2013 WL 8599412 (Me.) (Appellate Brief)
Supreme Judicial Court of Maine.

Lewis LUBAR, Trustee, Plaintiff/Appellee,
v.
Frederick W. CONNELLY, Defendant/Appellant.

No. YOR-13-198.
August 7, 2013.

On Appeal from the York County Superior Court

# Brief of Defendant/Appellant

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## *1 Introduction

This is an appeal from a grant of summary judgment in a residential foreclosure action. The appellant/defendant Frederick Connelly ("Frederick") has legal and equitable defenses that challenge the making and validity of the mortgage and which entitle him to a trial.

This is not a garden variety foreclosure. The lender, The Clover Trust, represented by its trustee, Lewis Lubar, (hereinafter "Lubar") a creditor under Maine law, misled Mr. Connelly, a senior citizen on a small fixed income, into pledging his primary

residence in Maine to secure a loan sought by his son, Charles, for debt Charles incurred in connection with Charles' place of residence in Belmont, Massachusetts. The lender knew or should have known that Frederick's primary residence was in Maine. The lender falsely assured Mr. Connelly that his home in Maine was not at risk. The lender took egregious advantage of Mr. Connelly in violation of equitable principles and fair lending laws.

There is no dispute that Frederick co-signed a mortgage for his son. Material factual issues exist regarding whether the lender is a creditor under Maine law that would hold the lender to a standard it violated. Factual issues exist regarding the making and validity of the mortgage including actions taken by the mortgage broker, the lender and the closing agent. Factual disputes exist regarding amounts allegedly due under the Note. The trial court erred by dismissing out of hand Frederick's defenses. Instead, the trial court granted summary judgment with a checklist.

There are substantive disputes of fact and procedural deficiencies and summary judgment should not have been granted in this case. Lubar must be required to prove every element of its claim and Mr. Connelly is entitled to a trial on the merits of his defenses.

***2 Procedural Posture**

A Complaint for foreclosure was filed on or about August 18, 2011, and an Answer with affirmative defenses followed. Appendix at 18, (hereinafter “App. __”). The parties participated unsuccessfully in private mediation prior to the suit being filed.[1] Lubar filed a motion for summary judgment on or about February 16, 2012. App. 2. On December 31,2012 the court (Fritzsche, J.) issued an Order on Motion for Summary Judgment and a Judgment of Foreclosure and Order of Sale. App. 21.

The Order on Motion for Summary Judgment is a checklist. The Judgment of Foreclosure and Order of Sale signed by the court was the proposed Order submitted by plaintiff, adopted wholesale by the court.[2]

In response to the orders, which provide no analysis of the facts of the case as presented at summary judgment, Mr. Connelly filed a Motion to Alter or Amend Judgment and Request for Findings of Fact and Conclusions of Law. App. 4. The Rule 59(e) motion was denied without explanation or analysis and the motion for findings of fact and conclusions of law was dismissed. App. 5. This timely appeal to the Law Court followed.

Facts

*A. Background of Frederick Connelly and His Son, Charles.*

Frederick Connelly was born on XX/XX/1930 and grew up in Belmont, Massachusetts. App. 120. He and his late wife, Lois, have five grown children, whom they raised in Belmont, Massachusetts. App. 120.

***3** In 1983, after he retired, Frederick moved to Wells, Maine where he and his family had summered. App. 120. He has been full time resident of Maine since 1983 and has lived at his current address 58 Hillside Street, Wells, Maine (“the Wells Property”) since 1990. App. 120.

Mr. Connelly is currently retired and lives on a fixed annual income of $25,476 from social security and his pension. App. 120.

Charles Connelly is one of Frederick's grown sons. App. 120. Charles is (or was last known to be) married to Susan Paratore Connelly. App. 121. Charles, Susan, and Susan's mother, Carla Paratore, lived together at 11 Ivy Road, Belmont, Massachusetts (“the Belmont Property”) from at least 2007 through 2010. App. 121. Frederick Connelly has never resided at the Belmont

Property. App. 121. Until June 2007, the Belmont Property was titled in the name of Susan Connelly with a life estate to her mother, Carla E. Paratore. App. 121, 136-137.

*B. Charles Defrauds His Father.*

Unbeknownst to Frederick, on June 25, 2007, Susan Connelly and Carla Paratore quitclaimed their interest in the Belmont Property to Frederick. App. 121, 136-137. Frederick learned about the conveyance to him when he read it in a "legal notice" section of a local newspaper while visiting his ailing brother in Belmont. App. 121.

Charles forged a Power of Attorney (POA) to himself from Frederick, which is recorded in the Middlesex County, Massachusetts Registry of Deeds dated June 27, 2007. App. 121-122, 138-139. The POA authorizes Charles, on Frederick's behalf as his attorney in fact, to purchase the Belmont Property for $750,000 and to grant a mortgage to Homecoming Financial, LLC (f/k/a Homecomings Financial Network, Inc.) for $480,000. App. 122, 140-153. Charles used the forged POA to obtain a loan through Homecoming Mortgage, all without Frederick's knowledge. App. 122.

***4** *C. Charles Gets The Belmont Property Back.*

In January 2008, Charles asked Frederick to sign a quitclaim deed, conveying the Belmont Property from Frederick to his daughter-in-law, Susan Paratore Connelly, for $1 consideration. App. 123, 156-157. Frederick does not recall ever seeing the first page of the quitclaim deed, which incorrectly lists Massachusetts as his state of residence, but he does recall seeing the second page, which he signed. App. 123.

The Massachusetts Notary Public who witnessed and notarized the quitclaim deed saw Frederick's Maine drivers' license and noted that he was a Maine resident, contrary to the first page of the deed that wrongly indicates he lived at the Belmont Property. App. 123.

*D. Charles Defaults Then Finds A New Lender: Lubar*

Charles almost immediately defaulted on the Homecoming mortgage. App. 122. He then arranged through a loan broker to refinance the Belmont Property with Lubar, a "hard money" lender. App. 122. Frederick was neither involved in, nor aware of, the application to refinance the Homecoming Mortgage with a new mortgage and loan from Lubar. App. 122.

The Lubar loan originated through a mortgage broker, Ben Greenblott, with Manhattan Financial Services, Inc., a licensed Massachusetts broker. App. 38. Frederick Connelly has never met or spoken with Benjamin Greenblott. App. 122. Frederick never filled out or signed a loan application, and never provided information or documentation as part of a loan process. App. 123. His signature is not on the loan application. App. 42.

E. *The Lewis Lubar/Clover Trust Loan*

At Charles' request, on March 31, 2008, Frederick accompanied Charles and Susan to the law office of Mason & Martin, LLP, in Wellesley, Massachusetts and participated in a closing that was handled by Attorney Kristina Yee of that firm. App. 123. As far as Frederick knew ***5** when he went there, the point of the closing was to get his name off the Homecoming mortgage. App. 124.

Frederick never filled out a loan application or provided documentation for a loan application to Lubar. App. 42, 124. Frederick did not understand he was refinancing the Homecoming mortgage with Lubar. App. 124. Frederick was never aware he was giving a mortgage on his primary residence in Wells, Maine for the full amount of the loan Charles sought. App. 124.

At the closing, Attorney Yee assured Frederick that his primary residence in Maine was being used to secure only 4% of the value of the note. App. 124. Frederick was not represented by counsel. App. 124. Frederick signed the instrument in reliance on Attorney Yee's assurance that only 4% of the note was collateralized against his home in Wells. App. 124.

At the closing Attorney Yee made a photocopy of Frederick's Maine driver's license. App. 124, 158. She had the recorded quitclaim deed on which the Notary Public indicated Frederick was a resident of Maine. App. 124, 156-157. Attorney Yee's notarization of Lubar's mortgage against Frederick's Wells home indicates he was a Maine resident at the time of signing. App. 124, 154. At no time did Frederick hold himself out as a Massachusetts resident or as a resident of Belmont, Massachusetts. App. 124.

Had Frederick understood that Lubar was using his Wells Property as collateral on several hundred thousand dollars, he would not have signed the mortgage. App. 125. Frederick was not given ample opportunity to read every page of the loan closing documents, including the loan application, note and mortgage, either at, before or after the closing. App. 125. On Attorney Yee's assurances, Frederick signed and initialed the pages they put in front of him, but was not given time to review these pages. App. 125.

***6** Despite that Frederick was on a fixed income of $25,000 per year, Lubar loaned him $600,000 on terms that included monthly payments of $5,941.75 with a variable interest rate that could go as high as 11.50%. App. 58-59,125.

Frederick did not receive any executed copies of documents. App. 125. Frederick was never told he had the right to choose his own title attorney or given the opportunity to retain his own attorney prior to closing. App. 125.

Frederick was not informed that under federal and state law, he had a right to rescind within three days of signing. App. 125.

In her affidavit, Kristina Yee states that Frederick Connelly “affirmatively represented that he was a resident of the Commonwealth of Massachusetts, and that the Belmont Property was his primary residence.” App. 51. That is false. Mr. Connelly has been a Maine resident since 1983, has never represented otherwise, and produced his driver's license at the closing. App. 123, 125.

In her affidavit, Kristina Yee states, “In his loan application, Defendant Frederick W. Connelly affirmatively represented that he was a resident of the Commonwealth of Massachusetts, and that the Belmont Property was his residence.” App. 51. That is false. Frederick Connelly never filled out, submitted or signed a loan application. It is signed only by Charles Connelly. App. 42.

Closing documents indicate that a loan was issued in the amount of $600,000, which was sufficient to pay off Homecoming Mortgage and pay cash out in the amount of $51,977.21. App. 194. Those funds were wired to an account for the benefit of Susan Paratore Connelly. App. 198. No funds were provided to Frederick and he never received any portion of that ***7** money. App. 125. In fact, Frederick never received a cent or benefited from the loan in any way. App. 125.

Before long, Charles and Susan defaulted on the Lubar mortgage and Lubar foreclosed on the Belmont Property. App. 126. The Belmont Property was sold at auction for $615,000. App. 48, 126. The principal owed on the note at the time of foreclosure was $598,821.57. App. 48, 126.

At trial, Frederick will establish that Lubar's loan is in violation of Maine laws and equitable principles. Without a trial on the disputed facts and asserted defenses Frederick will lose his home of over 20 years at age 83. It is hard to imagine the law working such a hardship without so much as a trial.

*Standard of Review*

The Law Court reviews a grant of a motion for summary judgment de novo, "viewing the evidence in the light most favorable to the party against whom judgment has been entered to decide whether the parties' statement of material facts and the referenced record evidence reveal a genuine issue of material fact." *Chase Home Finance LLC v. Higgins*, 2009 ME 136, ¶10, 985 A.2d 508, 510 (citation omitted). "Disputes of material fact related to a mortgage foreclosure must be resolved through mediation or bench trial, rather than through the summary judgment process provided by Rule 56." *Id.* at 2009 ME 136,¶13, 985 A.2d 508, 512.

On appeal, the Law Court considers the statements of material fact and record "to determine whether there was no genuine issue as to any material fact and that the successful party was entitled to judgment as a matter of law." *Id.* In this case, there are factual disputes that preclude summary judgment and the trial court erred by granting judgment of foreclosure as a matter of law.

***8** *Issues*

1. Whether the trial court erred by granting a judgment of foreclosure at summary judgment where there are genuine issues of material fact regarding the making and validity of the mortgage and note based, among other things, on the lender's conduct before and at the closing.

2. Whether the trial court erred by granting summary judgment where there is a genuine issue of material fact regarding whether Lubar is a creditor under Maine law.

3. Whether the trial court erred by granting a judgment of foreclosure at summary judgment where there are genuine issues of material fact amounts claimed by Lubar to be due and owing.

4. Whether the trial court erred by granting a judgment of foreclosure at summary judgment where the lender's summary judgment pleadings are deficient.

## Legal Argument

### I. FACTUAL DISPUTES ABOUT WHETHER LUBAR VIOLATED FAIR LENDING AND CONSUMER PROTECTION STATUTES PRECLUDE SUMMARY JUDGMENT AND THE TRIAL COURT'S ORDERS SHOULD BE VACATED.

### A. The Trial Court Erred by Granting Summary Judgment Where There Is A Genuine Issue of Material Fact Regarding Whether the Clover Trust is a Creditor Under Maine Law.

Under Maine law, "[a] creditor may not extend a high-cost mortgage loan to a consumer based on the value of the consumer's collateral without regard to the consumer's repayment ability as of consummation, including the consumer's current and reasonably expected income, employment, assets other than collateral, credit history, debt-to-income ratio, current obligations and mortgage-related obligations." 9-A M.R.S. §8-506(4). This is precisely the wrongful conduct in which Lubar engaged in this case. Further, as a creditor, Lubar is subject to other ***9** provisions that protect consumers like Mr. Connelly. At the very least whether Lubar is a creditor is a fact intensive analysis and summary judgment should not have been granted.

Without any factual basis, the trial court found that Lubar is not a creditor under the statute. 9-A M.R.S.A. §1-301 (17) defines a creditor under the Maine consumer credit code mirroring its federal counterpart. Here, Lubar/The Clover Trust constitutes a "creditor" under Maine law because it issued at least one "high-cost mortgage loan" which was originated through a mortgage broker, Manhattan Financial Services. [3] App. 38.

This is significant in this case and the trial court erred by finding that Lubar is not a creditor, or at least by failing to acknowledge that this is a material fact in dispute. In his Statement of Facts in support of his motion for summary judgment, Lubar made no factual assertion regarding whether or not he was a creditor and thus cannot argue at summary judgment he (the Clover Trust)

is not a creditor. App. 28-32. That is a fatal procedural deficiency. *See* Section III below. Because this issue was not raised in plaintiff's Statement of Fact, it remains unproven and in dispute.

Before the trial court, Lubar sought to overcome his deficient pleadings by relying on a supplemental affidavit in which he states that the Clover Trust "does not make any 'high-rate, high-fee" loan within the meaning of Section 8-103 of the Maine Consumer Credit Code. App. 37. His conclusory statement about the Trust's legal status is unsupported and inaccurate. Mr. Lubar is unqualified to render a legal opinion. The applicable legal definition is found in 9-A § 1-301 (17) and under that section, the Clover Trust clearly is a creditor. [4] At a minimum there is ***10** a significant factual and legal dispute that was not addressed by the trial court and which precludes summary judgment.

**B. The Trial Court Erred By Granting Summary Judgment Where There is A Genuine Dispute Over Whether Lubar's Closing Attorney Unlawfully Induced Frederick To Sign The Note and Mortgage.**

Under Maine's Consumer Credit Code (MCCC), an agent for a lender may not induce a "consumer to enter into a consumer credit transaction by misrepresentation of a material fact with respect to the terms and conditions of the extension of credit." 9-A M.R.S. §§ 9-401, 9-408. Any lender, or agent of the lender who does so is in violation of the MCCC and the Maine Unfair Trade Practices Act. Id. Such misrepresentation is grounds for rescission and damages against the inducing party, including costs and reasonable attorneys fees. 9-A M.R.S. §§ 9-405; 9-408; 5 M.R.S. § 213. Attorney Yee unlawfully induced Frederick to sign a mortgage in breach of the MCCC.

Frederick relied on Attorney Yee's assurance that his Wells home was only being collateralized for a small portion of the loan. App. 124. But for that assurance he would not have closed. App. 125. The closing agent's misrepresentations and omissions induced Frederick to risk his home on a loan transaction that should never have taken place, or at least raise an issue of fact about her conduct.

Lubar knew or should have known that Frederick was a Maine resident, retired, on a fixed income of $25,000 and utterly unable to qualify for a $600,000 mortgage with repayment terms of $5,941.75 initially per month and an adjustable interest rate of 6.25% over the prime rate with a floor interest rate that would never go below 11.50%. App. 58, 120, 125. Lubar knew or should have known of the questionable conveyances between Susan Connelly and Frederick Connelly and of the fraudulent POA. Lubar knew or should have of that Charles ***11** Connelly defaulted on the Homecoming Mortgage within months of fraudulently obtaining it, and should never have qualified him for a loan - even with his father as a co-signor and his father's house as collateral. The trial court erred by granting summary judgment with these facts in play.

**C. The Trial Court Erred By Granting Summary Judgment Where The Lender Failed To Provide The Required Notice Of Right To Rescind.**

Pursuant to the Truth in Lending Act, 15 U.S.C. §1601, *et seq,* and its state counterpart, 9-A M.R.S. §8-101, *et seq*, the right of rescission may be exercised by a consumer "in the case of any consumer credit transaction... in which a security interest... is or will be retained or acquired in any property which issued as a principal dwelling of the person to whom credit is extended." 15 U.S.C. §1635(a); 9-A M.R.S. §8-204(1). [5] Mortgages using a principal residence to secure refinancing are squarely within protection under the Code, and statute respectively. *Deutsche Bank National Trust Company v. Pellitier,* 2011 ME 110, ¶9, 31 A.3d 1235, 1237-38. The right to rescind is a defense to residential foreclosure in Maine. 9-A MRSA §8-204(9). A creditor's failure to provide notice of right to rescind gives a debtor a right to rescind within three years of the date of closing, or later if the creditor seeks foreclosure within that time. 9-A MRSA §8-204(6).

Frederick Connelly was never informed of his right to rescind. App. 125. Lubar's closing attorney, Kristin Yee, admits that Frederick was never advised of his right of rescission. App. 56, 125. If he had been informed of his right to rescind, he would have sought counsel after the fact, had the transaction properly explained to him and he would have rescinded. App. 125.

Yee claims no notice was required based on her mistaken belief that Mr. Connelly did not ***12** reside in Wells, Maine. App. 56. This assertion is disingenuous at best since she knew or should have known his primary residency was in Maine based on the information she had in her possession at the time of the closing. She had his driver's license, which she relied upon at the closing, and she had the notarization on page two the quitclaim deed. App. 55, 124, 157, 158. Yee herself notarized the mortgage on the Wells Property in reliance and acknowledgement of Frederick's Maine driver's license. App. 74. Her mistake is inexcusable and results in a substantive defect in the loan.

Lubar cannot establish a legal justification for the closing agent's failure to inform Frederick of his right of rescission. An issue of fact then remains as to whether Frederick exercised his right of rescission within 3 years of the transaction thus voiding the mortgage.

**D. The Trial Court Erred By Granting Summary Judgment Where Lubar Failed To Inform Frederick Of His Right To Select A Closing Agent.**

A debtor-mortgagor has the right to select his own title attorney for land transactions involving residential real estate. 9-A MRSA §§ 9-303; 9-101. It is the lender-creditor who "shall permit the prospective mortgagor to select a qualified attorney of his own choice." 9-A M.R.S. § 9-303. Violation of this provision also constitutes a violation the Maine Unfair Trade Practices Act and is subject to penalties thereunder. 9-A M.R.S. § 9-408.

Frederick was not provided an opportunity to select his own title attorney prior to the closing with Lubar. App. 125. Despite his advanced age and lack of sophistication he was convinced by those around him, including the lender, to sign over his primary residence in Wells, Maine as collateral on his son's refinancing of property in Belmont, Massachusetts. App. 124. Frederick was advised by Lubar's counsel. App. 124. This is a direct violation of the Maine Unfair Trade Practices Act. 9-A MRSA §§ 9-303, 9-408 and renders the mortgage and note voidable.

***13** Lubar conveniently ignored the unassailable history of Charles' bad acts and dubious credit history to make money at Frederick's expense. This is exactly the type of predatory lending that statutes are designed to guard against. Lubar has already been made nearly whole from the sale of the Belmont Property. His attempts to oust Fred Connelly from his home should not be permitted, either at law or at equity, and especially without a trial.

**II. MR. CONNELLY IS ENTITLED TO A TRIAL ON HIS EQUITABLE DEFENSES AND THE COURT ERRED BY GRANTING SUMMARY JUDGMENT.**

Mr. Connelly asserted numerous affirmative defenses including unclean hands and estoppel, and he specifically reserved the right to assert additional defenses. [6] There are genuine disputes of material facts and he is entitled to trial on his affirmative defenses.

Under the court's equity jurisdiction it has the authority to grant rescission and other equitable remedies. 14 M.R.S. § 6051. "The assertion of equitable defenses to a mortgage foreclosure requires that the defenses... challenge the making, validity and enforcement of the loan note and mortgage. This principle was...considered to include events leading up to the execution of the loan documents..." *TD Bank, NA v. M.J. Holdings, LLC,* 2013 WL 2477244 (Conn.App.) [12]. "Where the plaintiffs conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles...[The Connecticut] courts have permitted several equitable defenses to a foreclosure action." *Chase Manhattan Mortgage Corporation v. Machado,* 83 Conn.App. 183, 187-188, 850 A.2d 260, 264.

Courts in other jurisdictions as well as in Maine have made clear that foreclosure proceedings are subject to scrutiny to ensure they are equitable. The Connecticut Appeals court stated:

***14** At the outset we note that "[b]ecause a mortgage foreclosure action is an equitable proceeding, the trial court may consider all relevant circumstances to ensure that complete justice is done...The determination of what equity requires in a particular case, the balancing of the equities, is a matter for the discretion of the trial court the plaintiff's conduct is inequitable, a court may withhold foreclosure on equitable considerations and principles."

*TD Bank, NA v. M.J. Holdings, LLC,* 2013 WL 2477244 (Conn.App.) [5][6][7]. In Florida the court stated, "[I]t is equally well established that a court of equity may refuse to foreclose a mortgage when an acceleration of the due date of the debt would be an inequitable or unjust result and the circumstances would render the acceleration unconscionable." *Federal Home Loan Mortgage Corporation v. Taylor,* 318 So.2d 203, 208.(citation omitted).
The Connecticut court further noted that "equitable remedies are not bound by formula but are molded to the needs of justice... [the Connecticut Supreme Court] has endorsed the principle that [a] court of equity does full and equal justice to all having an interest in the subject-matter by tersely expressing that [e]quity never does anything by halves. The principle of [this] maxim embraces the well-established doctrine that when equity once acquires jurisdiction it will retain it so as to afford complete relief..." *TD Bank, NA v. M.J. Holdings, LLC,* 2013 WL 2477244 (Conn.App.) [8] (citation omitted).

Moreover, it is necessary to keep in mind...that equity looks to substance and not mere form...In speaking about the meaning and effect of the equitable concept of substance rather than form, Pomeroy... opines that it is one of great practical importance [which] pervades and affects to a greater or less degree the entire system of equity jurisprudence...Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction.

*TD Bank, NA v. M.J. Holdings, LLC,* 2013 WL 2477244 (Conn.App.), [9] (citation omitted) quoting 2 J. Pomeroy, Equity Jurisdiction (5th Ed. 1941) §378, pp. 40-41.

Maine courts have found similarly. The court may void a mortgage if induced by false ***15** statements. *Getchell v. Kirkby,* 92 A. 1007, 1008 (Me. 1915)(a contract obtained through false and fraudulent representations may be rescinded..."). It may also order rescission where it finds when one party has induced the action of another to his or her detriment. *See Harvey v. Dow,* 2008 ME 192, ¶ 11, 962 A.2d 322, 325 (quoting Restatement (Second) of Contracts § 90(1) (1981)). In this case, Frederick has pleaded sufficient facts at summary judgment to entitle him to a trial on his equitable defenses.

Mr. Connelly is **elderly**, good natured and noticeably unsophisticated. He was convinced to sign the loan documents through, among other things, improper activities by the lender who told Mr. Connelly that his Maine house would not be security for the whole transaction. App. 124. Lubar's affidavits maintain that Frederick held himself out a Massachusetts resident and signed a loan application, although both those assertions are false.

It was inconceivable that the **elder** Mr. Connelly could ever afford this loan. Charles scammed his father and the Clover Trust took equal advantage of the situation with full knowledge that the **elder** Mr. Connelly was pledging his primary Maine residence. It is just as inconceivable that the closing agent did not know that Charles had improperly conveyed the Belmont property into his father's name. The recent history of record title and mortgages screamed impropriety. These factual issues raise viable equitable defenses that deserve to be tried and summary judgment should not have been granted.

## III. FACTUAL DISPUTES REGARDING DAMAGES PRECLUDE SUMMARY JUDGMENT AND THE JUDGMENT OF FORECLOSURE SHOULD BE VACATED.

Even if Mr. Connelly were found liable for some portion of the Note, damages are in dispute and summary judgment should not have been granted.

***16** Paragraph 2 of the Judgment of Foreclosure states that the principal balance owed was $229,848.64 with accrued interest of $59,962.15, and per-diem interest of $113.00 due as of December 19, 2011. *See* Judgment of Foreclosure and Order of Sale, ¶ 2, App. 23. The court erred in issuing this Order. There is insufficient evidence to support the claim for damages. The terms of the Note do not entitle Lubar to apply funds to interest first and it can be argued that he recovered the entire principal under the Note from the sale of the Belmont Property. App. 48.

**A. The Note Does Not Permit Capitalization of Interest.**

On June 2, 2010, the Belmont, Massachusetts property was sold at auction for $615,000. At that time, total principal due on the note was $598,821.57. App. 48. Principal due on the $600,000 Note was paid in full. Neither the Note nor the Mortgage permits the opportunity for capitalization of interest or fees due. App 58-75. The Note does not require that payments are applied to interest before principal. App. 58-59.

Contrary to the amounts in Paragraph 2 of the Foreclosure Judgment, the $229,848.64 being called "Principal" in the Judgment on the Wells Property is actually a tally of interest, App. 23 outrageous late charges, late fees, administrative fees, insurance advances, and "other fees" leftover - but not capitalized - in the Massachusetts foreclosure sale. [7]

The only opportunity for capitalization of monies appears in Mortgage Article I "Additional Covenants of Mortgagor," Section 1.11(a)-(d) and a trailing paragraph. App. 70. Section 1.11 permits capitalization only of "sums advanced" by Lubar for unpaid taxes, payment of prior mortgage holders, and legal fees in defending the mortgage, among others. Furthermore, Lubar must actively "add to the principal balance" the "sums advanced" in protection of the property. *Id.*

***17** Article 1, Section 1.11 does not permit capitalization of interest on the Note which the mortgage secures. Even if it did, Lubar clearly has not provided evidence it advanced the funds, other than what it asserts are "reasonable" attorneys fees.

**B. The Note Is Ambiguous And The Trial Court Erred By Ordering Damages Without A Hearing.**

The Note contains no terms to indicate that interest is paid before principal and the absence of that term creates an ambiguity that precludes summary judgment. "If a document is ambiguous, the trial court considers extrinsic evidence, and the interpretation of the document is a question of fact for the fact-finder, subject to the rule that ambiguities in a contract are interpreted against the drafter." *Champagne v. Victory Homes, Inc.*, 2006 ME 58, ¶8, 897 A.2d 803, 805.

In support of its argument to the trial court that Lubar may apply payments as it sees fit, Lubar cited *Mutual Lumber Co. v. Gero*, 244 A.2d 564, 568 (1968) (*citing Lehigh Coal & Nav. Co. v. McLeod*, 96 A 736, 737). The *Mutual* case deals with order of payment for services provided by a materialman, not the payment of interest before principal under a note and mortgage. As cited in *Mutual*, the *McLeod* case stands for the proposition that, absent language to the contrary in the debt instrument, services rendered earlier in time must be paid prior to later services. Since the instant case involves a mortgage and note rather than services, these cases are inapposite.

Lubar also relied on a Massachusetts case, *City Coal Company of Springfield, Inc. v. Noonan*, 434 Mass. 709, 751 N.E.2d 894 (2001). *Noonan* holds that interest is applied before principal, but that case deals with a commercial transaction that involves voluntary payments made to satisfy a court judgment. That case does not address a residential foreclosure action where the note is silent on how the funds collected as a result of a default are applied and where ***18** a statutory foreclosure process requires certain notices and elements of proof.

The absence of terms regarding application of funds is an ambiguity that should be construed against the drafter and which ultimately is only resolved through extrinsic evidence. *See Champagne, supra.* The trial court erred by failing to consider this issue.

**C. Lubar Failed To Provide Admissible Evidence Regarding Its "Accounting" of Damages And The Trial Court Erred By Granting Summary Judgment Based On The Record Before It.**

Lubar's claim for damages as presented at summary judgment is insufficient. In support of its calculations for damages that the court adopted in the Judgment of Foreclosure, Lubar states only that it "provide an accounting of the sale proceedings." App. 30. It is unknown who prepared that "accounting" and no underlying documentation has been produced. The "accounting" is attached to a letter from the closing agent, Kristina Yee, and is appended to both Ms. Yee's affidavit and to the Affidavit of Lewis Lubar. That "accounting" was never sent to Mr. Connelly at his home in Maine - the address on his driver's license. App. 96-126.

The record lacks supporting admissible documentation and fails to show how calculations were reached. Frederick Connelly never saw the accounting before. App. 96-126. Disputes of fact remain with respect to damages and Lubar failed to document its claim with admissible evidence. Summary judgment should not have been granted.

**IV. LUBAR FAILED TO PRODUCE ADMISSIBLE EVIDENCE NECESSARY TO MEET STRICT PLEADING STANDARDS FOR SUMMARY JUDGMENT IN FORECLOSURE ACTIONS.**

In addition to improperly supporting its claim for damages, Lubar's affidavits are incomplete and unreliable and he failed to meet his burden at summary judgment.

Creditors in residential foreclosure actions are held to a higher standard of pleading, particularly at summary judgment. *See, e.g.,* ***19** *HSBC Bank USA, N.A. v. Gabay*, 2011 ME 101, ¶ 9, 28 A.3d 1158, 1163 (vacating summary judgment against debtor on grounds that creditor failed to meet strict pleading); *HSBC Mortg. Servs., Inc. v. Murphy*, 2011 ME 59, ¶ 9, 19 A.3d 815 (vacating summary judgment against debtor on grounds that creditor's statement of material facts and affidavits were deficient); *Camden Nat'l Bank v. Peterson*, 2008 ME 85, ¶ 21, 948 A.2d 1251, 1257 (vacating summary judgment against debtor for failure to comply with strict pleading rules and on substantive grounds). [8] In fact, the Law Court has "repeatedly noted the importance of applying the summary judgment rules strictly in the context of mortgage foreclosures." *Gabay, supra*, ¶9, 28 A.3d at 1163 (emphasis added). Failure to meet these strict procedural requirements is grounds for denial of summary judgment, regardless of the adequacy of the non-moving party's opposition thereto. *Id.* ¶ 8, 28 A.3d at 1163.

**A. Lubar Did Not Assert In Its Statement Of Material Facts That Certain Documents On Which It Relies Are Admissible And Thereby Violates Strict Pleading Rules At Summary Judgment.**

For a residential foreclosure to prevail at summary judgment, "rules require that each statement of material fact must directly refer the court to the specific portions of the record from which each fact is drawn. *Gabay, supra*, ¶ 9, 28 A.3d at 1163; M.R. Civ. P. 56(h)(1), (4). Per the rule, "[e]ach fact asserted in the statement [of material facts] shall be set forth in a separately numbered paragraph." M.R. Civ. P. 56(h)(1). Facts not set forth in the statement of material facts are therefore not deemed included in the summary judgment record. *Levine, supra*, ¶ 5, 770 A.2d at 655; *Pelletier, supra*, ¶ 11, 31 A.3d at 1238. At a minimum, in support of any motion for summary judgment in a residential mortgage foreclosure action, the mortgage holder must include facts that are supported by evidence of a quality that could be admissible at trial, in the statement of material facts. *Gabay, supra*, ¶ 10, 28 A.3d at 1163. Where the Court now requires ***20** strict adherence of the summary judgment rules, Lubar's failure to state in his Statement of Material Facts (SMF) that his records are admissible is in violation of strict pleading rules and grounds for vacating the trial court's order of summary judgment. *See Gabay*, ¶ 8-10, 28 A.3d at 1163.

Absent from Lubar's SMF is any representation as to the admissibility of records proffered by Attorneys Yee and Turcotte, or of records produced by Lewis Lubar. See generally Plaintiff's SMF, App. 7. As noted in Rule 56(h), each material fact must be set forth in its own paragraph. Failure to state a fact within the statement of material facts results in the court construing the fact as not before the court. *Levine*, ¶ 5, 770 A.2d at 655. Absent the necessary assertion as to admissibility in Lubar's SMF,

Lubar has set forth no grounds for considering the necessary issue of admissibility and the Law Court should vacate the trial court's summary judgment orders based on this procedural failure.

**B. Lubar's Affidavits Contain Blatant Falsehoods And So Unreliable They Are Insufficient To Support Summary Judgment.**

Even if the Law Court construes Plaintiff's Statement of Material Facts as conforming with the strict application of Rule 56(h), internal discrepancies render the affidavits so unreliable that they cannot be used in support of summary judgment for any issue in the case or to authenticate documents. [9]

There can be no doubt that Lubar's and Yee's affidavits are unreliable since the affiants' testimonies contradict documentary evidence. Lubar relies on the affidavits to introduce a loan application that they both contend was signed by Frederick, but it was not. App. 34, 42, 51, 79, 123. Yee also asserts that "[a]ll of the loan documents indicated that all of the borrowers, ***21** including Frederick W. Connelly, resided in the Belmont Property." App. 52. However, documents offered by Yee - including her own notarization of the mortgage against the Wells Property - show Frederick represented himself as a resident of Wells, Maine. App. 74, 124. While the first page of the Quitclaim Deed from Frederick to his daughter-in-law lists Frederick's residence as Belmont, Massachusetts, the signature page lists him as a resident of Maine. App. 123. Yee obtained Frederick's "photo identification" at closing, which has a Maine address App 55, 124, 158. Finally, in direct contradiction to Yee's later assertions, Yee herself notarized the signature page on the mortgage for the Wells Property and marked Frederick as a resident of Maine. App. 74.

The extent to which the affidavits are unreliable not only creates issues of fact, but throws into question their admissibility, including the admissibility of the very loan documents Lubar relies on to obtain a judgment of foreclosure. As a result of the unreliability of the supporting affidavits, Lubar failed to meet the strict pleading standards of Higgins and summary judgment should not have been granted.

**Conclusion**

For the reasons set forth above, the trial court erred by granting Lubar's motion for summary judgment and by issuing a judgment of foreclosure on damages. There are genuine issues of material fact and Frederick Connelly is entitled to a trial on his legal and equitable defenses and as to damages. Accordingly the trial court's orders should be vacated and the case should be remanded for trial.

Footnotes

1 Lubar agreed to participate in pre-litigation mediation only in exchange for a waiver of foreclosure mediation once suit was filed.

2 "[A] verbatim adoption of findings proposed by one party in a case is disfavored, as such an approach suggests that the court has not applied its independent judgment in making its findings and conclusions.... The key question is whether the court findings reflect the application of judgment by the court, and not simply one of the parties." *Bonville v. Bonville*, 2006 ME 3,¶¶10-1 1,890 A.2d 263, 266.

3 Manhattan Financial Services is a loan broker as defined in 9-A M.R.S.A. § 10-102(1)(A) since it arranges extensions of credit for consumers in return for separate payment of money or other valuable consideration.

4 9-A § 1-301 (17) states in part, "Notwithstanding the provisions of this section, any person who originates 2 or more high-rate, high-fee mortgages...in any 12 month period or any person who originates one or more such mortgages through a loan broker...in any 12-month period is considered a creditor." (emphasis added).

5 The Maine Statute and Federal Code are identical as to applications, exemptions, and rescission.

6 Under M.R.Civ.P. 15(a) leave to amend shall be freely given when justice so requires. Discovery is not complete and if the case is remanded motions to amend will not be untimely.

7 The foreclosure accounting lists interest in the amount of $178, 416.01, legal fees of over $18,000, a late charge of over $19,000, a 1% "foreclosure fee" of $8852.46 and more. App. 97.

8 For an extensive analysis of this trending issue, *see Robert S. Hark*, "Foreclosure Cases: The Reawakening of Strict Pleading," Me. Bar J. p.13 (Vol. 27, No. 1, Winter 2012), available at www.mainebar.org.

9 While the Court will generally look no further than a party's Statement of Material Facts, the Law Court has noted it is appropriate for the Court to look directly to certain affidavits offered in support, when, as here, the opposing party challenges the credibility of said affidavits. *See Murphy*, ¶16, 19 A.3d at 822 n. 9.

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