MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

SUPREME JUDICIAL COURT
LAW COURT DOCKET NUMBER

Oxf-2021-412

J.P. MORGAN ACQUSITION CORP.
PLAINTIFF-APPELLANT,

v.

CAMILLE J. MOULTON
DEFENDANT-APPELLEE.

ON APPEAL FROM THE SOUTH PARIS DISTRICT COURT
(District Court Docket No. SOPDS-RE-19-02)

AMICUS BRIEF FOR DOONAN, GRAVES & LONGORIA LLC

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Dated: September 27, 2022

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I. INTRODUCTION AND STATEMENT OF INTEREST

On March 1, 2017, the Maine Supreme Judicial Court, sitting as the Law Court ("Law Court"), invited amicus briefs on:

> "[W]hether the dismissal with prejudice of a foreclosure action bars a second foreclosure action based on the same note and mortgage."

Fed. Nat'l Mortg. Ass'n v. Deschaine, 2017 ME 190, ¶ 37, 170 A.3d 230 ("*Deschaine*") and *Pushard v. Bank of Am., N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103 ("*Pushard*") answered that question in the affirmative. In turn, parties and the courts have relied upon these decisions not just as a bar to "second foreclosures" but also to bar and dismiss claims through which litigants sought to enforce their interests in a mortgage loan based on alternative theories, which, following dismissals in prior cases, did not include a foreclosure count. Further, following the decision in *Beal Bank USA v. New Century Mortg. Corp.*, 2019 ME 150, 217 A.3d 731, litigants who moved to dismiss their cases *without prejudice* have had those cases dismissed *with prejudice* based upon on *Deschaine* and *Pushard*. The dismissal with prejudice of declaratory cases brought by mortgagees has then been used to support requests for the dismissal with prejudice and for summary judgment with respect to the mortgagee's subsequent equitable claims and suits on the note under *Deschaine* on the theory that such suits on

the note or claims in equity could have been brought in the prior declaratory case that was dismissed with prejudice.

Even in circumstances where a mortgagee obtains a Quitclaim Assignment or Ratification Assignment, litigants have even relied upon *Deschaine* and *Pushard* to advance a claim that "the mortgage be treated as void as a matter of law" outside of an action to foreclose. *See Johnson-Toothaker v. Bayview Loan Servicing LLC,* Civil Action No. 20-cv-00371-JDL, 2022 WL 3278883, *5 (D. ME Aug. 11, 2022).

Cases dismissed with prejudice prior to *Deschaine* and *Pushard* that contemplated re-demand and foreclosure have also been impacted. Following refinements in the law on notice or evidentiary standards, lenders and servicers, like the Plaintiff in this matter, had moved to dismiss pending cases without prejudice to have an opportunity to re-notice the borrowers under the refined standards. Courts have relied upon *Deschaine* and *Pushard* in dismissing such cases with prejudice, or, as in the instant matter, granting summary judgment in favor of the Defendant, notwithstanding the Plaintiff's pending Motion to Dismiss.

M.R.S.A. 33 § 508 was passed by the Legislature, and signed into law, to address some of the concerns resulting from *Deschaine* and *Pushard*. The Statute makes it clear that the holdings in these cases are limited to the foreclosure context. However, as demonstrated by the instant case, especially in light of the fact that Maine

is a title theory state, M.R.S.A. 33 § 508 did not do enough to clarify when the "first foreclosure" becomes final such that the Judgment for the mortgagee would have a *res judicata* effect on subsequent attempts to foreclose. Is it the service of notice under M.R.S.A 14 § 6111 ("NRC")? The filing of a foreclosure complaint? The conclusion of mediation in the Foreclosure Diversion Program? Is it after a trial date is set? The expiration of the Right of Redemption? The foreclosure Sale? As in other types of civil cases, does the "first foreclosure" require a final judgment on the merits and the expiration of the right of redemption and appeal periods, or is it a *magic bullet* entitling litigants or judges, *sua sponte,* to apply claim preclusion or *res judicata* to anticipated, subsequent actions brought for foreclosure or other equitable or contractual relief?

As set forth in detail below, the language in the Maine foreclosure statutes supports remand for dismissal without prejudice to allow the mortgagee to re-demand as the Note was not accelerated. The "first foreclosure" was never tried, and there was no final judgment, let alone a foreclosure sale. Public policy supports the practice of allowing a lender to issue a corrective NRC to apprise the borrower of the amounts needed to cure the default in circumstances where there is an issue with the content or clarity of the lender's NRC. The subsequent NRC cannot include attorney fees from the prior ineffectual notice, *see U.S. Bank v. Jones*, 330 F.Supp.3d 530 (D.Me. 2018),

aff'd 925 F.3d 534 (1st Cir. 2019), and, thus, the ability to dismiss and re-demand favors the borrower.

What has been expanded to be a "right" to a *Deschaine* dismissal if there is any issue with the *Higgins* elements of a foreclosure, including issues with the pre-foreclosure NRC, has wreaked havoc on Maine's title theory principles going back decades. Some Courts have attempted to right the ship and distinguish, rather than expand, *Deschaine* and *Pushard* in an attempt to return to pre-2017 jurisprudence. *See Johnson-Toothaker*, 2022 WL 3278883, at *5 ("Because Bayview has not initiated a foreclosure action, the Law Court's jurisprudence addressing the preclusive effect of a prior foreclosure action does not control the issue presented here"); *Jones*, 330 F.Supp.3d at 544 (Even though Judge Woodcock found for the borrower on the foreclosure claim because the lender's NRC included pre-demand costs and fees incurred to establish standing, he did not invalidate the entire mortgage loan or vest title in the borrower, rather, he evaluated the count on the note separately and found for the lender); *see also U.S. Bank v. Manning*, 2020 ME 42, ¶ 33, 228 A.3d 726 ("We also 'closely review' for an abuse of discretion a court's dismissal with prejudice of a foreclosure complaint . . . Due to the severity of dismissal . . . and the constitutional implications of such an action ... the trial court's discretion in imposing [this] ultimate sanction is narrow indeed and will be given close scrutiny on appeal.")(internal

citations omitted). The analysis in these decisions returns us to our roots and it is there that the answers to the questions this Court posed in requesting Amicus briefing lie. This Amicus Brief is respectfully submitted by the undersigned as my firm presently has over a dozen cases that will be directly impacted by the outcome of this case, and it is hoped that our perspective on the statutes and caselaw in this area will assist the Court in answering the questions posed.

II. SUMMARY OF ARGUMENT

On August 23, 2022, this Court signaled it may be time to reconsider the breadth and depth of the *Deschaine* and *Pushard* Decisions and to provide clarity both on what this Court intended in those decisions, and whether *Deschaine* and its progeny were consistent with Maine law prior to 2017 when decided. To answer, we return to the original question about which this Court requested additional analysis:

> Should the court reconsider and repudiate the language in *Fed. Natl Mortg. Assn v. Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230, and *Pushard v. Bank of Am., N.A.*, 2017 ME 230, ¶ 36, 175 A.3d 103, ordering that a failed foreclosure action barring a second foreclosure action on res judicata principles entitles the borrower to a discharge of the mortgage and title to the mortgaged property?

In short, yes. At a minimum, further clarification is needed on when a "first foreclosure" is final and thereby preclusive pursuant to principles of *res judicata* and in what context. Aligning the principles applied in foreclosure matters with civil matters, generally, and with Maine's foreclosure statute and title theory generally, will

bring consistency and predictability back to lending, servicing and default litigation in Maine.

> Should the Court reconsider its existing precedent that a foreclosure judgment in favor of the mortgagor based on the mortgagee's failure to comply with 14 M.R.S. § 6111 renders the note and mortgage unenforceable because a second foreclosure action is barred by principles of res judicata?

Yes, as outlined above, the expansion of the holdings in *Deschaine* and *Pushard* is in conflict with Maine title theory and the Maine Foreclosure Statutes.

> If so, upon what grounds, and to what extent, should principles of *res judicata* continue to apply? Should it make a difference if the second foreclosure action is based on a new default?

Simply, if a lender's first foreclosure fails as a result of defects in the NRC, *res judicata* should not operate to preclude the lender from bringing subsequent foreclosure action after sending a new NRC that includes only cure amounts accrued following the first failed foreclosure. *See Singleton v. Greymar Assocs.*, 882 So.2d 1004, 1007 (Fla. 2004)(holding that, although the lender's first foreclosure action was dismissed with prejudice, the lender was not precluded from bringing a second foreclosure action based on a subsequent default).

> If the lender is barred from pursuing a second foreclosure action under principles of *res judicata*, does this inability render the note and mortgage unenforceable such that the lender may pursue alternative claims including, but not limited to, an unjust enrichment claim against the borrower consistent with Restatement (Third) of Restitution & Unjust Enrichment § 2(2)?

No. Even if a lender is barred from foreclosing the mortgage lien due to a prior completed foreclosure that failed as a result of defects in the lender's NRC, under Maine title theory, the underlying residential loan obligation would not have been accelerated, the obligation does not "vanish," and the lender should be free to pursue alternative theories including but not limited to unjust enrichment.

This case presents a unique opportunity to return consistency to civil jurisprudence in this area. Like this Court's decision in *The Bank of New York Mellon v. Shone*, 2020 ME 122, 238 A.3d 671, this case presents an opportunity to resolve the conflict between the *Deschaine* and *Pushard* precedent and prior decisions grounded in Maine title theory, *see U.S. Bank Nat'l Ass'n v. Gordon*, 2020 ME 33, ¶¶ 15-30, 227 A.3d 577 (Horton, J., concurring)(outlining the recent departure from precedent dating back to the nineteenth century). One of the most frequent contexts in which dismissals with prejudice and *Deschaine* Judgments arise has been the interpretation of what constitutes a valid NRC. Does "strict compliance" allow lenders to correct errors in the NRC and re-notice the default; may a NRC include a cure amount less than every dollar owed on the loan; if the trial court determines there is an error in the NRC can the remedy be to send a compliant NRC, and should the lender have the right to a dismissal without prejudice to correct the defective NRC. If a NRC demands more than the amount a court later determines is owed, will that invalidate the demand? Does dismissal preclude a re-demand and foreclosure? What if the plaintiff seeks a dismissal

without prejudice prior to the entry of judgment against it at trial? Does dismissal require the lender to release all interest in the property not withstanding advances? The breadth and depth of the present application of *Deschaine* and *Pushard* calls for the re-analysis of the history of Maine as a title theory state. In that analysis and in the plain meaning of the Maine foreclosure statutes there is clear support for a subsequent foreclosure if the lender requests dismissal of the first foreclosure without prejudice prior to the entry of judgment, as in Moulton's case.

Further, as reflected in the plain meaning of the Maine foreclosure statutes, Maine title theory, as applied in the residential context, does not support the elimination of contract and equitable rights to recover advances as well as the amounts received and used by the defaulted borrowers. The statute provides: "A mortgage only may be discharged by a written instrument acknowledging the satisfaction thereof . . ." M.R.S.A. 33 § 551. The drafters did not say "or when the lender sends a defective NRC." For this reason, as set forth below, lenders should not be precluded from pursuing subsequent, alternate paths to recover the amounts due or advanced on a mortgage loan following the dismissal of its foreclosure claims.

III. ARGUMENT

A. RES JUDICATA REQUIRES ACCELERATION AND THE MAINE RESIDENTIAL FORECLOSURE STATUTES DO NOT ACCELERATE THE UNDERLYING NOTE UNTIL SALE.

Since Maine is a statutory construct in regard to foreclosure and sale, *Everest v. Bank of Am., N.A.*, 2015 ME 19, ¶ 16, 111 A.3d 655, various aspects of the process must be interpreted through the lens of the applicable statutes. *See, e.g. Wilmington Sav. Fund Society, FSB v. Needham*, 2019 ME 42, ¶¶15-16, 204 A.3d 1277 (when interpreting a contract, "courts are guided by a host of principles intended to assist in determining the meaning and intent of a provision even within the confines of a plain language analysis. . ."), *quoting Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 20, 107 A.3d 621; *see also Maietta Const., Inc. v. Wainright*, 2004 ME 53, ¶ 10, 847 A.2d 1169 ("Generally, Legislatures are deemed to draft legislation against the backdrop of the common law, and do not displace it without directly addressing the issue.").

In Maine, the processes for foreclosure and sale are governed by M.R.S.A. 14 §§ 6101-6327. For instance, while it has been suggested that the acceleration of a note occurs at the filing of a complaint for foreclosure and sale, *Deschaine*, 2017 ME 190, ¶ 26, the statutes do not support this interpretation. For example, § 6101 provides for the payment of legal fees and the costs of publication, a figure which is unknowable at the time of the filing of the complaint of foreclosure and sale. Additionally, § 6103 allows other creditors having claims against the borrower to file a complaint in

Superior Court to determine whether a breach of the mortgage has occurred. Does this mean that such a legal action by a third party accelerates the underlying note and mortgage, especially when such a filing prevents the expiration of the right of redemption of the underlying mortgage?

M.R.S.A. 14 §§ 6111, 6321 and 6322 are the principal sections of the statutory scheme related to the enforcement of a foreclosure. *See, e.g.*, *Chase Home Fin. v. Higgins*, 2009 ME 136, ¶ 11, 985 A.2d 508. A reading of the statutes clearly shows that it is not the sending of the NRC under § 6111 that accelerates the loan. Section 6111 requires that "the mortgagee may not accelerate maturity of the unpaid balance of the obligation *or* otherwise enforce the mortgage (emphasis added) . . . until at least 35 days after the date that written notice pursuant to subsection 1-A is given by the mortgagee. . ." In crafting § 6111, the Legislature chose not to use the word "and." Accordingly, by the plain language of the statute, acceleration does not, and cannot, occur at least until a valid NRC expires. Thus, any defect in the NRC would mean that the Note was not accelerated. As such, to "give effect to the legislative intent as indicated by the statute's plain language . . .," *Berube v. Rust Engineering*, 668 A.2d 875, 877 (1995), the Court should determine that the acceleration of the note is not a component of the Maine foreclosure process. In that respect, if the note is not accelerated due to a defect in the NRC, then there is no basis to preclude enforcement of the note or mortgage in a subsequent proceeding.

Additionally, implied in the recently enacted § 6113(3) is the power to "dismiss the action, stay the action on appropriate terms and conditions or impose other appropriate sanctions until the violation is cured." This section within the foreclosure statutes seems to give the Court, in the appropriate circumstances, the right to "de-accelerate" the loan if in fact it was accelerated by the filing of a foreclosure complaint. A better interpretation of the plain meaning of Maine's foreclosure statutes, when read as a whole, is that acceleration has not occurred while the action of foreclosure and sale is pending.

This view is buttressed by the statewide mediation program provided by the State of Maine under M.R.S.A. 14 § 6321-A. In commercial foreclosures, sales are authorized by advertising under the power of sale and recording that notice in the registry of deeds. Since it appears that, in those instances, acceleration occurs at notice or at actual sale, shouldn't residential mortgages follow the same rule in order to maintain consistency in the underlying principles applied to foreclosures, generally? This is clear in § 6203-B(4) which provides that "the premises are considered to have been sold free and clear of the interest of the mortgagor."

In the case of foreclosure and sale that does not result in full repayment of the debt, a further action to recover those monies must be initiated within two years after the sale under § 6203-D, and with proper notice under § 6203-E. The provisions of §§ 6203-D and 6203-E clearly indicate that such a sale, in and of itself, does not

accelerate the full indebtedness. The Court may also determine, upon application of a junior lienholder, the amount due to the superior lienholder and order that the superior lienholder accept such an amount and assign the superior lien. *See* M.R.S.A. 14 § 6205. The statute also anticipates that there will be occasions when nothing is found due on the mortgage making any acceleration impossible. *See* M.R.S.A. 14 § 6206.

Moreover, § 6321, aptly named "Commencement of foreclosure by civil action" makes no reference to the loan being accelerated and, in fact, provides that "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 mortgagor or any person holding under the mortgagee constitutes a waiver of the foreclosure…" Section 6321 clearly contemplates that the loan is not accelerated until at least after the right of redemption following entry of judgment has expired.

Similarly, a writ of possession may not issue until the expiration of the aforesaid period of redemption, *see* M.R.S.A. 14 § 6322, and the rights of the mortgagor are only terminated at this later time, *see* M.R.S.A. 14 § 6323. Section 6323 goes further to emphasize this point by giving the mortgagee the discretion to accept reinstatement funds even after the period of redemption has expired. Lastly, § 6323 provides that a deficiency claim is only determined as of the date of the sale.

A close reading of the entire opinion in *Deschaine* reveals that the unique facts, in particular the fact that the first foreclosure's dismissal with prejudice was a *sanction* for misconduct and the clear desire to send a strong message that such conduct would not be rewarded with a second chance, strongly influenced the decision of the Court in that matter. 2017 ME 190, ¶¶ 31-36.

A clear reading of the applicable foreclosure statutes requires finding that the amounts due under the Moulton Note and Mortgage were not accelerated by the sending of the NRC or the filing of the complaint of foreclosure, but rather, are most appropriately not considered accelerated at least until the post-judgment period of redemption has expired and probably not until the public sale has occurred and been consummated.

B. A NOTE CONTAINS SEPARATE RIGHTS AND OBLIGATIONS FROM A MORTGAGE AND A RESIDENTIAL JUDICIAL FORECLOSURE IN A TITLE THEORY STATE ONLY REMOVES THE EQUITABLE RIGHT OF REDEMPTION AND SHOULD NOT HAVE A PRECLUSIVE EFFECT ON SUBSEQUENT FORECLOSURES.

This Court has consistently found different rights and obligations under a note and a mortgage and different consequences in commercial versus residential situations. For instance, for many years, it has been clear that the mortgage is the conveyance of the subject real estate under our mortgage title theory. *Johnson v. McNeil*, 2002 ME 99, ¶ 10, 800 A.2d 702, *citing First Auburn Trust Co. v. Buck,* 137

Me. 172, 173 (1940), *Martel v. Bearce*, 311 A.2d 540, 543 (Me. 1973). This conveyance occurs at the time of the execution of the mortgage and is subject to the defeasance by full performance under the mortgage by the mortgagee. *See id.*

The transfer of interest in notes and mortgages are also different. *See Bank of Am., N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 10-12, 96 A.3d 700. The related statutes of limitation vary significantly between a note (six years), *see* M.R.S.A. 11 § 3-118(1), to a note executed under seal (twenty years), *see* M.R.S.A. 14 § 6104, to a mortgage (twenty years from the "time limited in the mortgage for the full performance of the conditions there[in]"), *see* M.R.S.A. 14 § 6104. Moreover, it is clear that a mortgage can be enforced even when the statute of limitations has run on the underlying note since the debt itself has not been extinguished. *See Johnson*, 2002 ME 99, ¶ 9. There has been no showing here that the Moulton debt has been extinguished.

It is only by reviewing the language of the Moulton Note, Moulton Mortgage, the foreclosure statutes and the fundamental principles of title theory in Maine real estate law that we are able to arrive at a reasonable answer to the Law Court's questions. The Note and the Mortgage are separate documents which provide different rights and obligations of the parties. *See Bordetsky v. JAK Realty Trust*, 2017 ME 42, ¶ 13, 157 A.3d 233 (This Court noted the different treatments of a commercial loan and one used for "personal, family or household use" cautioning that "[t]he nature of

the loan is explained by the Note alone, . . ."). The foreclosure statute neither provides for nor requires the specific notice requirement(s) for acceleration of the Note. *See* M.R.S.A. 14 § 6111; *but see Johnson v. Samson Const. Corp.*, 1997 ME 220, ¶ 2, 704 A.2d 866 (the note at issue required that "If any default be made under this Note, and if such default is not made good within thirty (30) days after written notice of same, the entire unpaid principal and accrued interest *shall* become immediately due and payable without further demand" (emphasis added). The distinction between § 6111 and the decision in *Johnson* is important as it reflects the interplay and flexibility of using the word "may," as opposed to "shall," in the provisions of most residential notes allowing the lender to waive a default).

In short, a residential, judicial foreclosure in a title theory state is, by statute, an action in equity designed only to remove the equitable right of redemption and should never have preclusive effect on subsequent foreclosures. What is decided by a foreclosure is whether a 90 day right of redemption is triggered, and, if not exercised, when the actual sale and, with it, the actual termination of the equitable right of redemption may take place. If the mortgagee loses, the mortgagor retains the right of redemption indefinitely unless and until all steps outlined in the statutes are completed and the right is extinguished. There is no statutory basis for removal of the obligation to redeem if the borrower wants the fee title back. The subject Note provides for

acceleration of the Note under certain criteria, which are not present on this record, and therefore the summary judgment on the foreclosure action, if upheld, should *not* bar a second foreclosure action based on the same Note and Mortgage, let alone preclude recovery under alternate equitable theories.

IV. CONCLUSION

Since Maine statutes and caselaw and the operative documents treat promissory notes and mortgages differently, and as having different rights and obligations, rights to enforcement, including foreclosure, continue to be available in a second action even if a first foreclosure action has been dismissed with prejudice. Moreover, even in the rare instance that a Note is fully accelerated, and redemption period expired and/or the foreclosure sale conducted, the equitable claims for unjust enrichment etc. are not extinguished with the contractual obligations. The language in the Maine foreclosure statutes as well as title theory principles upon which real property law in Maine have long been grounded, supports remand for dismissal without prejudice in the Moulton case as the Note was not accelerated and the "first foreclosure" was never tried, was not a sanction for poor conduct of the lender, and was not a final judgment let alone a sale.

Respectfully submitted,

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Dated: September 27, 2022

CERTIFICATE OF SERVICE

I hereby certify that on this twenty-seventh day of September 2022, I have served two (2) copies of the within Amicus Brief by priority mail, postage prepaid upon:

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