclose. CLS's claim to the mortgage rests on the final assignment in the chain of title executed June 6, 2023, while this action was pending, by CLS as attorney-in-fact for M&T Bank.

That power of attorney (the LPOA), the Estate argues, has two independent problems. First, it does not confer authority on its face over this loan. The instrument, dated October 4, 2017, is a limited power of attorney running to Bayview Loan Servicing, LLC (CLS's name before it changed in 2021)¹ and provides that it

“...is given pursuant to a certain Default Management Agreement by and between M&T and [CLS] dated as of September 30, 2011

Now therefore, [CLS] 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 [CLS] pursuant to the Agreement for the following, and only the following purposes.”

¹ CLS was formerly known as Bayview. For ease of reference, Bayview will be replaced with [CLS] throughout after this point.

LPOA, App. at 146 (emphasis added).

The Default Management Agreement (DMA) was never introduced at trial, and no evidence established that CLS ever serviced this loan under it. To fill this gap, CLS offered the testimony of a corporate witness, Mr. Cooper, who stated, over objection, his opinion that the power of attorney authorized the 2023 assignment, while conceding on cross-examination that nothing in the LPOA tied it to this loan.

Second, the power of attorney was recorded only in Miami-Dade County, Florida, but not in any Maine Registry of Deeds. Whether an attorney-in-fact may convey a recorded Maine mortgage interest under a power of attorney absent from Maine's registries is a question of first impression for this Court, though three trial courts to consider unrecorded powers of attorney — *Carney*, *Gionest*, and *Sidelinger*— found the resulting assignments ineffective. That conclusion is consistent with Maine Title Standard No. 302 (“[t]he document or a copy of the document must be recorded in a Registry of Deeds in Maine to be relied upon by a title examiner.”), and with 33 M.R.S. § 353-A(4), which implies the same by saying that the want of a recorded power of attorney is cured by 20 years of continuous occupancy.

CLS responds, on the scope of the power of attorney, that there is no need for the DMA to be in the record because a plain reading of the POA shows that the loan, being defaulted and in foreclosure, is covered by it, so the Agreement's absence from the record is immaterial; that Mr. Cooper's testimony reflected his perception from business records rather than an opinion on legal effect; that Maine law permits signing authority to be proven by testimony alone, without the power of attorney itself; and that the Estate framed its challenge as one of standing without arguing that any evidentiary ruling was an abuse of discretion. CLS also reads *Carney* differently, contending the decision supports a trial court's discretion to rely on testimony or other evidence of authority.

On the recording of evidence of authority, CLS notes, correctly, that no Maine statute or decision of this Court expressly requires that a power of attorney be recorded here. It points to 18-C M.R.S. § 5-906(4) under which a power of attorney executed in another state is valid in Maine if its execution complied with the law of the jurisdiction that governs its meaning and effect, and 18-C M.R.S. § 5-906(6), under which a photocopy of a power of attorney has the same effect as the original. It argues that 33 M.R.S. § 353-A and Maine Title Standard No. 302 address

marketability of title, not the validity of an instrument. Finally, CLS argues in the alternative that 33 M.R.S. § 353-A (2), which provides a two-year cure for recorded assignments “not drawn in accordance with statutory requirements,” validated the assignment, which had been of record since June 8, 2023, more than two years before trial.

II. ARGUMENT

A. There is no competent evidence in the record showing that the LPOA applies to the Cloutier Mortgage.

The LPOA might cover the Cloutier loan, but there is no way to know whether it does, because CLS failed to bring a critical document to trial. The LPOA was granted “pursuant to a certain Default Management Agreement,” and applies to loans serviced “pursuant to the Agreement,” but the Agreement is not in the record.

1. There is no way to know if the LPOA applies to the Cloutier Mortgage because there is no way to know if the Cloutier loan is a “Defaulted Loan”; that specific capitalized term from the LPOA is not defined anywhere in the record.

The LPOA appoints CLS attorney-in-fact “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 [CLS] pursuant to the Agreement.” (LPOA, App. at 146). The LPOA does not define “Defaulted Loan.” And “the Agreement” is identified but not produced: the LPOA “is given pursuant to a certain Default Management Agreement by and between M&T and [CLS] dated as of September 30, 2011 (the ‘Agreement’).” (*Id.*). The reasonable

inference is that the Default Management Agreement says both what a “Defaulted Loan” is, and which loans are “serviced by [CLS} pursuant to the Agreement.” (*Id.*). That Agreement is not in the record, and so there is no proof that the LPOA authorized the mortgage assignment to CLS.

a. The LPOA’s scope cannot be understood without the Default Management Agreement to which it is expressly connected.

The LPOA can only be understood by reading it along with the Default Management Agreement. Multiple documents should, at times, be read together to understand parties’ agreements. *See Casco Bank & Tr. Co. v. Cloutier*, 398 A.2d 1224, 1230–31 (Me. 1979) (separate documents are read together where they contain “within their four corners” information “indicating that the documents are interrelated as parts of the same transaction”; an express reference from one document to the other suffices); *accord Cty. Fed. Credit Union v. Madore*, 2025 ME 93, ¶ 19, 347 A. 3d 1014, 1019 (“[W]e have long adhered to this approach”); *Sprague v. Dugan*, 268 A.2d 465, 468–69 (Me. 1970) (construing an assignment and a reconveyance contract together, where one “expressly refers to” the other, “to effectuate the agreement between the parties”). The LPOA is connected to the Default Management Agreement

by express reference twice over: it “is given pursuant to” the Agreement, and its grant runs to loans “serviced by [CLS] pursuant to the Agreement.” (LPOA, App. at 146). Without the Agreement, it is impossible to know what the LPOA truly means.

Courts have applied the same principle to powers of attorney and have held the evidence insufficient — and assignments ineffective — where a limited power of attorney depended on an outside agreement or schedule to establish its reach over the loan at issue. *See In re Hayes*, 393 B.R. 259, 264, 268 (Bankr. D. Mass. 2008) (assignment executed under a limited power of attorney that “appl[ied] only to . . . enumerated transactions” was “ineffective,” and the creditor “failed to adequately trace the loan” where the loan schedules referenced by the operative agreement were not in evidence); *U.S. Bank Tr., N.A. v. Rose*, 176 A.D.3d 1012, 1015, 110 N.Y.S. 3d 700, 703 (N.Y. App. Div.) (validity of an assignment executed by an attorney-in-fact under a limited power of attorney covering “certain mortgage loans” purchased by a named entity was not established, because nothing showed the subject mortgage “was among those ‘certain mortgage loans’” the servicer was authorized to assign); *Deutsche Bank Nat’l Tr. Co. v. Haller*, 100 A.D.3d 680, 683, 954

N.Y.S. 2d 551, 554 (N.Y. App. Div.) (plaintiff “failed to produce any evidence” of the signer’s authority to execute the assignment as attorney-in-fact).

b. The capitalized “Defaulted Loan” is a defined term, not a general reference to any loan that happens to be in default — and there is no way to know whether the Cloutier loan is among the “Defaulted Loans” the LPOA contemplates.

When parties capitalize a term, the capitalization signals a defined term carrying a special meaning. “[C]apitalization typically alters the meaning of words,” *Sapp v. Indus. Action Servs., LLC*, 75 F.4th 205, 215 (3d Cir. 2023), and “[w]here the parties to a contract take pains to define a key term specially, their dealings under the contract are governed by that definition,” *In re Blinds to Go Share Purchase Litig.*, 443 F.3d 1, 7 (1st Cir. 2006). The issue of whether capitalized terms in a contract or power of attorney should be read as terms of art with a specific definition, rather than according to the general meaning of the words, does not appear to have been addressed in Maine. As a general rule, however, “powers of attorney are ordinarily very carefully drafted and scrutinized, [so] courts give the terms used a technical rather than a popular meaning.” *King v. Bankerd*, 303 Md. 98, 106, 492 A.2d 608, 611 (Md. 1985) (citing Restatement (Second) of Agency § 34 cmt. h (1958)). And

other courts that consider the general versus specific meaning of capitalized terms read them as carrying a defined meaning distinct from the common meaning of the uncapitalized version. *See Wells Real Estate Inv. Trust II, Inc. v. Chardon/Hato Rey P'ship, S.E.*, 615 F.3d 45, 54 (1st Cir. 2010) (defined terms “indicated by initial capital letters” carried their special definitions rather than ordinary meaning); *Derry Fin. N.V. v. Christiana Cos.*, 797 F.2d 1210, 1214 (3d Cir. 1986) (inferring from documents that “[w]hen the parties intended to create a term of art or to incorporate specific definitions from other documents, they capitalized the referencing term and then utilized the same term in the referenced document.”). So, the record contains a grant of authority over “Defaulted Loans” and Defaulted Loans would seem to have special meaning, but there is no evidence of what a “Defaulted Loan” is.

CLS says the Agreement does not need to provide “a definitive and static list of loans.” (Appellees Br. at 18). The Estate has never argued that it does. The Estate’s argument is that “Defaulted Loan” refers to a definition found in the Agreement, and neither the trial court nor this Court can know what that definition includes — by product type, by origination date, by servicing status, or otherwise — because CLS

neglected to bring that key document to trial. And without the definition, it is impossible to know whether CLS had the power to assign this particular mortgage.

c. The LPOA conveys authority only as to loans “serviced by [CLS] pursuant to the Agreement.”

Again, the LPOA says it applies 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 [CLS] pursuant to the Agreement.”

(LPOA, App. at 146).

That final condition, “serviced by [CLS] pursuant to the Agreement,” ties the LPOA’s coverage to the Agreement a second time. CLS seems to argue that “serviced by [CLS] pursuant to the Agreement” applies only to REO properties. So that the LPOA would reach (1) any defaulted loan in workout, foreclosure, or bankruptcy status, whoever serviced it and on whatever terms, and (2) REO properties serviced by CLS under the Agreement.

That reading makes little sense. The “serviced by” condition follows the entire parallel series of statuses, and “[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in

a series,” a modifier at the end of the list “normally applies to the entire series.” *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402-403 (2021) (quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012)). The condition “serviced by” fits every category equally; there is nothing about a loan in foreclosure that applies to servicing any less than an REO property does. CLS’s narrow reading would also strip “pursuant to the Agreement” of work for most of the grant, in an instrument that states on its face that it “is given pursuant to” that same Agreement — a construction Maine law disfavors, because a contract is construed “to give force and effect to all of its provisions” and to “avoid an interpretation that renders meaningless any particular provision.” *Acadia Ins. Co. v. Buck Constr. Co.*, 2000 ME 154, ¶ 9, 756 A.2d 515, 517 (quotation marks omitted).

The better reading is that the LPOA serves only those loans that meet the definition of “Defaulted Loans” and perhaps other conditions outlined in the DMA. And since the DMA was not produced at trial, the court erred in finding CLS was entitled to a foreclosure judgment.

2. Cooper’s statement that he thought the LPOA applied to the mortgage was not a “perception”; a perception is firsthand knowledge or observation of a fact.

CLS argues that Mr. Cooper did not offer an opinion at all, but a “perception” of what the LPOA “appeared to say on its face,” admissible under Rule 701(a). (Appellees Br. at 16, 19.) First, if that is their only argument about Mr. Cooper’s contribution to this issue, then the discussion simply falls back to de novo review of the document itself, and there is no need to discuss whether objections to what he said were preserved, or to parse the distinction between perception and opinion. Second, Rule 701 “was adopted for the purposes of (a) requiring firsthand knowledge or observation,” *State v. Mitchell*, 2010 ME 73, ¶ 36, 4 A.3d 478, 487 (citing M.R. Evid. 701 Advisers’ Note), and a lay witness’s perception “must be adequately grounded on personal knowledge or observation just as would be the case with simple statements of fact,” *Chrysler Credit Corp. v. Bert Cote’s L/A Auto Sales*, 1998 ME 53, ¶ 21, 707 A.2d 1311, 1317 (quoting Field & Murray, *Maine Evidence* § 701.1 (4th ed. 1997)).

The question is not one of fact, but of interpretation of a copy of a written document; Mr. Cooper’s perceptions are not at issue, and he, himself, was quite candid about his ability to interpret the document:

“I’m not an attorney to understand that.” (Tr. 57:22–57:23, App. at 204; see Tr. 60:16, App. at 207).

3. The Estate objected to the inadmissible opinion that the LPOA applies to the Mortgage, and the objections were preserved.

To the extent that Mr. Cooper’s testimony could be considered evidence about the scope of the LPOA², his testimony was properly objected to, and contrary to CLS’s argument that the Estate never said the court abused its discretion, the opening brief said the trial court abused its discretion in accepting Mr. Cooper’s testimony about the LPOA’s scope over objection. (Appellant’s Br. 16-17).

The testimony and objections were as follows:

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.

² CLS also argues that a factfinder may rest a finding on the testimony of one witness, which is accurate. But a finding survives review only if there is "competent evidence in the record to support it," *Sulikowski v. Sulikowski*, 2019 ME 143, ¶ 9, 216 A.3d 893, 896, and testimony is competent as to a fact only where the witness has personal knowledge of it, M.R. Evid. 602; *Estate of Smith v. Salvesen*, 2016 ME 100, ¶ 13 n.3, 143 A.3d 780, 784 n.3 (witness lacking personal knowledge "was [not] competent to testify on that point").

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. . . .

(Tr. 27:15–27:25, App. at 174).

Q: And the limited power of attorney from M&T to [CLS] dated October 4th, 2017, did that authorize [CLS], 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.

(Tr. 32:03–13, App. at 179).

The question whether the LPOA “authorize[d]” the June 6, 2023, assignment is a question about the legal effect of a written instrument. That question is for the court, to be answered from the text of the instrument. *Acadia Ins. Co. v. Buck Constr. Co.*, 2000 ME 154, ¶¶ 8–9, 756 A.2d 515, 517; *see Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 99–100 (1st Cir. 1997) (lay opinion on a question of law is inadmissible). CLS agrees: its brief states that the legal effect of the LPOA “was for the Court

to construe from its text, not from conclusory statements of witness testimony.” (Appellees Br. at 19).

CLS responds that nothing shows the trial court relied on Mr. Cooper’s opinion. (Appellees Br. at 19). CLS also suggests the trial court could have found signing authority on Mr. Cooper's testimony alone, "without regard to the LPOA at all." *Id.* Those arguments, too, simply bring the issue back to de novo review of what the document says on its face.

B. Maine law requires, or should require, that a power of attorney be recorded when it supplies the authority for a recorded assignment of mortgage.

Maine law is unclear about how deeds and mortgage assignments signed by an agent should be handled. The Court in *Carney* said 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, Nat’l Ass’n. v. Carney*, 2018 Me. Super. LEXIS 10, at * 5, but that is not controlling. The Maine title standard, at a minimum, suggests that it is prudent to record proof of authority with the deed itself. Me. Title Standard No. 302(A) (a power of attorney “must be recorded in a

Registry of Deeds in Maine to be relied upon by a title examiner,” and “[t]he best practice is to record” it in the registry for the county where the property lies). And 33 M.R.S. § 353-A(4) goes further, saying that for deeds where the POA is not in the record, the defect is only cured after 20 years, and then only where the grantee has “occupied, claimed or treated” the property as its own. This Court should adopt the rule articulated in *Carney*.

1. This Court should adopt the rule in *Carney*.

As addressed in the opening brief, this Court should follow *Carney*, which said that “[j]ust as proof of the existence and recording of the power of attorney is required for the mortgage, so too for each assignment.” *Carney*, 2018 Me. Super. LEXIS 10, at * 6. *See Carrington Mortgage Services, LLC v. Gionest*, No. 2:16-cv-00534 (D. Me. Mar. 19, 2020) (following *Carney*); *see also, PROF-2014-S2 Legal Title Tr. II v. Sidelinger*, No. 2:19-cv-00220-DBH (D. Me. Oct. 26, 2020) (describing *Carney* and *Gionest* as “indicating that power of attorney agreements enabling assignments must be recorded in the registry of deeds” but finding a recording of the POA after the recording of a mortgage assignment to be sufficient). This rule is consistent with the 20-year cure

outlined in 33 M.R.S. § 353-A(4), the Maine title standards, and a leading treatise on property law — authorities *Carney* relied on. *See* Cowan & Scannell, *Maine Real Estate Law and Practice* §§ 10:10, 24:20 (2d ed. 2007); Me. Title Standard No. 302(E).

It is also consistent with this Court’s older decisions on the formality an agent’s authority must carry. “A power to convey lands must possess the same requisites and observe the same solemnities as are necessary in a deed directly conveying the land.” *Heath v. Nutter*, 50 Me. 378, 381 (1862). And it makes sense. As articulated by Maryland’s highest court: unless the power was “attested, acknowledged and recorded, the deed is of no validity,” because “[i]t is only by the power of attorney that the real owner is connected with the conveyance, and it is by and through the medium of such power that title is transferred.” *Figgins v. Cochrane*, 403 Md. 392, 417-418, 942 A.2d 736, 751 (2008). Other jurisdictions require the same by statute. *See, e.g.*, Okla. Stat. tit. 16, § 20 (recording of an agent-executed mortgage instrument is “of no effect for any purpose” until the power is filed for record); Cal. Civ. Code § 2933; Tex. Est. Code Ann. § 751.151; Ky. Rev. Stat. Ann. § 382.370.

2. Section 353-A(2) applies only to defects in how an instrument was drawn; it is not a general cure for legally deficient assignments.

CLS suggests that whatever defect might exist with the assignment matters not, because by statute “[a] duly recorded . . . instrument made and recorded for at least 2 years . . . not drawn in accordance with statutory requirements” is considered valid. 33 M.R.S. § 353-A(2). But this law only applies to defects as to form, not substance. “Not drawn in accordance with statutory requirements” describes an instrument defective in its technical drafting, not one lacking the signature of someone with authority to do so.

3. That the LPOA may be valid in Maine as an out-of-state instrument does not answer either question presented.

CLS also argues in passing that Maine law allows that an out-of-state power of attorney can be valid in Maine if valid in the foreign state. 18-C M.R.S. § 5-906(4); *see also id.* § 5-906(6) (a copy has the same effect as an original). This has no bearing on the issues here. The questions here are whether there is evidence that the LPOA reaches the Cloutier Mortgage at all and whether the authority for a recorded assignment of Maine real estate must itself appear in a Maine registry of deeds. Neither issue turns on the instrument’s validity in Florida.

III. CONCLUSION

Based on the foregoing, the Estate of Norman Cloutier asks this Court to reverse the trial court's judgment for CLS and remand for appropriate action.

Date: 08/04/2026

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, John Z. Steed, hereby certify that on August 4, 2026, I caused a true and accurate copy of the foregoing Reply Brief of the Appellant to be served upon counsel for the Appellee by electronic mail, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to the Maine Rules of Appellate Procedure 7A(f)(1), undersigned counsel hereby certifies that this brief complies with the applicable page and word limitations. The brief contains 3,769 words and consists of 17 pages, excluding those portions of the brief excluded from the calculation pursuant to Maine Rules of Appellate Procedure 7A(f)(3).

Dated: 08/04/2026

/s/ John Z. Steed
John Z. Steed, Esq.