2014 WL 7800576 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

U.S. BANK NATIONAL ASSOCIATION, Appellant,
v.
Dorothy ADAMS, et al., Appellees.

No. 13-589.
June 9, 2014.

On Appeal from Judgment Entered By the Superior Court Hancock County

Brief of Appellees

Thomas A. Cox, Esq., P.O. Box 1314, Portland, Maine 04104, (207) 749-6671, for appellees.

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***5** STATEMENT OF FACTS

On December 14, 2005, American Brokers Conduit, (hereafter "ABC") lent $2,324,000.00 to Dorothy Adams, taking back from her an "Interest First Note" for that sum. (A. 38.)[1] Dorothy Adams granted to MERS as nominee for ABC, and to ABC as Lender, a mortgage to secure the note. (A. 19) ("the Mortgage"). The Mortgage was upon her one-half joint interest in a residential property located in Dedham, Maine (the "Property"). Charles Adams, Dorothy's brother, owned the other half interest. Only Dorothy Adams signed the note, Mortgage and other loan documents at the loan closing conducted by ABC at the Property. (A. 35 & 40, Tr. 11, lines 2-5. & Tr. 12, lines 17-19.) The note and Mortgage had typed signature lines only for Dorothy Adams, and the notarial certificate on the Mortgage had only Dorothy Adams' typed name within it. (A. 34-35 & 40.) Charles Adams was also present at the closing. (Tr. 38, lines 19-21.) He explicitly told the closing agent for ABC that, while he was a joint owner of the Property, he would not sign any loan documents and would not be a participant in the ABC loan. (Tr. 38, lines 8-15; Tr. 38, line 25 to TR. 39, line 3, Tr. 45, lines 8-11.) Neither the note nor the Mortgage contained any restrictions on the use of the cash proceeds of the loan.

***6** In its complaint (A. 13), the Plaintiff/Appellant, U.S. Bank, N.A. (the "Bank") claims to have acquired an interest in the Mortgage by a series of three mortgage assignments from MERS as nominee for ABC dated June 14, 2008, February 20, 2009 and January 21, 2012. (A. 102,104 & 105.) These assignments did not purport to assign to the Bank anything other than the Dorothy Adam's mortgage and the note, and contain no mention of Charles Adams. The trial record contains no assignment by the lender, ABC, to the Bank of an interest of ABC in the Mortgage. The trial record is likewise devoid of evidence that ABC either possessed or assigned to the Bank any interest in the two causes of action that are the subject of the Complaint. Nor is there evidence in the record that the Bank independently possessed a cause of action against Charles Adams.

The May 14,2012 complaint was not for foreclosure, even though this loan went into default in 2008. Rather, the Bank asserted two other claims for relief. In Count 1, it asserted a cause of action seeking reformation of the mortgage from Dorothy Adams to ABC and to MERS as its nominee, asserting that Charles Adams was not included in the Mortgage to ABC due to mutual mistake of ABC and Dorothy and Charles Adams. (A. 13-14, ¶9.) In its second count (as well as in the first count), the Bank asserted a claim that Charles Adams did not sign the Mortgage to ABC due "clerical or other error." (A. 14, ¶12.)

At the trial on August 28, 2013, the Bank produced no witness to testify to facts showing that there was any mutual mistake or clerical error in the making of the loan to Dorothy Adams. The only witness presented by the Bank, Christine Hyman, was an employee of Wells Fargo Bank, the loan servicer for the Dorothy Adams loan. (Tr. 5, line ***7** 25 to Tr. 6, line 3.) She first

came in contact with the loan file for the Dorothy Adams loan about two weeks before trial (Tr. 29, lines 12-18), over seven and one-half years after the ABC/Dorothy Adams loan closing. Thus, she was unable to offer any testimony to support the claim that ABC had made a mistake by including only Dorothy Adams on the Mortgage. While she testified, over objection, that it was unusual for a lender to take a mortgage from one of two joint owners of a mortgaged property (Tr. 11, line 20 to Tr. 12, line 2), she offered no evidence that ABC had intended or expected Charles Adams to be a signatory on the Mortgage. In fact, she admitted that she had reviewed the entire loan file generated by ABC (Tr. 26, lines 13-16), and that none of the loan documents bore a signature of Charles Adams, or called for a signature by him. (Tr. 23, lines 20-24.)

In its Judgment dated October 25,2013, the Superior Court ruled that "Plaintiff has not established by clear and convincing evidence that a mutual mistake of fact occurred warranting reformation [of the Mortgage]." (Judgment at A. 9.) With respect to the equitable lien claim, the Superior Court specifically found that "'in 'good conscience' and after 'weighing of the equities' an equitable lien should not be imposed on the real estate." (Order at A. 12.) The Bank's motion for reconsideration was denied id., and this appeal ensued.

In its Blue Brief, the Bank has not argued for reversal of the Superior Court determination that the Bank had not proved any right to reformation of the Dorothy Adams Mortgage. It argues instead on the sole ground that the trial court erred in denying the Bank's claim for an equitable lien upon the interest of Charles Adams in the Property.

***8** ISSUES PRESENTED FOR REVIEW

1. Whether the Superior Court was correct in ruling that it would be unfair and inequitable to impose an equitable lien upon the one-half interest of Charles Adams in the Property.

2. Whether the Superior Court judgment for the Adams should be sustained on the grounds that the action was barred by the six-year statute of limitations of 14 M.R.S. § 752.

3. Whether the Superior Court was correct in finding that there was no mutual mistake between ABC and the Adams and that the Bank was therefore not entitled to an order reforming the Dorothy Adams mortgage to add Charles Adams to it.

SUMMARY OF ARGUMENT

This Court will review a trial court's factual findings underlying a judgment for clear error. [2] Pitts v. Moore, 2014 ME 59, ¶9 A.3d , Wells Fargo v. Burek, 2013 ME 87, ¶ 17, 81 A.3d 330. It "will not set aside equitable determinations by a trial court unless there is no competent evidence in the record to support them. United Carolina Bank v. Beesley, 663 A.2d 574, 576 (Me. 1995). [3] The Bank was required to prove its claim for reformation of the Mortgage by clear and convincing evidence, Lietz v. Barry, 543 A.2d 367, 368 (Me. 1988.) Since the Superior Court found that the Bank failed to meet that ***9** burden, this Court reviews the trial record to determine if it contains sufficient evidence to compel a finding contrary to that made by the Superior Court. Id. at fn. 1.

This action consists in essence of an effort by a large and sophisticated **financial** institution to transform the business judgment of an originating mortgage lender into a lien upon the interest of an **elderly** individual in his home, a person who, with full knowledge of the originating lender, specifically and unequivocally declined to mortgage his interest in the Property.

Dorothy Adams and Charles Adams jointly own the Property that forms the subject matter of this litigation. Dorothy Adams agreed to mortgage her interest to secure the loan made to her by ABC, but Charles Adams "expressed his refusal to be obligated on the note and Mortgage to the representative of American Brokers Conduit," the originating lender. (Judgment at A. 8, ¶8.) Nevertheless "American Brokers Conduit proceeded with the closing knowing that Mr. Adams refused to be responsible for

the note and mortgage." Id. Charles Adams "specifically told American Brokers Conduit that he would not sign the note and/or mortgage." (Judgment at A. 9.) There was "no persuasive evidence that anyone, from Charles Adams, Dorothy Adams, or anyone from American Brokers Conduit, was mistaken as to the intended parties to or terms of the December 14, 2005, mortgage," (Judgment at A. 8-9.) "[A]ll parties understood that Charles Adams would not be a mortgagor, and American Brokers Conduit chose to loan money to Dorothy Adams and take a mortgage from only her on the property in question." (Judgment at A. 9.) ABC "engaged in a risk analysis and chose to make a loan to only one of the joint tenants and is left with the result of its business decision." (Judgment at ***10** A. 11.) "It would be unfair and inequitable to require Charles Adams to make up for the lending decisions and practices by Plaintiff, its predecessors and assigns." (Order at A. 12.)

There is ample and competent evidence in the trial record to support the Superior Court's determination that "[e]quity and 'good conscience' do not require that the lender be insulated from its own business decisions by obtaining a lien against property of a person who the lender knew refused to be bound by the note and mortgage in question." (Judgment at A. 11.) Moreover, there is no trial evidence to establish, by way of assignment or otherwise, that the Bank itself even has a cause of action against the Dorothy Adams or Charles Adams. Last, but not least of the reasons why judgment for the Adams should be sustained is that Bank's action was untimely. The Bank should be found to have been time-barred from bringing suit.

ARGUMENT

I. JUDGMENT FOR THE ADAMS SHOULD BE UPHELD BECAUSE THE BANK BROUGHT ITS ACTION AFTER THE STATUTE OF LIMITATIONS HAD RUN.

For reasons set forth in subsequent sections of this Argument, there are ample grounds to uphold the Superior Court on the basis of the findings and conclusions announced in its judgment. This Court may also "affirm a trial court's judgment 'on a ground not relied upon by the trial court."' Deutsche Bank Nat'l Trust Co. v. Wilk, 2013 ME 79, ¶ 19, 78 A.3d 363, quoting Mortg. Elec. Registration Sys., Inc. v. Saunders, 2010 ME 79, ¶18, 2 A. 3d 289. In their answer to the Complaint, in their opposition to the Bank's motion for summary judgment, and at trial (Tr. 82-83), the Adams asserted a statute of ***11** limitations defense pursuant to 14 M.R.S. § 752. The running of the statute is itself a sufficient ground to uphold the judgment of the trial court.

In its Complaint, the Bank attempted to state claims for reformation of the mortgage "to reflect the signature and obligation of the respondent Charles Adams" (A. 16-17, Count I), and for an order determining "[t]hat the Petitioner is entitled to an equitable lien upon the entire parcel comprising the Property..." (A. 17, Count II.) The Bank alleged that "[t]he mortgage was inadvertently not signed by Charles Adams" (A. 17, ¶ 6), that it was "the intent of the parties...that both Respondents would grant the Petitioner's predecessor a mortgage on the Property," (A. 17, ¶7), and that the absence of Charles Adams' signature on the Mortgage was the result of "clerical or other error [by ABC]". (A. 17, 12.) These equitable claims (never proved at trial), are subject to the statute of limitations set forth in 14 M.R.S. § 752 which provides:

> All civil actions shall be commenced within 6 years after the cause of action accrues and not afterwards, except actions on a judgment or decree of any court of record of the United States, or of any state, or of a justice of the peace in this State, and except as otherwise specially provided.

The general six-year statute of limitations expressed in 14 M.R.S. § 752 applies to "'all civil actions,' including equitable claims. Although the doctrine of laches can shorten the statutory period of time, it cannot extend it." Maine Municipal Employees Health Trust v. Maloney, 2004 ME 51, ¶11, 846 A.2d 336, (internal citations omitted, emphasis added.) [4]

***12** The only issue to resolve concerning the statute of limitations in this action is the question of when the six years began to run. "The general test for determining when a cause of action accrues is when a plaintiff received a judicially cognizable injury." Johnston v. Dow & Coulombe, Inc., 686 A.2d 1064, 1065-66 (Me. 1996). "[A] contract cause of action accrues at the time of breach." Dunelawn Owners Association v. Gendreau, 2000 ME 94, ¶11, 750 A.2d 591. This is so "although no injury

results from the breach until afterwards." Manning v. Perkins, 86 Me. 419, 29 A. 1114, 1115 (1894). The Bank's claims here are in the nature of those arising under a contract - the Bank claims that it was the intent of ABC and Charles Adams for him to grant a mortgage to ABC upon his interest in the Property. The claim is, in essence, that Charles Adams intended and agreed to grant a mortgage interest to ABC at the loan closing, but the agreement was not performed because of "inadvertence" or "clerical error." Thus, the time at which the cause of action accrued on the Bank's unproved claim was the date the loan was closed, December 14, 2005.

An analogous fact pattern arose in Salois v. Dime Sav. Bank of New York, FSB, 128 F.3d 20 (1st Cir. 1997) where mortgagors sued their lender for deceiving them at the time of loan closing as to the actual terms of the loan. The trial court dismissed the case on ***13** statute of limitations grounds and the First Circuit affirmed. The appeals court held that "[a] cause of action generally accrues at the time of the plaintiff's injury, or, in the case of a breach of contract, at the time of the breach," id. at p. 25, and rejected the borrowers' claim that the statute did not begin to run until their later discovery of the deception. Similarly, here the six-year limitation period of 14 M.R.S. § 752 began to run at the time of the ABC/Adams loan closing, more than six years before this suit commenced. It is not open to the Bank to claim that the statute of limitations did not begin to run until the loan went into default, or until the holder of the Adams loan suffers a deficiency (if indeed it does) in the event a foreclosure suit is brought successfully against Dorothy Adams.

Even if it were possible for ABC to claim that it was ignorant of the absence of Charles Adams' signature from the Mortgage for some period of time after the closing-something it could not do because the documents it produced did not call for his signature-- or even if Charles Adams acted culpably, such "misfeasance... does nothing by itself to prevent the running of the statute of limitations." Bozzuto v. Ouellette, 408 A.2d 697, 699 (Me. 1979). "The limitations period...begins to run as soon as the cause of action accrues, and in the absence of fraud, its running is not delayed even if the cause of action is not immediately discovered." Northeast Harbor Golf Club, Inc. v Harris, 1998 ME 38, ¶22, 725 A.2d 1018.

The statute of limitations set out in 14 M.R.S § 752 applies to the cause of action and is not altered or restarted depending upon who may from time to time become the party entitled to assert the cause of action. Thus, the cause of action arose with ABC, and the Bank, as the purported assignee from MERS as nominee for ABC was bound to assert the ***14** claims, to the extent that they existed at all, within the six-year limitations period. In this matter, the statute of limitations on the claims for mortgage reformation and equitable lien began to run on the date of the ABC/Adams loan closing, December 14, 2005, and expired six years later on December 13, 2011. This action was not commenced until May 30, 2012. It is barred by 14 M.R.S. § 752, and the Judgment of the Superior Court should be affirmed on this basis.

II. DENIAL OF THE CLAIM FOR AN EQUITABLE LIEN WAS PROPER BECAUSE THERE ARE NO EQUITIES IN FAVOR OF THE BANK.

"Remedies in equity, as well as at law, require some primary right or interest of the plaintiff which shall be maintained, enforced or redressed thereby." 4 Pomeroy, Equity Jurisprudence, § 1234 (5th ed., Symons 1941). Here, the Bank seeks a "weighing of the equities without having first proved any "primary right or interest." In its Blue Brief, the Bank does not challenge any of the specific factual findings of the Superior Court which are outlined in the Summary of Argument portion of this brief. The trial record established, and the Superior Court found, that "all parties understood that Charles Adams would not be a mortgagor, and that American Brokers Conduit chose to loan money to Dorothy Adams and take a mortgage from only her on the property in question." (Judgment at A. 9.) The Bank does not argue, nor could it effectively do so, that it had some greater right against Charles Adams than ABC had at the time of closing. Thus, there is no "primary right or interest" of the Bank against Charles Adams to have a loan arrangement made by ABC, without mistake or fraud, changed or enhanced for the benefit of the Bank.

***15** The Bank does not challenge the finding of the Superior Court that there was no mistake on the part of ABC in excluding Charles Adams from the Mortgage when that court found that there was not "anyone from American Brokers Conduit [who] was mistaken as to the intended parties to the December 14, 2005 mortgage." (Judgment at A. 9, top.) The Bank does not allege that Charles Adams defrauded or deceived ABC in its making of the loan, and the Superior Court made no finding to the contrary.

The Bank did not prove that ABC received less security for its loan than it bargained for. Nor did it prove that there was any agreement or intent (express or implied) on the part of Charles Adams to give, or any intent on the part of ABC to receive, any lien or security in Charles Adams' share of the ownership of the Property to secure the ABC loan to Dorothy Adams.

Simply, there is no proof that Charles Adams engaged in any kind of inequitable conduct in the making of the ABC loan to Dorothy Adams. Thus, the Superior Court ruled that "[e]quity and 'good conscience' do not require the lender [ABC] to be insulated from its own business decisions by obtaining a lien against property of a person who the lender knew refused to be bound by the note and mortgage in question." (Judgment at A. 11.)

Maine law, going back to 1843, has held that equity will create a lien upon property, real or personal, "whenever parties by their contract intend to create a positive lien..." Griffith v. Douglas, 73 Me. 532 (1882), quoting Mitchell v. Winslow, 2 Story 630 (Me. 1843) (emphasis added.) Here, not only was there no intent by either ABC or Charles Adams to create a lien upon the interest of Charles Adams in the Property, the ***16** Superior Court found an affirmative intent, known to ABC, of Charles Adams to not create a lien upon his interest in the Property. (Judgment at A. 10.)

Intent is a fundamental requirement for a court to impose an equitable lien in many other jurisdictions as well. See VRG Corp. v. GKNRealty Corp., 135 N.J. 539,546-547,641 A.2d 519 (1994) ("Generally 'the theory of equitable lien has its ultimate foundation...in contracts, express or implied, which either deal or in some manner relate to specific property, such as a tract of land... quoting 4 John N. Pomeroy, A Treatise on Equity Jurisprudence § 1234, at 695 (Symons ed., 5th ed. 1941), and "it is generally recognized that the intent of the parties controls in the creation of an equitable lien."), Thorme Real Estate, Inc. v. Nezeiek, 100 A.D.2d 651,473 N.Y.S.2d 82 (1984) ("The existence of an equitable lien requires an express or implied contract concerning specifically identified or identifiable property."), Equitable Trust Co. v. Imbesi, 287 Md. 249, 256, 412 A.2d 96 (1980) ("An equitable lien is based upon specific enforcement of a contract to assign property as security." (Citations omitted)), Schrotv, Gannett, 370 Mich. 161,164,121 N.W. 2d 722 (1963) (an equitable lien may be imposed "... in the absence of such written contract where the intent to give identifiable security is clear and the complainant has dealt in reliance upon such intent."), Milam v. Milam, 138 Tenn. 686, 200 S.W. 826 (1918) ("There must be an intent to make the particular property, real or personal, a security for the obligation..."), Westallv. Wood, 212 Mass. 540,544-545,99 N.E. 325 (1912) ("If the arrangement between the parties interpreted in the light of the conditions in which they were placed, indicates a contemporaneous intention to adjust their rights upon a basis which can be established only by resort to the equitable principle ***17** of lien or pledge, then, in the absence of intervening adversary interests, such an intent will be executed in chancery.") Here, there simply was no intent of Charles Adams to grant, or allow to be created, a lien upon his interest in the Property. In the absence of such intent, and in the face of a directly contrary intent, equity should not be used to create such a lien.

The equity jurisdiction of the Maine Superior Court is found in 14 M.R.S. § 6051. Of the twelve specific stated grounds for equitable jurisdiction, the only one that might apply to the Bank's equitable lien claim is the category of "fraud, trust, accident, or mistake" stated in subpart (4). [5] In Count III (sic) of its Complaint, the Bank alleged that Charles Adams was not included on the Mortgage due to "clerical or other error." (A. 14, ¶12.) For the Bank to have been entitled to any weighing of the equities, it first had to prove that a mistake or "clerical or other error" had occurred. Implicit in any finding of error or mistake must be that there was an intent of the parties that was not achieved due to such error or mistake. Here the Superior Court found explicitly that there was no mistake or error, holding that "[t]here has been no persuasive evidence that anyone,Charles Adams, Dorothy Adams, or anyone from American Brokers Conduit, was mistaken as to the intended parties to or the terms of the December 14,2005 mortgage." ***18** (Judgment, A. 8-9.) This finding should have been dispositive of the equitable lien claim, and the Superior Court was not required to conduct a "weighing of the equities" analysis.

The Superior Court did, nevertheless, conduct a "weighing of the equities," stating "[t]he Court specifically finds that in 'good conscience' and after 'weighing of the equities' an equitable lien should not be imposed upon the real estate. It would be unfair and inequitable to require Charles Adams to make up for the lending decisions and practices by the Plaintiff, its predecessors and assigns." (Order at A. 12.) There simply were no equities on the side of the Bank since "Charles Adams was present at the

closing on December 14, 2005 and explicitly refused to sign/be liable on the note and mortgage; therefore American Brokers Conduit affirmatively knew Charles Adams' position." (Judgment at A. 10, last par.)

This Court has twice previously addressed the situation where one of two joint owners of a property does not mortgage his or her interest to secure a loan to the other party who does sign a mortgage. (Other facts in the two cases were substantially different, resulting in different outcomes.) U.S. Bank v. Thomes, 2013 ME 60, 69 A.3d 411, involved a review of a trial record showing that a loan was made by a lender to one of two co-owners of a residential property for the purpose of paying off a previous loan on which both co-owners were liable and for the purpose of generating additional cash for making improvements to the property. The trial court found that the lender was fully aware that there were two co-owners and that it was getting a mortgage from only one of them. Emphasizing the word "unjust" in the phrase "unjust enrichment," this Court held that it was not unjust for the non-signing co-owner to receive the benefits of the new loan where ***19** the lender made the loan with full knowledge that it was receiving a mortgage upon only one co-owner's interest. Id. ¶16.

The Bank argues that its equitable lien claim is based upon the theory of unjust enrichment (Blue Brief, p. 8, 1st par.), which was the basis for the bank's claim in Thomes, but it ignores the fact that, as in Thomes, there is nothing unjust for Charles Adams to have received whatever benefits there may have been from the loan to Dorothy Adams, where ABC made the loan with full knowledge that Charles Adams was a joint owner and was explicitly refusing to be a party to that loan. Instead, the Bank argues that United Carolina Bank v. Beesley, 663 A.2d 574, (Me. 1995) compels a reversal of these findings by the Superior Court, but its argument ignores a fundamental factual distinction in Beesley. There, two out of the four co-owners of a property obtained a mortgage by falsely representing that those two owned the entire interest in the property. Here, Charles Adams was explicit in telling ABC's closing agent that he was a co-owner of the Property and that he refused to participate in the ABC loan in any respect. (Judgment at A. 9.) Under the facts of Beesley, that lender was induced to make the loan by a material false representation of the property owners, and the court held that it was proper to impose an equitable lien upon the interest of the co-owners who were not mortgagors to the extent that the proceeds of the United Carolina Bank loan were used to improve the mortgaged property. Here, the facts found by the Superior Court are fundamentally different from those in Beesley - there was no false representation made to ABC that induced it to make its loan ABC made its loan to Dorothy with full knowledge that Charles Adams was a co-owner of the Property and that he was not conveying a mortgage on his interest in the ***20** Property. ABC elected to proceed with the loan on that basis. As trenchantly stated by the Superior Court in denying the Bank's motion for reconsideration, "[Beesley] sets forth the analysis to be applied to factual situations, it does not compel a result." (Order at A. 12.) The result here must be different from Beesley because the facts here are fundamentally different.

Just as the facts of this case differ from those in Beesley, so to do they differ from the facts in the various Florida intermediate appellate court decisions cited by the Bank. For example, Della Ratta v. Della Ratta, 927 So.2d 1055 (Fla. 4th DCA 2006) involved an equitable lien ordered when one family member improved jointly owned property for the benefit of the other owner, based upon that owner's promise to convey title to him in the future, and the court held that "an equitable lien is an appropriate remedy to prevent unjust enrichment between family members or those with close personal relationships." Crane Co. v. Fine, 221 So.2d 145 (Fla. 1969) involves a decision where a materialman supplied labor and materials to a property and was held entitled to an equitable lien as an alternative to a mechanics lien. Fishbein v. Palm Beach Savings & Loan Assn., 585 So.2d 1052 (Fla. 4th DCA 1991) involved a case where the court found a lender to be entitled to an equitable lien where a husband and joint owner forged his wife's signature on a mortgage deed. None of the cases cited by the Bank are factually similar to those here, where the non-borrowing joint owner expressly declared his joint ownership interest at the closing and explicitly stated his intent to not be a party to the mortgage. The Bank has cited no case that holds that an equitable lien may be ordered against property of an owner ***21** who has expressly refused to be a party to the loan transaction, as Charles Adams did here.

Facts much more similar to those in issue here are found in the Ohio Court of Appeals decision in Fannie Mae v. Winding, 2014 Ohio 1698, N.E.3d (April 21, 2014). There, the court held that an equitable lien remedy was not available to Fannie Mae against a co-owner who did not sign the mortgage where there was a "lack of any conduct on behalf of the [the non-signing co-owner] that was fraudulent and unjust and the fact that Fannie Mae, a sophisticated commercial lender, made a series of dilatory actions even though the deed, mortgage and note made clear the nature of the ownership of the property." Id. ¶ 36.

Here, while it may not be appropriate to characterize the Bank's pre-trial actions as dilatory, they were highly questionable. The Bank filed a motion for summary judgment shortly before trial and supported it by a July 23, 2013 affidavit of a Wells Fargo Bank employee stating on "my personal knowledge" (even though there was no possible basis for such personal knowledge) that seven years earlier, it was " [t]he intent [of ABC] to list both of the Respondents as borrowers on the mortgage." (Affidavit of Amy L. Brodish in trial record.) This false affidavit was a violation of M.R.Civ. P. 56(g) that was not acted upon at the time.

All of these cases illustrate the reality that "the equities" in any given case are unique to the facts of that case. There is competent evidence in this case to support the factual findings of the Superior Court and its determination that the Bank is not entitled to an equitable lien against the interest of Charles Adams in the Property. There simply is no clear error in those findings or that judgment.

***22** The Bank argues that somehow the Superior Court erred in denying the Bank's claim for an equitable lien by improperly applying an equitable subrogation analysis, and by failing to conduct a "weighing of the equities." That issue was raised below by the Bank's motion for reconsideration filed on November 11, 2013. The Order of the Superior Court dated November 26, 2013 (A. 12) denied that motion and made clear that the court had conducted a weighing of the equities and found no equitable basis to grant the Bank an equitable lien.

III. DENIAL OF THE CLAIM FOR REFORMATION OF THE MORTGAGE WAS PROPER BECAUSE THERE WAS NO MUTUAL MISTAKE OF FACT.

In Count I of its Complaint, the Bank asserts that the Mortgage was not signed by Charles Adams due to inadvertence and clerical error (A. 14, ¶¶ 6 & 7), and that it was "[t]he intent of the parties that both respondents would grant the Petitioner's predecessor a mortgage on the property." (A. 14, ¶7.) The reference to "parties" presumably is to ABC and the Adams, since the Bank was not a party to the loan transaction and could not have formed any intent as to the scope of the mortgage interest to be included. At trial, there was no witness testimony and no documentary evidence of the intent of ABC, other than the fact that the note and the Mortgage were set up only for signature by Dorothy Adams. (A. 34 & 40.) She was defined as "the Borrower" in the Mortgage (A. 19, ¶B), and only her typed name appears on the signature page and in the notarial certificate. (A. 34-35.) Thus, the absence of a signature of Charles Adams on the Mortgage is not simply a mistaken failure to sign - the document shows that it was not the intention of ABC for him to sign. The Bank's trial witness stated that she reviewed the entire loan file that has ***23** been in the possession of Wells Fargo Bank since 2006 (Tr. 26, lines 13-16), and there is not a single document in it that named Charles Adams or showed that he intended to mortgage or grant a lien upon his interest in the Property. It was the specific finding of the Superior Court "that all parties understood that Charles Adams would not be a mortgagor, and that American Brokers Conduit chose to loan money to Dorothy Adams and take a mortgage only from her on the property in question." (Judgment at A. 9.)

In order to prove its claim to entitlement of reformation of the Mortgage, the Bank was required to prove by clear and convincing evidence that there was a mutual mistake of fact by ABC and Charles Adams, which resulted in Charles Adams not being included on the Mortgage. Lietz v. Barry, 543 A.2d 367, 368 (Me. 1988.) The Superior Court found that the Bank failed "to establish that Charles Adams. Dorothy Adams or American Brokers Conduit misunderstood the effect of the mortgage (Judgment at A. 8), and that "Plaintiff has not established by clear and convincing evidence that a mutual mistake occurred warranting reformation." (Judgment at A. 9.) There is no sufficient evidence in the trial record that could compel a contrary finding by this Court. Furthermore, the Bank appears to have abandoned the mortgage reformation claim on appeal by not addressing it in the Blue Brief.

IV. THE BANK FAILED TO PROVE THAT IT IS A PARTY ENTITLED TO EQUITABLE RELIEF AGAINST CHARLES ADAMS.

If there was "inadvertence", or a failure to achieve the "intent" of the parties to the loan closing, or if there was any "clerical or other error" as alleged by the Bank, any such events occurred at the time of the loan closing on December 14, 2005. Any claim for ***24** equitable relief as a result of any such events belonged to ABC at that time. There is no proof in the record that the Bank, as a stranger to that transaction, has any right to equitable relief against Charles Adams.

There is a paucity of evidence in the record regarding details of the Bank's acquisition of its asserted interest in the ABC/Dorothy Adams loan. The only evidence of that acquisition is the series of three MERS mortgage assignments (A. 102, 104 & 105), none of which mention Charles Adams or any claim against him. The trial record leaves unanswered the following critical questions:
1. Whether the Bank acquired its interest in the Mortgage as of the date of the July 14, 2008 MERS assignment, or whether it purchased its interest in the loan at some earlier date.

2. Whether the Bank was aware, at the time that it acquired its interest in the Mortgage, that a joint owner of the Property was not a party to the Mortgage.

3. Whether the consideration paid by the Bank to acquire its interest in the Dorothy Adams loan was discounted below face value due to the fact that Charles Adams was not a mortgagee.

4. Whether the Bank's purchase of the Mortgage from ABC or some intervening owner of the Dorothy Adams loan was based upon a warranty and representation that the Dorothy Adams loan was secured by a mortgage upon the interests of all owners of the property.

5. Whether the Bank has a remedy at law against the party who sold the Dorothy Adams loan for failing to disclose that the note was not secured by a mortgage upon the interests of all owners of the property.

If the Bank knew at the time of its acquisition of the ABC/Dorothy Adams loan that Charles Adams was a joint owner of the Property and was not a party to the Mortgage, and especially if it purchased the loan at a discount due to Charles Adams absence, then the Bank has suffered no harm and is entitled to no relief, whether at law or ***25** in equity. If the Bank purchased its interest in the ABC/Dorothy Adams loan at face value believing, based upon representations and warranties of its seller, that the loan was secured by a mortgage upon the interests of all owners of the Property, then it may have a remedy at law against its seller for damages, but it has no remedy against Charles Adams for equitable relief.

The only other basis upon which the Bank could assert a claim for equitable relief against Charles Adams would be for it to prove that it somehow acquired such a claim from ABC. But the only record evidence of the receipt by U.S. Bank of anything from ABC is in the form of three assignments to the Bank by MERS. The scope of MERS authority to assign, however, was strictly limited. At trial, the only evidence of that authority was expressed in the Mortgage signed by Dorothy Adams. But just as in Mort. Elec. Registration Sys., Inc. v. Saunders, 2012 ME 79, 2 A. 3d. 289, that document only recognized MERS authority only to record the mortgage All of the remaining rights in the Mortgage were granted to ABC. Id. The Mortgage did not grant to MERS any assignable interest of the lender, ABC, in the Mortgage, and it certainly did not assign to MERS any claim that ABC might have had against Charles Adams.

The first MERS assignment, dated July 14, 2008, refers only to a mortgage by Dorothy Adams and does not mention Charles Adams. It only purported to assign "said mortgage and the Note and claim secured thereby." (A. 102.) The purported claim for an equitable lien of ABC against Charles Adams was not something "secured thereby." The second MERS assignment dated February 29, 2009, purported to assign to the Bank "the Assignor's interest in a certain note and mortgage made by Dorothy Adams..." (A. 104), ***26** and again did not mention or purport to assign an equitable lien claim against Charles Adams. The third MERS assignment, dated January 21, 2012, again referring solely to Dorothy Adams, purported to assign "the Mortgage...with all moneys now owing or that may hereafter become due in respect thereof, and the full benefit of all powers and all covenants therein contained..." (A. 105.) It did not purport to assign any equitable lien claim against Charles Adams. Nothing in any of

these assignments purported to assign any claims against Charles Adams or any equitable lien in his share of the Property. There simply is no assignment in the trial record to the Bank of any purported right of ABC to assert claims against Charles Adams.

The necessity of proof an assignment of such claims by ABC is no mere technicality. In the absence of such an assignment, there is no basis to believe or infer that ABC even believed that a claim for an equitable lien existed. If proof such an assignment is not required, then U.S. Bank, as a stranger to the December 14, 2005 loan transaction, would be free to manufacture any claims that might enhance its recovery on the Dorothy Adams loan that it claims to have acquired from ABC. Even if such an assignment by ABC existed, it would not prove the claim, but it might lend a bit of credibility to the Bank's present assertion as to the existence of such a claim. Here that credibility is entirely absent. There simply is no proof that ABC ever had such a claim, or that such a claim was ever assigned to U.S. Bank.

To the extent that a controversy might have existed, before the expiration of the statute of limitations, between ABC and Charles Adams on claims for mortgage reformation and an equitable lien, the Bank failed to prove that it was harmed by such the ***27** events giving rise to such claims, and it failed to prove that it has the right to assert on its own behalf any such claims that ABC may have had. Upon this basis, this Court should determine that the Bank had no basis to assert a claim for equitable relief against Charles Adams and should sustain the judgment of the Superior Court in favor of the Adams on that basis.

IV. CONCLUSION.

The Bank filed the present action more than five months after the running of the six-year statute of limitations. For this reason alone, the Law Court should uphold the trial court judgment for the Adams. But even if this Court should reach the merits of this matter, there was no wrongful or inequitable conduct by Charles Adams in connection with the making of the loan by ABC to Dorothy Adams, and therefore there is no reason to reverse the considered judgment of the trial court. Charles Adams openly stated the fact of his joint interest in the Property to ABC and openly refused to be a party to his sister's loan. Knowing this, ABC chose to make the loan to Dorothy Adams secured by only her interest in the Property. There is no basis for equity to now intervene and provide to the Bank a remedy in the form of a lien upon Charles Adams' interest in the Property, especially considering that the Bank produced no evidence that even if ABC ever had a claim, the Bank somehow acquired it. The Superior Court properly found that there was no inequitable or wrongful conduct by the Adams, and therefore its decision denying relief to the Bank must be affirmed. of the loan closing. The Judgement of the Superior Court should be sustained.

Footnotes

1 The Appellant's Blue Brief creates confusion as to who the lender was when it makes assertions such as those that “[t]he plaintiff/appellant would not knowingly have agreed to loan the funds in question without a mortgage signed by both record title holders,” (Blue Brief, p. 2, last par.), and that U.S. Bank “directly bestowed a benefit upon the defendant Charles Adams...” (Blue Brief, p. 8, 2nd par.) It was ABC who lent the money, not U.S. Bank. There is no evidence in the record of any involvement of U.S. Bank in the making of the loan to Dorothy Adams, nor is there any evidence of the Bank bestowing any benefit upon Charles Adams. The record shows no evidence of any involvment of U.S. Bank with this loan before the first purported mortgage assignment to it dated July 14, 2008. (A. 102.)

2 The Bank suggests that an abuse of discretion standard for review applies here, (Blue Brief, p. 5), but that standard is inapplicable to a judgment rendered after trial.

3 The Bank also quotes this standard, but incorrectly attributes it to a different opinion of this Court. (Blue Brief, p. 5.)

4 Counsel for Bank argued to the contrary in another Superior Court case also involving claims for reformation of a mortgage and for an equitable lien, but that court rejected arguments that other statutes of limitation applied. U.S. Bank v. Leighton, RE-13-97 (Me. Super. Ct. Penobscot, April 22, 2014 - motion for reconsideration pending) (Cuddy, J.) There, counsel for Bank argued that the six-year statute of limitations that begins to run after the maturity or acceleration of a negotiable instrument, 11 M.R.S. § 3-1118, should apply. That statute does not apply here because this case is not a suit to collect a negotiable note, and the Bank concedes that it is not even seeking to charge Charles Adams with liability on the note that is secured by the Mortgage. (Blue Brief, p. 7, last par.). The Bank's counsel also tried to argue in Leighton that the 20-year statute of limitations for liabilities under seal, 14 M.R.S. § 751, should apply, but this suit is not a “personal action on contracts or liabilities under seal.” Rather it is a suit for an order to impose an equitable

lien, which, if granted, would be a claim against Charles Adams ownership interest distinct and apart from the mortgage on the interest of Dorothy Adams. This Court should apply the six-year statute of 14 M.R.S. § 752, just as the Superior Court did in Leighton.

5 The Bank has neither alleged nor argued under 14 M.R.S. § 6051(13) that this is a case justifying equitable jurisdiction "according to the usage and practice of courts of equity, in all other cases where there is not a plain and adequate remedy at law." Implicit in the provision for an equitable remedy when there is no adequate remedy at law, is that there has been a wrong for which a remedy is required. The Superior Court properly found that no such wrong exists in this case. Charles Adams expressly refused to participate in the ABC loan transaction, and was within his rights in doing so. ABC decided to proceed with the loan transaction without the participation of Charles Adams, and was likewise within its rights to do so. No remedy, legal or equitable, is required or appropriate for such conduct

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