MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

SUPREME JUDICIAL COURT
LAW COURT DOCKET NUMBER

Pen-22-250

KEYBANK NATIONAL ASSOCIATION
PLAINTIFF-APPELLANT,

v.

ELIZABETH KENISTON, ET AL.
DEFENDANT-APPELLEE.

ON APPEAL FROM THE BANGOR DISTRICT COURT
(District Court Docket No. BANDC-RE-2018-60)

AMICUS BRIEF FOR DOONAN, GRAVES & LONGORIA LLC

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Dated: February 23, 2023

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I. INTRODUCTION AND STATEMENT OF INTEREST

On January 17, 2023, the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court" or "this Court"), invited amicus briefs on whether a "debtor" is an indispensable party in a foreclosure when the debtor is deceased, time for probate has passed, and the property is owned by a surviving joint tenant who is not liable on the note.

This Court specifically identified the conflict in the analysis of necessary parties to a Mortgage Foreclosure and Sale action as set forth in *MTGLQ Investors, L.P. v. Alley*, 2017 ME 145, 166 A.3d 1002, ("*Alley*") in contrast with the U.S. District Court's decision in *Johnson-Toothaker v. Bayview Loan Servicing LLC*, Civil Action No. 20-CV-00371-JDL, 2022 WL 3278883 (2022)("*Toothaker*"). The *Alley* Court reversed the Trial Court Foreclosure Judgment in favor of *MTGLQ, sua sponte,* and ordered that the complaint be dismissed without prejudice where it named neither the (deceased) debtor nor the debtor's estate. In *Toothaker* the District Court reasoned that because Maine is a title theory state, a mortgage is enforceable even if the note is not, and, it follows that the deceased debtor or his/her estate are not necessary parties to a foreclosure.

Out of this conflict, this Court has identified two questions for briefing:

1. Under these circumstances, what enforceable interest, if any, does the mortgagee have in the subject property?
2. Is formal administration of an estate or appointment of a special administrator required in order to foreclose when the debtor is deceased?

As set forth in detail below, and as supported by well-settled law in Maine the answer to the first question is clearly that the mortgagee has an interest in the property that survives, and is unaffected by, the death of the first of two joint tenants.

The answer to the second question, also outlined in Maine's Probate Law, is that it depends on the tenancy of the owners at the time of the foreclosure and, if there is no surviving joint tenant, whether the decedent passed more than three years ago. If less than three years have passed since the decedent's death and there is no surviving joint tenant, then yes, a Probate Petition to appoint a Special Administrator is necessary if the debtor died intestate. If more than three years have passed, an heir search is the most appropriate approach, naming the heirs in the Foreclosure and Sale action, however, as Maine is a title theory state, if an heir is omitted, the Judgment is not invalid. A fictitious "Estate of the Debtor" is not a necessary party to the action and a Special Administration is not available, nor required, after three years to foreclose a mortgage lien.

The undersigned, and the clients we represent, have an interest in the outcome of this case. The unique facts of *Alley*, and the dismissal without prejudice have resulted in its ruling being largely limited to that case for six years and the extension of *Alley* in *Key Bank National Association v. Elizabeth Keniston, et al.*, Law Court docket number Pen-22-250 ("*Keniston*") is in direct conflict with well-settled Maine Law on joint tenancy and introduces confusion and uncertainty where clarity previously prevailed due to the fact that Maine is a title theory state.

The extension of *Alley* is not only contrary to the law, it is also against public policy as the implied "requirement" to name and serve the "Estate of the Deceased" more than three years after a mortgagor's death is an impossibility and will thwart the enforcement of mortgage liens on properties that are occupied and, as is often the case in the event that the mortgagor passes away, properties that are vacant and abandoned.

II. ARGUMENT

There are important distinctions between *Keniston* and *Alley*. Foremost, *Alley* presented a situation where it appears the *Alley* Court perceived that the property was not held in a joint tenancy at the time of the borrower's death.[1] *Keniston* involves a joint tenancy and the remaining joint tenant, Elizabeth Keniston, regardless of her absence of liability on the underlying Note, is the only person with an interest in the subject premises and she alone should have been named in the Foreclosure action.[2]

A. Mortgagee's Interest in the Property is not affected by the death of a Joint Tenant.

Maine law on joint tenancy is well-settled:

> A joint tenancy is not a testamentary disposition of property. A joint tenancy is a present estate in which both joint tenants are seized in the case of real estate, . . . One of the characteristics of a joint tenancy is a right of survivorship between the joint tenants, if the joint tenancy is still in existence. The right of survivorship, however, does not pass anything

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[1] *See Alley*, 2017 ME 145 at ¶¶ 1, and 4, 166 A.3d 1002, 1003-1004 (In reciting the facts of the case, the Law Court stated, "Wells Fargo further alleged that **John and Linda deeded the property to Alley on April 26, 2007; Linda died on June 26, 2011,"** and "The court found—and there is no dispute—that only Linda executed the note in 2007 in favor of First Magnus (as noted above, both Linda and John executed the mortgage **and then purported to deed the property to Alley**)." (emphasis added) However, the Deed in the *Alley* appendix and recorded in the York County Registry of Deeds on May 14, 2007 at Book 15157, Page 199 was from "John and Linda" to Linda M. Shelley . . . and Shelley Alley . . . as Joint Tenants. Thus, just as Elizabeth Keniston is, Shelley Alley was the surviving joint tenant following Linda's death).

[2] The naming of the heirs of Fredrick L. Keniston, while not necessary as all right title and interest vested in Elizabeth Keniston at the moment of Fredrick's death, did not support dismissal of the Foreclosure Complaint.

> from the deceased joint tenant to the surviving joint tenant. By the very nature of joint tenancy, the title of the first joint tenant who dies terminates with his death, and as both he and his cotenant were possessed and owners per tout, that is of the whole, the estate of the survivor continues as before.

Strout v. Burgess, 144 Me. 263, 279, 68 A.2d 241 (1949)(citing *Attorney General v. Clark*, 222 Mass. 291, 110 N.E. 299 (1915)); *see also Palmer v. Flint*, 156 Me. 103, 112, 161 A.2d 837, 842 (1960)(Following a lengthy history and detailed description of joint tenancy in Maine, the Law Court stated that an "estate in joint tenancy is well recognized in this state").

In short, in Maine, when property is held in joint tenancy by two individuals and one of the joint tenants passes away, the property is never in the estate of the deceased. *See Strout*, 144 Me. 263, 279, 68 A.2d 241. Rather, any rights that the deceased had are simply terminated. *See id.* The decedent's interest in the property does not "pass" to the survivor, but rather, it is simply that only the survivor's rights to the property, including the equity of redemption, continue to exist following the deceased joint tenant's death. *See id.*

Where, as here, Maine is a Title Theory State, a foreclosure only terminates the equity of redemption. *Toothaker*, 2022 WL 3278883, at *4. In addressing a challenge similar to *Keniston,* Judge Levy reminded litigants that:

> Maine is a title theory state, meaning that "a mortgage is a conditional conveyance vesting legal title to the property in the mortgagee, with the mortgagor retaining the equitable right of redemption and the right to possession."

Id. (citing *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 8, 2 A.3d 289). Judge Levy further recalled that long standing precedent provides that,

> . . . even if a note secured by a mortgage becomes unenforceable, the mortgage may still be foreclosed: "[T]he running of the period of limitations during which the provisions of the note may be enforced does not eliminate the existence of the debt obligation itself, nor does it abrogate the mortgage securing the debt or affect the foreclosure remedies available to the mortgagee."

Id. (quoting *Johnson v. McNeil*, 2002 ME 99, ¶ 13, 800 A.2d 702). For decades litigants have relied on the principles as set forth in *Johnson,*

> In *Johnson*, the Law Court concluded that a mortgagee was not precluded from foreclosing on the mortgage despite being barred from pursuing a separate action on the note evidencing the debt, because the debt itself still remained and thus the mortgage was not extinguished.

Id. (citing *Johnson*, 2002 ME 99, ¶¶ 1, 13, 800 A.2d 702).

The First Circuit's decision in *Summers v. Financial Freedom Acquisition LLC*, 807 F.3d 351 (1st Cir. 2015) explains that the underlying rational for a mortgage's independent enforceability stems from the fact it was given in a Mortgage title theory state. In a mortgage title theory state "the right to foreclose should be treated as separate and distinct from the right to collect the underlying debt." *Id.* at 358.

It is this well-settled Maine law that provides the clear answer to Question 1: Under the circumstances of a foreclosure action brought against the remaining joint

tenant, Elizabeth Keniston, the interest of the holder of the mortgage, Key Bank, is not compromised by one joint tenant, Fredrick Keniston's death, and, clearly, that interest may be enforced through a mortgage foreclosure action against the property. This is as it should be. The surviving mortgagor is in the best position to dispute the amount due because it is that person, and not the estate of the deceased or any heirs, who would be entitled to any potential overage even if a foreclosure was brought strictly as an *in rem* proceeding concerning the subject property.

B. Formal Administration of an Estate is not Required where there is a Surviving Joint Tenant

As set forth above, Maine is a title theory state, and as such a mortgage is enforceable even if the note is not. In a situation where there is a surviving joint tenant, neither the deceased joint tenant nor their estate are necessary parties to a foreclosure. Thus no formal administration is required for any purpose let alone to foreclose. The avoidance of probate is one of the clear rationales behind establishing a joint tenancy in real estate, as opposed to a tenancy in common, and should be respected.

C. Formal Administration of an Estate is Required where the Decedent Passed Within Three Years but only if there is no Surviving Joint Tenant

Perhaps this is where the analysis in *Alley* misses the mark on the issue as the Court's analysis is based on the presumption that "John and Linda" deeded the property to "Alley" and not "Linda and Alley as joint tenants." As a result of the

lender's failure to clearly describe the transfer of interest into a joint tenancy, it appeared the Plaintiff failed to appoint a Special Administrator as the death was within three years of the foreclosure complaint.[3] The *Alley* Court dismissed the matter *sua sponte* because a party appeared to be missing but, given that Alley was the surviving joint tenant, there was no missing party. Had the transfer been accurately described, it is not clear how the *Alley* Court would have ruled, but as suggested in *Toothaker*:

> *Alley* does not govern the result in this case, as it stands for **the narrow proposition that a necessary party to a foreclosure action must be joined but does not provide a comprehensive range of people or entities who are necessary parties to a foreclosure action.** *Alley* also does not address the question of whether the debtor to a note would be a necessary party to an in rem foreclosure action. Additionally, under *Johnson*, the mortgage may still be enforced through available foreclosure remedies, such as an in rem foreclosure action, even if the note is unenforceable, because Maine is a title theory state. The Supreme Court has also explained that when the holder of a note's personal obligations to repay the debt have been extinguished through bankruptcy, that "[e]ven after the debtor's personal obligations have been extinguished, the mortgage holder still retains a "right to payment" in the form of its right to the proceeds from the sale of the debtor's property."

Toothaker, 2022 WL 3278883, at *5 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991))(emphasis added).

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[3] In *Alley* the foreclosure complaint was filed September 12, 2013, within three years of the death of the individual who signed the Note, as Linda Shelley died June 26, 2011. In *Alley* the lender's right to foreclose was being challenged, within three years of the borrower's death, by an owner, through an unauthorized transfer, but an owner, nevertheless who was a surviving joint tenant.

The Supreme Court's decision in *Johnson* goes to the heart of this matter. Key Bank holds the Mortgage and notwithstanding one of two joint tenants' extinguished personal obligations thereon, Key Bank "still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." *Johnson*, 501 U.S. at 84.

Accordingly, in *Keniston*, because of the application of the laws of joint tenancy, no formal administration is required to foreclose the interest of the only remaining tenant.

D. Formal Administration of an Estate is not Required Where the Decedent Passed More than Three Years ago.

Formal administration of an Estate is also not required, nor even allowed, if the sole owner's death, or, in the case of joint tenancy, the death of the last remaining individual tenant, occurs more than three years prior to the bringing of the foreclosure action.[4] The probate laws specifically allow for the appointment of a Special Administrator for three years only. Beyond that, the mortgagee may foreclose its mortgage without instigating a formal probate action to determine what heirs may have had a right to come forth and address the loan obligation to prevent foreclosure

[4] *See* Title 18-C Section 3-108 (this probate law provides the limited conditions under which probate may be commenced more than three years after a descendants' death (none of which are present here) and therefore there are no grounds under Maine Law for the opening of a probate of the deceased borrower after three years).

of the right of redemption. The Legislature has determined that three years is sufficient in Maine. If there is no interest of record at that point, the mortgage lien may be foreclosed without notice to any heirs or may be addressed in the foreclosure action itself. It is standard practice to perform an heir search and to name and notice any known heirs, however, as a matter of law, omission of an heir will not invalidate the Foreclosure Judgment in a title theory state such as Maine.

III. CONCLUSION

It appears from the records that the facts established by the evidence at trial included the execution of the Keniston Note and Mortgage, assignment of the Keniston Mortgage to Plaintiff, endorsement and transfer of the Keniston Note to Plaintiff in accordance with 11 M.R.S.A. §§ 3-1201 and 3-1203, default in payment of the Keniston Note, as well as the amount due, and this evidence to be submitted entitles Key Bank to Judgment as a matter of law under 14 M.R.S.A. § 6322. *See Chase v. Higgins,* 2009 ME 136 ¶11, 9985 A.2d 508, 510-511 (2009); *H.S.B.C. Bank, as Trustee v. Gabay*, 2011 ME 101 ¶10, 28 A.3d 1158, 1164 (2011); *Abbot v. LaCourse,* 2005 ME 103, 882 A.2d 253 (2005); *see also, Simansky v. Clark,* 128 ME 280, 147 A.205 (1929). Pursuant to 14 M.R.S. § 6322, and precedent established by, but not limited to, *Bank of America v. Greenleaf*, 2014 ME 89, ¶13, 96 A.3d 700, 708 (2014); *Bank of America v. Cloutier*, 2013 ME 17, ¶13, 61 A.3d 1242, 1245 (2013); *H.S.B.S. Bank, as Trustee v. Gabay*, 2011 ME 101, ¶10, 28 A.3d at 1164 (2011);

Wells Fargo Bank, N.A. v. deBree, 2012 ME 34, ¶9, 38 A.3d 1257, 1259 (2012); *Beneficial Maine, Inc. v. Carter*, 2011 ME 77, 25 A.3d 96 (2011); *Higgins*, at ¶11; *Deutsche Bank Nat'l Trust Co. v. Raggiani*, 2009 ME 120, ¶¶ 5-8, 985 A.2d 1, 3 (2009); and *U.S. Bank Tr. v. Jones,* 330 F. Supp.3d 530, 535 (D. Me. 2018); Key Bank met its burden of proof on each of the elements of foreclosure with the evidence presented outlined above and no more was required. Key Bank established:

- "the existence of the mortgage, including the book and page number of the mortgage, and an adequate description of the mortgaged premises, including the street address, if any, *see* P.L. 2009, ch. 402, §§ 9, 17 (effective June 15, 2009) (amending 14 M.R.S. §§ 2401(3), 6321 (2008));
- properly presented proof of ownership of the mortgage note and the mortgage, including all assignments and endorsements of the note and the mortgage, M.R. Civ. P. 56(j) (amendment effective Aug. 3, 2009); *see* P.L. 2009, ch. 402, § 17 (effective June 15, 2009) (amending 14 M.R.S. § 6321 (2008));
- a breach of condition in the mortgage, *Johnson v. McNeil*, 2002 ME 99, ¶ 17, 800 A.2d 702, 705; *see* 14 M.R.S. § 6322 (2008);
- the amount due on the mortgage note, including any reasonable attorney fees and court costs, *Johnson,* 2002 ME 99, ¶ 17, 800 A.2d at 705; *see*

14 M.R.S. § 6322; P.L. 2009, ch. 402, § 11 (effective June 15, 2009) (to be codified at 14 M.R.S. § 6111(1-A));

- the order of priority and any amounts that may be due to other parties in interest, including any public utility easements, *Johnson,* 2002 ME 99, ¶ 17, 800 A.2d at 705; *see* 14 M.R.S. § 6322;
- evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements, in accordance with 14 M.R.S. 6111; M.R. Civ. P. 56(j); *see* 14 M.R.S. § 6111; and
- proof that the defendants are not in military service in accordance with the Servicemembers Civil Relief Act, *see* 50 U.S.C.S. app. § 521 (LexisNexis Supp. 2009); M.R. Civ. P. 55(b)(4)." *Chase v. Higgins* 2009 ME 136; *see also Camden Nat'l Bank v. Peterson,* 2008 ME 85, ¶ 21, 948 A.2d 1251, 1257.
- Participation in the Foreclosure Diversion Program is also not an element to be established in this matter due to the death of the borrower.

No more was required given the fact that one of the two joint tenants survived and was named in the foreclosure action. The Plaintiff did not advance a claim on the Keniston Note and made it clear only an *in rem* judgment extinguishing the remaining joint tenant's interest in the property was sought. There was no "missing party;" in fact, given the status of the joint tenancy, the naming of the heirs was

superfluous and, as a result, the matter should not have been dismissed. In a title theory state such as Maine, this is all that is necessary to foreclose the mortgage lien. The mortgagee's interest in the property was not impacted by the death of one of two joint tenants and no formal administration of the deceased tenant was required to foreclose the right of redemption and enforce its mortgage lien.

Respectfully submitted,

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