STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW DOCKET NO. YOR-15-361

US BANK NATIONAL ASSOCIATION, AS TRUSTEE ON BEHALF OF SAIL 2006-3 TRUST FUND,

Appellee/Plaintiff

v.

DEBRA J. REAGAN,

Appellant/Defendant

v.

CITIFINANCIAL INC.

Appellee/Party-in-Interest

ON APPEAL FROM THE DISTRICT COURT (SPRINGVALE)

BRIEF OF APPELLANT

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STATEMENT OF FACTS

Appellee U.S. Bank National Association as Trustee on Behalf of SAIL 2006-3 Trust Fund ("U.S. Bank") filed a foreclosure complaint against Appellant Debra J. Reagan ("Reagan") on November 25, 2009. App. at 1. U.S. Bank based its standing to foreclose on:

- a mortgage from Reagan to Countrywide Home Loans, Inc. dated January 12, 2006 which was
- assigned by **Mortgage Electronic Registration Systems, Inc. as Nominee for Countrywide Home Loans, Inc.** ("MERS") to U.S. Bank National Association as Trustee for SAIL 2006-3 by an Assignment dated October 16, 2007 and
- further assigned by U.S. Bank National Association as Trustee for SAIL 2006-3 to the Appellee by an Assignment dated August 20, 2009.

App. at 25, ¶¶6-7, (Complaint) and 32-51 (Exhibits B & C to Complaint). Reagan (pro-se) argued in her pleadings and at a trial in Springvale District Court that U.S. Bank lacked standing to foreclose because, among other reasons, MERS did not have the authority to assign the mortgage. App. at 59 & 69 (Counterclaim); 88 at lines 1-15 (Transcript of Hearing); and 90-91 (Defendant's Closing Arguments). A Judgment of Foreclosure and Sale entered against Reagan on January 3, 2013. App. at 18-21. Reagan appealed and again argued in her Brief that MERS did not have authority to assign the mortgage. App. at 93-95 (quoting *Mortgage Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289). U.S. Bank

responded in its Appellee Brief that the MERS assignment was a valid transfer of the mortgage. App. at 97-98. The myriad of issues raised by Reagan on appeal were not directly addressed by this Court and the Judgment was affirmed in a memorandum of decision. *U.S. Bank N.A. v. Reagan*, Mem-13-139 (Dec. 24, 2013).

Shortly thereafter, Reagan (still pro-se) brought a complaint in the U.S. District Court for the District of Maine against U.S. Bank and other parties on February 14, 2014 alleging various constitutional and statutory violations in connection with this case. App. at 123 (Docket No. 1). Her complaint in federal court was dismissed on October 20, 2014. App. at 130 (Docket No. 74) and she appealed the decision in the U.S. Court of Appeals for the First Circuit on November 18, 2014. App. at 131 (Docket No. 76).

While her appeal in the First Circuit was pending, Reagan hired the undersigned and filed the present Motion for Relief in Springvale District Court on March 20, 2015. App. at 13. Her First Circuit appeal was then dismissed April 2, 2015 on Reagan's motion. App. at 136. The basis underlying Reagan's Motion for Relief was *Bank of America , N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700, which was decided on July 3, 2014 while the federal court case was pending. App. at 99. The Springvale District Court denied her Motion for Relief, finding that the motion had not been brought within a "reasonable time" under M.R. Civ. P. 60 and that the

motion was an "indirect attempt to apply *Greenleaf* retroactively to a final judgment." App. at 17. This appeal followed.

STATEMENT OF ISSUES

1. Whether the District Court erred in finding that Appellant was indirectly attempting by way of her motion for relief to retroactively apply the ruling in *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700 entered on July 3, 2014 to the foreclosure judgment entered against Appellant in this case on January 3, 2013

2. Whether the Law Court's decision in *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700 with respect to the ineffectiveness of an assignment from MERS to establish standing in a foreclosure case was an articulation of new law or a reiteration of existing law recited in *Mortgage Electronic Registration Systems, Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289, based on the plain meaning of the word "mortgagee" in 14 M.R.S. §6321.

3. Whether the District Court erred in finding that the Appellant failed to bring her motion for relief within a "reasonable time" under M.R. Civ. P. 60(b).

SUMMARY OF ARGUMENT

The District Court's Order denying Appellant's Motion for Relief from Judgment should be reversed. Reagan filed her Motion on the basis that she made a valid argument under existing law which should have entitled her to judgment in her favor and her argument was subsequently validated by the Law Court. Contrary to the District Court's contention, her Motion was not an attempt to retroactively apply a subsequent decision to the facts of her case because this Court's decision in *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, was an articulation of prior law and did not create "new law." Additionally, the District Court committed serious error by failing to give any weight to the intervening actions of the Appellant (and lack of action of the Appellee) in finding that Appellant's Motion was not filed within a "reasonable time."

STANDARD OF REVIEW

The denial of a motion for relief from judgment is reviewed on appeal for an abuse of discretion. *See Hamill v. Liberty,* 1999 ME 32, ¶ 4, 724 A.2d 616, 618. "When the trial court has correctly understood the facts and the law relevant to its analysis, we will defer to its ability to give weight to the appropriate factors under the law, and will find an abuse of discretion only where the court made a 'serious mistake' in weighing those factors." *Id.* (citing *West Point-Pepperell, Inc. v. State Tax Assessor,* 1997 ME 58, ¶ 7, 691 A.2d 1211, 1213).

ARGUMENT

I. The District Court misconstrued the law in finding that Appellant's Motion for Relief was an indirect attempt to retroactively apply *Greenleaf* because *Greenleaf* did not create new law.

A. The Appellant should be granted relief under M.R. Civ. P. 60(b) because she made a valid argument entitling her to a judgment in her favor and her argument was subsequently validated by the Law Court.

The Appellant sought relief in the District Court under M.R. Civ. P. 60(b)(5) & (6). Rule 60(b) provides:

> [o]n motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: . . . (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Appellant's claim for relief fits into the third clause that "it is no longer equitable that the judgment should have prospective application." Rule 60(b)(5) "permits an equitable adjustment of an equitable remedy." *Comfort ex rel. Neumyer v. Lynn Sch. Comm.*, 541 F. Supp. 2d 429, 432-33 (D. Mass. 2008) (construing the Rule's federal counterpart). A judgment of foreclosure and sale is in equitable remedy. *See Farm Credit of Aroostook v. Sandstrom*, 634 A.2d 961, 962 (Me. 1993) (discussing "the equitable power granted to the court in actions to foreclose mortgages"); 4 M.R.S. §152(5)(H) (conferring jurisdiction and the power to grant equitable relief in foreclosure actions).

Additionally, "Rule 60(b)(6) provides the court a grand reservoir of equitable power to do justice in a particular case." 3 Harvey, *Maine Civil Practice* §60:11 at 303 (3d ed. 2013) (citation omitted). "The equitable principles which should guide the court's discretion when determining whether to grant a motion pursuant to Rule 60(b)(6) include the interests of the party in whose favor the original judgment was granted, as well as those of the moving party." *Moulton v. Brown*, 627 A.2d 521, 524 (Me. 1993) (citing 2 Field, McKusick & Wroth, *Maine Civil Practice* § 60.1 at 71 (2d ed. 1970)).

Reagan is entitled to an equitable remedy because she made a valid argument in the original proceeding under existing law and her argument was subsequently validated by this Court. As noted above, during the original proceedings in Springvale District Court and on appeal, Reagan made the argument that U.S. Bank did not have standing to foreclose as a result of an ineffective assignment from MERS. She cited *Mortgage Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, 2 A.3d 289, in support of her position. The language pertaining to MERS in Appellant's mortgage to Countrywide Home Loans, Inc. at issue in this case is identical to the language pertaining to MERS discussed in the mortgage at issue in *Saunders*. *Compare* App. 33-35 (the mortgage) *with Saunders*, 2010 ME 79, ¶ 9, 2 A.3d 289, 294-295. *Saunders* was decided 2 1/2 years before the Judgment of Foreclosure and Sale in this case.

In *Saunders*, this Court concluded that the mortgage in that case granted to MERS "only the right to record the mortgage" as the lender's nominee, and "having only that right, MERS [did] not qualify as a mortgagee pursuant to our foreclosure statute." *Id.* ¶¶ 10–11 (quotation marks omitted). In *Greenleaf*, this Court applied *Saunders* to hold that an assignment from MERS was ineffective to provide standing to the assignee because MERS could only assign its right to record the mortgage as nominee for the lender. *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 15-17.

As pointed out below, *Greenleaf* did not create new law. If *Greenleaf* did not create new law, then there is no cognizable reason why the Judgment of Foreclosure and Sale against her should stand. The standing argument advanced by Appellant in the original proceedings justified a ruling in her favor then and it justifies a vacation of the Judgment now. The typical reasons upon which courts deny relief under Rule 60(b)(6) are not present here. *See, e.g., Putnam v. Albee*, 1999 ME 44, 726 A.2d 217 (Me. 1999) (failure to pay for transcript or to take any other steps to secure it does not justify relief); *Thompson v. America Agr. Chemical Co.*, 134 Me. 61, 181 A. 829 (1935) (failure to employ lawyer after knowledge of first lawyer's death); *Jason v. Godddard,* 129 Me. 483, 149 A. 622 (1930) (defendant present on return day but "left without having made any pertinent

inquiry"). The Appellant here did everything she could to protect her own interests.

B. The Court did not create "new law" when it decided Greenleaf.

The idea that Appellant's Motion for Relief was an indirect attempt to retroactively apply *Greenleaf*, rests on the faulty assumption that this Court was engaged in the so-called practice of "legislating from the bench" when it decided *Greenleaf*. This is incorrect. This Court did not create new law in *Greenleaf*, but rather, applied existing law as recited in *Saunders* based on the plain meaning of the word "mortgagee" in 14 M.R.S. §6321.

In *Saunders*, this Court concluded that the mortgage in that case granted MERS only the right to record the mortgage and, as such, MERS was not a "mortgagee" under the foreclosure statute. *Saunders*, 2010 ME 79, ¶¶ 10-11, 2 A.3d at 295-96 *Id.* The holding in *Saunders* was based on the plain meaning of the word "mortgagee" in 14 M.R.S. §6321:

> MERS's only right is the right to record the mortgage. Its designation as the "mortgagee of record" in the document does not change or expand that right; and having only that right, MERS does not qualify as a mortgagee pursuant to our foreclosure statute, 14 M.R.S. §§ 6321–6325. Section 6321 provides: "After breach of condition in a mortgage of first priority, the *mortgagee* or any person claiming under the mortgagee may proceed for the purpose of foreclosure by a civil action...." (Emphasis added.) It is a fundamental rule of statutory interpretation that words in a statute must be given their plain and ordinary meanings. The **plain meaning** and common understanding of mortgagee is "[o]ne to whom property is mortgaged," meaning a "mortgage creditor, or lender." Black's Law Dictionary 1104 (9th

> ed.2009). In other words, a mortgagee is a party that is entitled to enforce the *debt obligation* that is secured by a mortgage.

Saunders, 2010 ME 79, ¶ 11, 2 A.3d at 295-96 (quotations and citations omitted) (emphasis in bold added). The holding in *Greenleaf* that an assignment from MERS was ineffective to provide standing to the assignee because MERS could only assign its right to record the mortgage as nominee for the lender, *Greenleaf*, 2014 ME 89, ¶¶ 15-17, was a fairly straight-forward application of *Saunders*.

The District Court's contention that Reagan's Motion for Relief was an indirect attempt to retroactively apply *Greenleaf* necessarily implies that *Greenleaf* created new law. This case is analogous to the situation dealt with in *Sears, Roebuck & Co. v. State Tax Assessor*, 2012 ME 110, 52 A.3d 941 (2012). In *Sears*, this Court found it was unnecessary to decide the question of whether its decision in *Linnehan Leasing v. State Tax Assessor*, 2006 ME 33, 898 A.2d 408[1] could be applied retroactively because, even without the holding in *Linnehan*, a plain reading of the tax statute led to the same result. *Sears*, 2012 ME 110, ¶12, 52 A.3d at 945.

Similar to the situation confronted in *Sears*, the decision in *Greenleaf* did not reflect a "change in the judicial view of applicable law", *see Higgins v. Robbins*, 265 A.2d 90, 93 (Me. 1970). But rather, *Greenleaf* was an articulation of the principles explained under *Saunders* based on a plain meaning of the word,

[1] Holding that two separate corporations did not qualify as an "other group or combination acting as a unit" under 36 M.R.S. §1752(9) for purposes of claiming the bad debt sales tax credit.

"mortgagee" in 14 M.R.S. §6321. "In the years since *Saunders* was announced, Maine trial courts consistently relied on it, deciding regularly that foreclosure judgments cannot be granted when the foreclosure plaintiff depends upon a MERS assignment instead of an assignment from the lender." Thomas A. Cox & L. Scott Gould, *In Defense of Greenleaf: A Response to Standing to Foreclose*, 30 Me. Bar J. 18, 19 (Winter 2015)[2].

Even under the "abuse of discretion" standard applicable to this appeal, as an initial matter the District Court needs to have "correctly understood the facts **and the law** relevant to its analysis." *See Hamill v. Liberty,* 1999 ME 32, ¶ 4, 724 A.2d 616, 618. (citing *West Point-Pepperell, Inc. v. State Tax Assessor,* 1997 ME 58, ¶ 7, 691 A.2d 1211, 1213) (emphasis added). Here, the trial court misconstrued the law relevant to its analysis. Reagan was not trying to apply the holding in *Greenleaf* retroactively to her case, she was using *Greenleaf* to demonstrate why she was correct under *Saunders* according to the existing law at the time her case was decided.

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[2] *See Deutsche Bank National Trust Co. v. Merrill*, 2010 Me. Super. LEXIS 126 (Oct. 14, 2010) (If the assignment from MERS to Deutsche Bank had any effect, it was only to give Deutsche Bank the bare right to possess and record the mortgage document..."), *BAC Home Loans Servicing v. Richards*, 2011 Me. Super. LEXIS 194 (Dec. 7, 2011) ("the assignment of rights from MERS does not assign any rights other than the right to record."), *Ocwen Loan Servicing v. Parry*, RE-11-35 (Me. Super. Ct., Cum. Cty., Dec. 7, 2011) (Any assignment of MERS rights would only be an assignment of the right to record."), *Bank of America, N.A. v. Collins*, RE-10-506 (Me. Super. Ct., Cum. Cty., Jan. 10, 2012) ("If the assignment from MERS to BAC Home Loans Servicing had any effect, it was to give BAC the right only to record the mortgage document as HAC's nominee."). But see *Bank of America v. Wald*, RE-11-566 (Me. Super. Ct., Cum. Cty., Jan. 30, 2013) ("the court can discern no reason why an assignment by MERS to the real party in interest in this case would not be valid", with no discussion of the language of Saunders quoted and discussed above).

II. The District Court made a serious error by failing to give any weight to what occurred between the entry of the Foreclosure Judgment and the filing of the Motion for Relief in deciding whether the Motion was brought within a "reasonable time".

The District Court's argument that Reagan did not bring her Motion within a "reasonable time", as required for motions brought under M.R. Civ. P. 60(b)(5) & (6), fails to acknowledge what transpired (and what did not) between entry of the Judgment and her filing of the present Motion. The timeline of relevant events is as follows:

Jan. 3, 2013	Entry of Judgment of Foreclosure of Sale in District Court. App. at 11.
Dec. 24, 2013	Law Court issues Memorandum of Decision affirming District Court Judgment. *U.S. Bank N.A. v. Reagan*, Mem-13-139 (Dec. 24, 2013).
Jan. 14, 2014	Law Court denies Motion to Reconsider filed by Reagan. *U.S. Bank N.A. v. Reagan*, Law Docket No. Yor-13-139 (Jan. 14, 2014).
Feb. 14, 2014	Reagan files *Reagan v. U.S. Bank Nat'l Assoc. et al.*, No. 2:14-cv-00059-GZS (D. Me.) seeking to collaterally attack District Court Judgment. App. at 123.
July 3, 2014	The Law Court decides *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700.
Oct. 21, 2014	Judgment enters against Reagan in U.S. District Court. App. at 130.
Nov. 18, 2014	Reagan files a Notice of Appeal in U.S. District Court to the United States Court of Appeals for the First Circuit. App. at 131.

March 19, 2015 Reagan files Motion to dismiss her appeal in the First Circuit. App. at 136.

March 20, 2015 Reagan files her 60(b) Motion in this case. App. at 13.

This timeline of events is not in dispute. What is and is not a "reasonable time" under M.R. Civ. P. 60(b) is a fact-specific determination. 3 Harvey, *Maine Civil Practice* § 60:4 at 298 n.1. *See Tarbuck v. Jaeckel*, 2000 ME 105, ¶ 14, 752 A.2d 176, 180 (no reversible error to dismiss motion for relief filed 14 years after entry of judgment and 6 ½ years after movant became aware of grounds for motion); *Zink v. Zink,* 687 A.2d 229, 232 (Me.1996) (dismissal of Rule 60(b)(6) motion as untimely brought 6 years after judgment and 4 years after grounds became known was not an abuse of discretion). The District Court stated that Reagan's "federal litigation does not extend the reasonable time to seek relief from the state trial court under Rule 60(b)." App. at 17. Why doesn't it? The District Court's conclusory assertion breaks down under analysis.

Reasonableness "is a mutable cloud, which is always and never the same." *Sierra Club v. Sec'y of Army*, 820 F.2d 513, 517 (1st Cir. 1987) (quoting R.W. Emerson, *Essays: First Series* (1841)). The relevant considerations in determining whether a motion for relief have been filed within a reasonable time under the federal counterpart to M.R. Civ. P. 60(b) include "whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner." *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661

(1st Cir. 1990) (citing *See In re Pacific Far East Lines Inc.*, 889 F.2d 242 (9th Cir.1989)).

Reagan had a "good reason" why she did not file her Motion for Relief sooner. *Greenleaf* wasn't even decided until July of 2014 and Reagan was busy exploring alternative avenues of relief. "Rule 60(b) provides collateral remedial relief against unjust or inequitable final judgments, but the rule presupposes that a party has performed his duty to take legal steps to protect his own interests in the original litigation." *Scott v. Lipman & Katz, P.A.*, 648 A.2d 969, 974 (Me. 1994). As demonstrated above, Reagan took almost every legal avenue imaginable to protect her interests here. She has on a continuous (and some might even argue unrelenting) basis tried to undo the Judgment of Foreclosure and Sale entered against her. Reagan could be criticized for the strategy she chose. Perhaps a more experienced litigator would not have made the decisions she made in filing an action in federal court—but that's not the point. The relevant consideration should look to whether she was taking steps to protect her interests. She was taking those steps and those steps constitute a good reason why she did not file her Motion sooner.

As to the issue of prejudice, U.S. Bank has not been prejudiced by the delay. The docket entries in this case show U.S. Bank has done nothing to act on the Judgment of Foreclosure and Sale since it entered. *See* App. at 1-15. U.S. Bank

has failed to act despite language in the Judgment requiring the Plaintiff to "proceed with a sale of the real estate . . . pursuant to 14 M.R.S. § 6321-6324". App. at 20. U.S. Bank has not attempted to sell the mortgaged property in accordance with the Judgment and Maine's foreclosure statutes.[3] U.S. Bank hasn't changed its position whatsoever since the entry of Judgment.

Moreover, the decision in *Greenleaf* presents a problem for U.S. Bank here due to the MERS assignment in the chain of title. Although it did not actually create new law as pointed out above, *Greenleaf* generated "significant turmoil in the title industry as insurers struggle with how to address the title issues created by the decision." John J. Aromando, *Standing to Foreclose in Maine: Bank of America, N.A. v. Greenleaf*, 29 Me. Bar J. 186, 190 (Fall 2014). Whatever the arguments that U.S. Bank may advance stressing the policy reasons why final judgments should not be disturbed, there is still going to be a title defect in its chain of title at the end of the day.

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[3] Maine's foreclosure statue provides:

> Upon expiration of the period of redemption, if the mortgagor or the mortgagor's successors, heirs or assigns have not redeemed the mortgage, any remaining rights of the mortgagor to possession terminate, and the mortgagee shall cause notice of a public sale of the premises stating the time, place and terms of the sale to be published once in each of 3 successive weeks in a newspaper of general circulation in the county in which the premises are located, the first publication to be made not more than 90 days after the expiration of the period of redemption.

14 M.R.S. § 6323(1). The Judgment of Foreclosure and Sale entered on January 3, 2013. The period of redemption expired on April 3, 2013. There has neither been a sale, nor an attempted sale of the premises at any time since.

The District Court made a "serious error" here in failing to give any weight to the steps Reagan took between the entry of the Judgment of Foreclosure and Sale and the filing of her Motion for Relief when compared to the lack of action on the part of U.S. Bank during that time frame. In light of the actions of Reagan and inaction of U.S. Bank since the entry of Judgment, the time in which she filed her Motion for Relief was entirely reasonable.

CONCLUSION

For all the reasons stated above, the Appellant, Debra J. Reagan, requests that the District Court's Order denying Appellant's Motion for Relief from Judgment be reversed and this matter be remanded to the District Court for an Order granting Appellant's Motion for Relief.

Dated at Kennebunk, Maine, this 13th day of October, 2015.

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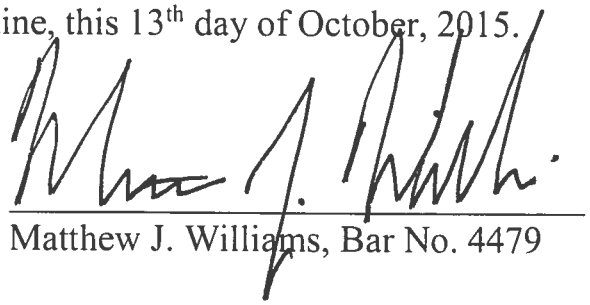
CERTIFICATE OF SERVICE

I hereby certify that on this date I served two copies of the foregoing Brief of Appellant on the Appellee/Plaintiff and Appellee/Party-in-Interest in this matter via First Class United States Mail.

Dated at Kennebunk, Maine, this 13th day of October, 2015.



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