

No. Cum-26-56

**SUPREME JUDICIAL COURT OF MAINE
Sitting as the Law Court**

Marcy Kamin-Crane et al.

Appellant

v.

U.S. Bank National Association

Appellee

**On Appeal from the Cumberland Superior Court, Maine, No.
PORSC-RE-2018-277**

REPLY BRIEF OF THE APPELLANT

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I. INTRODUCTION

Marcy Kamin-Crane appeals a judgment of foreclosure on two grounds: (1) that the foreclosure was waived under 14 M.R.S. § 6321 when the mortgagee accepted payments after commencing the foreclosure action, and (2) that Cabana unlawfully added late fees to Ms. Kamin-Crane's indebtedness after the loan was accelerated and no more monthly payments could come due under the contract.

As to waiver, Ms. Kamin-Crane's mortgage went into default on June 1, 2018, and Wells Fargo (the prior servicer) directed that this foreclosure be filed on October 31, 2018. (Docket, App. at 4). Wells Fargo accepted two payments from Ms. Kamin-Crane on February 27, 2019, and on April 1, 2019, and applied them to the loan balance while the foreclosure was pending. (Pay History, App. at 155–156). The money was never returned. Ms. Kamin-Crane testified that the payments related to a “trial modification” involving three payments, but otherwise the record is silent as to the parties' agreement.

Under Maine law, if a mortgagee accepts payment from a mortgagor after filing a foreclosure, they waive the foreclosure:

The acceptance, before the expiration of the right of redemption and after the commencement of foreclosure proceedings of any mortgage of real property, of anything of value to be applied on or to the mortgage indebtedness by the mortgagee or any person holding under the mortgage constitutes a waiver of the foreclosure unless an agreement to the contrary in writing is signed by the person from whom the payment is accepted or unless the bank returns the payment to the mortgagor within 10 days of receipt.

14 M.R.S. § 6321. Some version of this rule has been codified for over a century. See P.L. 1923, ch. 73; *Casco N. Bank, N.A. v. Edwards*, 640 A.2d 213, 216 (Me. 1994); P.L. 2007, ch. 391, § 9 (moving the rule from 14 M.R.S. § 6204 to § 6321).

The trial court found that after the foreclosure was commenced, the mortgagee accepted payment from Ms. Kamin-Crane, and found that neither of the exceptions listed applied, saying that “if the court were only to apply this portion of the statute, the Defendant has proven a waiver.” (Order, App. at 33). The court nonetheless entered judgment for the mortgagee, reasoning that the final paragraph of § 6321—the Stay Rule—creates a “broad exception” to the Waiver Rule. (Order, App. at 34).

Ms. Kamin-Crane argues that this was an error. The Stay Rule is a limited, permissive mechanism that permits discretionary stays:

The mortgagee and the mortgagor may enter into an agreement to allow the mortgagor to bring the mortgage payments up to date with the foreclosure process being stayed as long as the mortgagor makes payments according to the agreement. If the mortgagor does not make payments according to the agreement, the mortgagee may, after notice to the mortgagor, resume the foreclosure process at the point at which it was stayed.

14 M.R.S. § 6321. The Stay Rule allows the parties to a pending foreclosure to enter into a cure agreement, stay the proceeding while the mortgagor performs, and, after notice, resume the proceeding if she does not. There is no evidence that the Stay Rule was invoked during the foreclosure or used by anyone in this case—no stay, resumption, or pre-resumption notice appears in the record; the trial court used the Stay Rule only as an interpretive device to divine its understanding of the purpose of the Waiver Rule.

Cabana also argues that, because waiver is an affirmative defense, Ms. Kamin-Crane was required to prove not just that payments were accepted and applied, but also that no exception applied.

As to late fees, the note authorizes a late charge when “the full amount of any monthly payment” is not received within fifteen days of its due date, and “only once on each late payment.” (Note ¶ 6(A), App. at 41). Once a loan is accelerated, “the entire debt bec[omes] due, [and] the

contract bec[omes] indivisible. The obligations to pay each installment merge[] into one obligation to pay the entire balance on the note.” *Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 22, 307 A.3d 1049 (quoting *Johnson v. Samson Constr. Corp.*, 1997 ME 220, ¶ 8, 704 A.2d 866). With the installments merged into a single accelerated debt, no monthly payment could be missed, and so no late fee could lawfully be imposed. The \$260 Cabana’s servicer charged during this foreclosure was unlawful and should not have been added to Ms. Kamin-Crane’s indebtedness. (Pay History, App. at 148–151).

Cabana does not respond to the substance of this argument. It first contends that Ms. Kamin-Crane misquoted *Finch* on the effect of acceleration, directing the Court to paragraph 2 of that opinion rather than the quoted language of paragraph 22, and says no more about the legal structure of the argument. Cabana then argues that the issue is one of fact rather than law—that because Ms. Kamin-Crane sought no findings, the trial court’s findings about the late fees should not be disturbed.

II. REPLY ARGUMENTS

A. The questions before the Court are purely legal.

Cabana repeatedly, though never explicitly, attempts to change the standard of review on both the waiver issue and the late-fee issue by framing them as questions about the trial court's findings and its discretion. It invokes M.R. Civ. P. 52 and the doctrine of implicit findings throughout its brief, but it never identifies a fact not explicitly found that this Court might rely upon as alternative support for the judgment. *Coastal Ventures v. Alsham Plaza, LLC*, 2010 ME 63, ¶ 19, 1 A.3d 416.

The trial court stated its findings about waiver. It stated that under the Waiver Rule alone “the Defendant has proven a waiver,” and then ruled for the mortgagee on a construction of the statute—reasoning from “the intent of the Legislature” and the rule against “surplusage.” (Order, App. at 33–34).

Likewise, as to late fees, the record is clear that Cabana's servicer charged late fees after the foreclosure was filed. The question is whether Cabana was allowed, under contract and Maine law, to charge the fees.

The questions presented are about the application of uncontested facts to a statute (waiver) and a pure question of contract interpretation

(whether late fees may be charged under the parties' contract after a foreclosure is filed seeking the full balance). Both are reviewed de novo, and Rule 52 and discretion have no bearing on this matter.

B. The party seeking an exception bears the burden of proving that the exception applies.

Cabana argues, without citation to law, that Ms. Kamin-Crane, not Cabana, bore the burden to show that no exception to the Waiver Rule applied. That is, Cabana says that Ms. Kamin-Crane has to show not just that payments were accepted after the foreclosure was filed, but also to do the impossible and prove the negative that no exception applied.

That argument fails because, under Maine law, the party invoking a statutory exception must show that the exception applies. That has been the law in Maine since at least the 1800s. *State v. Gurney*, 37 Me. 149, 155 (1853) ("it is for the party for whom matter of excuse is furnished by the statute, to bring it forward in his defense"). And this Court reiterates that general rule in many contexts. *See, e.g., Progressive Nw. Ins. Co. v. Metro. Prop. & Cas. Ins. Co.*, 2021 ME 56, ¶ 9, 261 A.3d 920 (insurer bears the burden of proving that a policy exclusion applies); *Francis Small Heritage Tr. v. Town of Limington*,

2014 ME 102, ¶ 12, 98 A.3d 1012 (party claiming a tax exemption bears the burden of proving it falls within the exemption); *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 2013 ME 76, ¶ 12, 73 A.3d 1061 (employer claiming an exemption from the statutory presumption of employment bears the burden of proving each of its elements); *Town of Burlington v. Hosp. Admin. Dist. No. 1*, 2001 ME 59, ¶ 13, 769 A.2d 857 (agency seeking to withhold public records bears the burden of establishing cause for nondisclosure); *State v. York*, 1997 ME 209, ¶ 8, 704 A.2d 324 (State need not disprove a statutory exception unless the evidence at trial puts it in issue). Ms. Kamin-Crane established the facts showing that the Waiver Rule applied; Cabana failed to show that any exception applied.

C. The Trial Court invoked the Stay Rule only as an interpretive aid; there are no facts to suggest that any such stay was ever requested or granted by the Court.

Portions of Cabana's brief suggest that the judgment can be sustained on the ground that the parties actually proceeded under the Stay Rule—that the trial payment plan was a Stay Rule “agreement” and that the foreclosure was “stayed.” (Appellee's Br. at 10 n.3, 13 & n.5).

The trial court made no such finding. It did not apply the Stay Rule to the facts; it used the paragraph as an interpretive aid in construing the Waiver Rule. (Order, App. at 33–34).

Nor could those findings be assumed based on the record. The Court will assume findings to support a judgment only “to the extent that they are supported in the record,” examining the record and the reasonable inferences it will bear in the light most favorable to the judgment. *Coastal Ventures*, 2010 ME 63, ¶¶ 18–19, 1 A.3d 416.

The record here will not bear the inference. The docket contains no motion to stay the foreclosure, no order staying it, on motion or sua sponte, and no resumption of proceedings after a stay; and there is no proof that notice of any failure to meet the conditions of the purported stay agreement was ever given. The consented motions to continue mediation that Cabana cites have nothing to do with a stay and were never offered or admitted at trial (Docket, App. at 5–6), and a factfinder may not rest findings on papers in the court file that were not admitted in evidence. *Deutsche Bank Nat’l Tr. Co. v. Wilk*, 2013 ME 79, ¶ 14, 76 A.3d 363 (vacating a foreclosure judgment that rested on documents attached to filings but never admitted at trial).

Moreover, the numbers don't work. The Stay Rule describes an agreement "to allow the mortgagor to bring the mortgage payments up to date." 14 M.R.S. § 6321. It would have taken over 40 years to bring Ms. Kamin-Crane's mortgage up to date at the rate she started paying in 2019.¹

D. The mortgage is not the "Agreement to the Contrary in Writing" that the Waiver Rule requires.

In a footnote, Cabana suggests that a clause in the Mortgage dealing with receipt of rents and other proceeds after acceleration satisfies the "agreement to the contrary" requirement of the Waiver Rule. (Appellee's Br. at 18 n.6). An argument raised only in a footnote, without development, may be treated as waived. *State v. Lepenn*, 2023 ME 22, ¶ 1 n.3, 295 A.3d 139; *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290. The argument also fails on the merits.

¹ The regular monthly installment was \$2,094.14 when the loan went into default, so the nine missed payments totaled \$18,847.26 when Ms. Kamin-Crane made her first post-foreclosure payment. (Pay History, App. at 155–156). The two new post-foreclosure payments were for \$2,131.62, or \$37.48 more than the regular monthly payment. It would take 503 months, or over 40 years, to pay off the arrearage and bring the loan current by paying an extra \$37.48 per month on the loan.

The quoted language Cabana relies on is from Paragraph 24 of the Mortgage deals with proceeds generated from the property or from third parties, and reads:

I agree that Lender may accept rents from the Property, hazard insurance proceeds, condemnation awards, and any other monies produced by the Property or paid by me, even though Lender has demanded immediate payment in full and begun foreclosure and sale under Section 22 above. Lender may use such monies to pay off any part of the Sums Secured without affecting Lender's right to continue foreclosure and sale.

(Mortgage, App. at 58).

The “monies” referred to in ¶ 24 are not mortgage payments or payments as part of a “trial modification.” When general words follow a list of specific items, the general words are construed to refer to the class of the items listed. *New Orleans Tanker Corp. v. DOT*, 1999 ME 67, ¶ 6, 728 A.2d 673 (construing “other machinery or equipment,” following a list of vehicles, to reach only things comparable to the vehicles listed); *Reed v. A.C. McLoon & Co.*, 311 A.2d 548, 551–52 (Me. 1973) (limiting a catch-all — the right “to do any and all things necessary to fulfill all the foregoing purposes” — to the enumerated rights preceding it, so that the right to keep a gasoline storage tank did not include a kerosene tank); *Bryant v. Bryant*, 129 Me. 251, 254, 151 A.

429, 430–31 (1930) (“all other personal property belonging to me in the home,” following an enumeration of household furniture, reached only property of like kind). Otherwise, if the general words reached everything, there would be no need for the list. *New Orleans Tanker Corp*, 1999 ME 67, ¶ 10.

First, Paragraph 24 lists a variety of ways third parties might be required to pay the mortgagee or mortgagor under circumstances where she would be required to pass the money on to the mortgagee) (see e.g. ¶ 5 and ¶ 11, which require the mortgagor to turn over certain proceeds) and “monies produced by the Property or paid by me” therefore has to refer, generally, to monies of a kind with those in the list, not any and all payments, otherwise there would be no sense in making the specific list.

Second, Cabana’s reading would nullify the protections of the Waiver Rule with boilerplate language found, or which could be inserted, into most mortgage contracts. Paragraph 24 is a uniform covenant in the Fannie Mae/Freddie Mac uniform instrument for Maine single-family mortgages. (Mortgage, App. at 58). Fannie Mae and Freddie Mac account for almost half of the Nation’s mortgage market,

Collins v. Yellen, 594 U.S. 220, 228 (2021), and both require that loans they purchase use their uniform instruments. *Pinti v. Emigrant Mortg. Co.*, 472 Mass. 226, 236 n.16, 33 N.E.3d 1213 (2015) (citing Forrester, *Fannie Mae/Freddie Mac Uniform Mortgage Instruments: The Forgotten Benefit to Homeowners*, 72 Mo. L. Rev. 1077, 1085-86 (2007)).

Such a reading, practically speaking, renders the Waiver Rule in § 6321 meaningless. It can be written out of the law in boilerplate adhesion contracts. Statutory construction that renders language meaningless or produces anomalous results is disfavored. *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶¶ 21-22, 107 A.3d 621; *cf. New Orleans Tanker Corp.*, 1999 ME 67, ¶¶ 13-14, 728 A.2d 673 (strictly construing an exception to a statutory rule and citing authority that an exception may not be “allowed to ‘swallow the rule’”). And, when a party gives up a statutory right, the waiver “must be clear and unmistakable,” and the Courts “will not infer from a general contractual provision that the parties intended to waive a statutorily protected right.” *Dow v. Billing*, 2020 ME 10, ¶ 17, 224 A.3d 244 (emphasis and quotation marks omitted).

E. No monthly payments existed after acceleration, so no payment could be missed, and no late fees could be charged.

Cabana's response to the late-fee argument opens by saying Ms. Kamin-Crane misquoted and miscited the law (*Finch*), directing the Court to ¶ 2 of that opinion. (Appellee's Br. at 21–22). But Ms. Kamin-Crane had, in fact, correctly cited and quoted ¶ 22. Otherwise, Cabana offers no response to the substance articulated in the opening brief.

The note authorizes a late charge only when “the full amount of any monthly payment” is missed. (Note ¶ 6(A), App. at 41). After sending a compliant 6111 notice and filing the foreclosure, the note was accelerated and “the entire debt became due, [and] the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note.” *Finch*, 2024 ME 2, ¶ 22 (quoting *Johnson*, 1997 ME 220, ¶ 8). If there were no more monthly payments, there would be no more payments to be late on.

Cabana's remaining argument is that, absent a Rule 52 motion, this Court must assume the trial court found the facts necessary to support “the amount due, including late fees.” (Appellee's Br. at 19–20). But the evidence shows that \$260 in late fees was charged and added to the total,

and the facts are not in dispute as to where that particular \$260 in the Court's judgment came from. Whether the late-charge provision applies to an accelerated loan is a question of contract interpretation reviewed de novo.

III. CONCLUSION

This case involved the straightforward application of a rule with a hard-to-stomach consequence: a windfall for Ms. Kamin-Crane. However, any trial that “should” come out one way can come out the other because a party fails to introduce an important piece of evidence. Here, in litigation over hundreds of thousands of dollars, the mortgagee either failed to bring key evidence to trial, or never had it in the first place.

The Waiver Rule has been the law for a century, and it protects a vulnerable class: people about to lose their homes. It acts in an environment ripe for abuse. Nobody wants to be homeless, and borrowers in a desperate situation might well agree to anything they think will save their home or keep them housed. And the Legislature, as with the statute of frauds, and as with the writing requirements that run throughout Maine's mortgage and foreclosure scheme, see, e.g., 14 M.R.S. § 6323(1) (a waiver of foreclosure required “the written consent of the mortgagor”)

and the requirements that mortgages and promissory notes be in writing, made a hard and fast rule for mortgagees who want to take money from mortgagors after foreclosing on their home: put it in writing.

If Cabana followed that rule but did not bring the evidence to court, it stands with any other litigant who fails in its proof, and the consequence is clear. If Cabana or the prior servicer or mortgagee never obtained the agreement in writing, the consequence is equally clear. This Court should not—as the trial court did, and as Cabana urges—bend plain meaning and the statute’s clear protections because one result of applying the rule is a windfall.

On the other side of the windfall is a servicer or mortgagee who appears to be systematically charging and demanding unlawful late fees and was less than attentive to the evidence they needed at trial. Those fees will come out of whatever meager amount remains after a foreclosure sale, meaning that the servicer or mortgagee is unlawfully enriching itself at the expense of families that have just lost their home.

And careful attention to proof at trial is especially important for mortgagees granted the incredibly powerful remedy of foreclosure and sale upon breach of their contract. The vast majority of foreclosures

proceed against unrepresented or defaulted litigants in dire straits. Statutory protections aimed at this vulnerable population should be enforced to help ensure that abuse does not occur. The Waiver Rule has been the law of this state for more than 100 years, and there seems no reason to ease the Cabana Trust's burden in proving its cases in Maine's courts.

The Cabana Trust should be held to its proof. Ms. Kamin-Crane asks that the judgment be vacated and the matter remanded for entry of judgment in her favor or, in the alternative, for entry of a judgment excluding, and/or addressing the appropriate consequences for charging, unlawful late fees.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John Z. Steed, hereby certify that on August 17, 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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