Doonan, Graves & Longoria LLC
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MAINE FORECLOSURES:

Is it time for a return to pre-2014 jurisprudence?

DGL responds to the Law Court's call for an Amicus Brief in *Moulton* arguing for the reversal of *Deschaine* and *Pushard*.

> "On August 23, 2022, [The Law 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." [AB 5]

Controlling law in Maine is one strike and you are out – one shot at foreclosure. A dismissal with prejudice will generally result in a free house. *Federal National Mortgage Association v. Deschaine*, 170 A.3d 230 (Me. 2017); *Pushard v. Bank of America, N.A.*, 175 A.3d 103 (Me. 2017). This decision could change that landscape entirely. DGL filed its Amicus Brief on September 26, 2022, advocating for the reversal of *Deschaine* and *Pushard* based on Maine title theory and a thorough analysis of the Maine Foreclosure statutes.

In the DGL Amicus Brief we take the position that,

> "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." [AB 15]

The Law Court requested amicus briefing in *J.P. Morgan Acquisition Corp. v. Moulton*,[1] which is on Appeal from the South Paris District Court, Law Court No. OXF 21-412. The appeal in *Moulton* arises out of the

[1] The Law Court invited amicus briefs on the following issues:

1. "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?
   a) 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?
   b) 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

lower court's Judgment in favor of the borrower, which was entered notwithstanding the fact that the lender had moved to dismiss the matter without prejudice so that it may send a new Notice of Right to Cure that complies with 14 M.R.S.A. §6111, as well as the trial court's *sua sponte* "release of the Mortgage" "Free House" decision relying on *Deschaine* and *Pushard*.

In *Moulton*, the Notice of Right to Cure (hereinafter the "NRC") stated the total amount causing the loan to be in default, with an attached itemization of charges. The issue with the Notice was that the figure on the cover page and the remainder (after the credit was applied) in the referenced itemization were different. The issue before the Law Court is whether the lower court was correct in granting summary judgment against the lender based on the representations within the Notice, and if so, what is the correct outcome under present case law and whether the Court should reconsider its "all or nothing" approach as dictated by *Deschaine*, 2017 ME 190, ¶ 37, 170 A.3d 230, and *Pushard*, 2017 ME 230, ¶ 36, 175 A.3d 103. DGL argues in support of the reversal:

> "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." [AB 13]

> "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." [AB 4]

The make-up of the Law Court has changed since 2019, and recent decisions have begun to signal a return to pre-2014 jurisprudence in Maine. We can see this shift beginning with *Manning* and the concurring opinion in *Gordon*, . . .

> "*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)." [AB 4]

> "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)." [AB 7]

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including, but not limited to, an unjust enrichment claim against the borrower consistent with Restatement (Third) of Restitution & Unjust Enrichment § 2(2)?

2. 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?"

Do *Shone* and *Gordon*, combined with a fresh analysis of Maine title theory and the Maine Foreclosure Statutes, give us hope for the future?

We think the time was right to respectfully advocate for a change in the law in the hopes of returning Maine to its roots in title theory. We filed our Amicus Brief with that in mind. We will keep you informed of the decision. Please reach out to schedule in-person or virtual *DGL Knowledge Exchanges* to discuss strategies on your particular cases during these changing times.

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