STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. YOR-15-361

U.S. BANK NATIONAL ASSOCIATION
AS TRUSTEE ON BEHALF OF SAIL
2006-3 TRUST FUND,

Plaintiff/Appellee,

v.

DEBRA J. REAGAN,

Defendant/Appellant.

APPELLEE U.S. BANK, N.A., AS TRUSTEE ON BEHALF OF SAIL 2006-3 TRUST FUND'S RESPONSE TO DEFENDANT'S MOTION FOR RELIEF

INTRODUCTION

On June 22, 2016, this Court directed Appellant Reagan to file a motion asserting lack of standing, and Appellee U.S. Bank, N.A., as Trustee on Behalf of SAIL 2006-3 Trust Fund ("U.S. Bank") to respond. The Order posits that Reagan had throughout the foreclosure action against her clearly argued that U.S. Bank lacked standing based on *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶¶ 9-15, 2 A.3d 289; that the trial court, then this Court, apparently misunderstood or overlooked her argument on appeal; and that these circumstances provide a basis for relief under Me. R. Civ. P. 60(b).

As explained below, such extraordinary relief is not warranted. First, established principles of law do not support such relief here. Second, if the Court is considering establishing a new legal principle based on the equities, the circumstances in this case do not provide a sound predicate for doing so.

I. RELIEF IS WARRANTED ONLY IF THE SUPERIOR COURT ABUSED ITS DISCRETION, WHICH IT DID NOT.

The District Court denied Reagan's motion. Such denials are reviewed for abuse of discretion. *Tarbuck v. Jaeckel*, 2000 ME 105, ¶ 13, 752 A.2d 176, 180 ("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.") (citations omitted).

The District Court made no such serious mistake here. Reagan sought relief under Rule 60(b)(5) and 60(b)(6). Under both provisions, relief must be sought "within a reasonable time." The District Court denied the motion, in part, because it found Reagan had not met this requirement. Reagan had delayed filing her motion over a year after this Court denied her motion for reconsideration. Instead of promptly seeking relief under Rule 60(b) in the trial court, she chose to pursue an unsuccessful collateral attack on the judgment in federal court.

The District Court's decision that this delay was not reasonable was not an abuse of discretion. There was no legal basis to pursue a collateral attack in federal court. Further, by delaying over a year, Reagan moved outside the one-year limit set forth in Rule 60(b)(1)-(3), including Rule 60(b)(1)'s basis for relief due to, among other things, a "mistake."

Hence, the District Court was well within its discretion under existing legal principles to deny the motion based on this delay alone.

Rule 60(b)(5), moreover, applies in instances when a judgment involves relief of prospective application, such as injunction or family law custodial or support decree, and circumstances change making that judgment no longer tenable. *See Provencher v. Provencher*, 2008 ME 12, ¶ 8, 938 A.2d 821, 823; 11 Charles Alan Wright, Arthur R. Miller, & M. Kane, *Federal Practice & Procedure* ("*FP&P*") § 2864 at 498 (3d ed. 2012). That is not the situation here – a foreclosure is a final judgment not of prospective application, and there have been no factual changes since the judgment became final.

While the limits of Rule 60(b)(6) cannot be easily described given its catch-all nature, it is an extraordinary remedy granted only when the more particularized circumstances set out in the other sub-sections do not apply. *See* Me. R. Civ. P. 60(b)(6) ("any **other** reason justifying relief ...") (emphasis supplied); *Ezell v. Lawless*, 2008 ME 139, ¶ 18, 955 A.2d 202, 206-07; 11 *FP&P* § 2864 at 498 (Rule 60(b)(6) and other five clauses are "mutually exclusive"). Hence, Rule 60(b)(6) is not to be used when the time limit of a pertinent other clause, such as Rule 60(b)(1), has passed. So this clause also was not a viable basis for relief, and the District Court did not abuse its discretion in denying Reagan's motion.

Finally, there is no existing precedent compelling the District Court to grant relief under the circumstances presented. The District Court made no error of law or fact and did not abuse its discretion. Under established principles of law, the District Court's denial of Reagan's motion should stand.

II. THE EQUITIES DO NOT MANDATE DEVIATION FROM ESTABLISHED LAW IN THIS INSTANCE.

With the District Court having not erred, in order to grant relief here, this Court would need to ignore the established standard of review and make new law broadening the circumstances when judgments must be altered by the trial court after reaching finality. If the Court is so contemplating, U.S. Bank respectfully submits that this is not the appropriate case for establishing such new precedent.

A. The issue of standing was not clearly raised in the foreclosure action.

In its Order, this Court assumes that Reagan "relentlessly, and apparently correctly" presented the argument that U.S. Bank lacked standing based on the Court's decision in *Saunders*. Reagan, however, never squarely presented a challenge to MERS's ability to assign a mortgage. Her challenge to the MERS assignment was based on allegations of robo-

signing and the timing of the assignment based on the alleged closing date of the trust. (App. 59.) She offered no evidence in support of her position. Indeed, her focus in the 20 issues she presented to this Court in her initial appeal was based on the same type of challenges. Thus, the presumed predicate for creating new law – a party who has clearly and persistently articulated a correct legal argument that was inexplicably rejected – is not present in this instance.

B. The equities do not support relief.

This Court will vacate a denial of a Rule 60(b) motion only when it "works a plain and unmistakable injustice." *Provencher*, 2008 ME 12, ¶ 6, 938 A.2d at 823 (citation omitted). No such manifest injustice is present here.

First, Reagan has not made a payment on her loan since June 16th, 2008. BANA, as the servicer for U.S. Bank, has expended monies on taxes and insurance since that time. Reagan has not repaid the amount owed on her loan or any of BANA's expenditures, and has lived at the property paying nothing for the last eight years.

Second, as this Court has made clear, standing in this context is not jurisdictional, it is a justiciability requirement "that does not affect, let alone, destroy, the court's authority to decide disputes that fall within its subject matter jurisdiction." *Bank of America, N.A. v. Greenleaf*, 2015 ME 127, ¶ 7, 124 A.3d 1122, 1124-25 ("*Greenleaf II*"). Thus, Reagan lacks any merit-based defense to the foreclosure and the District Court's judgment is not jurisdictionally infirm. *See also Wells Fargo Bank, N.A. v. White*, 2015 ME 145, 127 A.3d 538 (2015) (affirming denial of Rule 60(b) motion to vacate a foreclosure based on lack of standing).

Third, U.S. Bank produced evidence that it was the owner of the Note and Mortgage, and as the (successor) lender and mortgagee, it was and is the only entity with the

right to foreclose in this case. Thus, there is no risk that Reagan could be subject to another entity pursuing her in a subsequent action based on this standing issue.[1]

In sum, if there are circumstances in which a Rule 60(b) motion should be granted because the movant's position in the case was mistakenly rejected on the merits, this case does not provide the context in which the equities urge tipping the balance to the movant.

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[1] At trial, U.S. Bank offered proof at trial that it is the owner of the note and mortgage because the note was sold into the sail 2006-3 trust for which U.S. Bank serves as the trustee. In particular, Lori Hosni, corporate representative of BANA, the servicer of the mortgage, testified that based on her personal knowledge, experience, and review of the SAIL 2006-3 trust records available on the securities and exchange commission website (*see* Pl.'s Tr. Exs. 3, 4 and Def.'s Tr. Exs. 1, 2), U.S. Bank took ownership of the loan through the following chain of title:

- Countrywide Home Loans, Inc., the originator of the Loan, sold the Loan to Lehman Brothers Bank, FSB and endorsed the Note in blank in or around March 2006. (*See* Pl.'s Tr. Ex. 4 at 16, 21, 27, 51.
- Lehman Brothers Bank, FSB transferred the Note endorsed in blank to Structured Asset Securities Corporation in or around May 2006. (*See* Pl.'s Tr. Ex. 4 at 1.)
- Structure Asset Securities Corporation transferred the Note endorsed in blank to U.S. Bank as Trustee for the SAIL 2006-3 Trust to be in included in the assets backing the Trust in or around May 2006. (*See* Pl.'s Tr. Ex. 11 at 5.)
- In its role as Trustee of the SAIL 2006-3 Trust, U.S. Bank is the current owner and holder of the Note endorsed in blank by the originating Lender, Countrywide. (*See* Pl.'s Tr. Ex. 11 at 62; Pl.'s Tr. Ex. 10 at 162.)
- MERS, the only mortgagee named in the Mortgage, assigned the Mortgage on October 16, 2007 to "U.S. Bank, N.A. as Trustee for SAIL 2006-3." (Pl.'s Tr. Ex. 8.)
- "U.S. Bank, N.A. as Trustee for SAIL 2006-3" assigned the Mortgage to "U.S. Bank, N.A., as Trustee on Behalf of SAIL 2006-3 Trust Fund" on August 20, 2009. (Pl.'s Tr. Ex. 9.)
- U.S. Bank recorded both assignments in the York County Registry of Deeds shortly after they were created. (Pl.'s Tr. Ex. 8 and 9.)

Ms. Hosni then testified based on personal knowledge, experience, and documents admitted into evidence that U.S. Bank continues to own and hold the Note and is the current record owner and holder of the Mortgage. Reagan offered no evidence to rebut U.S. Bank's clear chain of title.

In sum, the evidence presented at trial proved that U.S. Bank was the owner of the Note and Mortgage, and as the (successor) lender and mortgagee, U.S. Bank is the only entity with the right to foreclose in this case. Countrywide originated the Loan with Reagan and then sold all of its interest to Lehman Brothers Bank, FSB, as the Note and Mortgage provide. The Loan was subsequently transferred into a Trust that U.S. Bank is the trustee. U.S. Bank is the only party with the right to foreclose after Reagan defaulted on her payment obligations in 2008.

C. The Court's initial denial of Reagan's appeal was not inexplicable.

A foreclosure judgment in the amount of $199,556.63 was entered against Reagan in 2013. The judgment was affirmed and rendered final and unappealable by this Court that same year. The next year, 2014, this Court issued its ruling in *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, 96 A.3d 700 ("*Greenleaf I*"). As previously briefed, the rendering of new law after a final judgment is not a ground for relief under Rule 60(b). "[A] change in the judicial view of applicable law after a final judgment [is not] sufficient basis for vacating such judgment entered before [the] announcement of the change." *Higgins v. Robbins*, 265 A.2d 90, 93 (Me. 1970) (internal quotations and citations omitted). "To permit the alteration of a judgment on the strength of a later decision of the Law Court would impair the certainty and finality of judgments in the trial court." *Id.* And, "'[i]t is necessary that judgments, especially those settling property rights . . . have a high degree of stability and finality.'" *Kolmosky v. Kolmosky*, 631 A.2d 419, 421 (Me. 1993) (quoting *Merrill v. Merrill*, 449 A.2d 1120, 1125 (Me. 1982)).

The Order appears not to contest this strongly entrenched principle of Maine law. Rather, the Order suggests that extraordinary relief could be granted here on a different basis: because *Saunders* made clear that there was no standing under the circumstances presented in this foreclosure, this Court's denial of Reagan's appeal amounted to an inexplicable mistake on the Court's part.

Setting aside the lack of precedent to support relief under such circumstances, U.S. Bank respectfully submits that the rulings of the District Court and this Court were not inexplicable mistakes. The law was not clear in 2013, and the general principle against re-opening final judgments based on new law applies here. Rule 60(b) is not a mechanism by which litigants are permitted to revisit final, non-appealable judgments based on subsequent

clarifications of law from the Court. Indeed, even Reagan admits that she is trying to apply an argument that was decided after her judgment was final. (App. 100: "The Defendant made a valid argument under prior law and her argument was subsequently validated by the Law Court."; *see also* App. 17 (Justice Fritzsche noting that Reagan's Rule 60(b) is based on an attempt to apply Greenleaf post-judgment).)

As Judge Darvin remarked after *Greenleaf I* was remanded for additional proceedings:

> It would be disingenuous to maintain that the Law Court's decision in *Greenleaf* is not a seminal decision that has fundamentally informed and altered foreclosure practice in Maine. This court agrees with the assertions by plaintiff that the decision represents a significant departure from prior precedent. While it is true that *Greenleaf* builds on the holding in *MERS v. Saunders*, 2010 ME 79, 2 A.3d 259, the court agrees with plaintiff that *Saunders* was widely interpreted and applied to mean only that MERS was not a proper party (plaintiff) in a foreclosure action. Numerous other decisions involving a MERS assignment were decided without reference to a lack of standing as a result of the defective assignment.

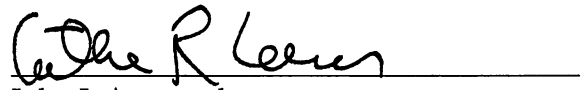
(Order After Remand for Dismissal with Conditions at 5, *Bank of America, N.A. v. Greenleaf*, No. BRIDC-RE-11-109 (Me. Dist. Ct. Cumberland Cty. Dec. 22, 2014).) At the time of the judgment in this case, neither the bench nor the bar expected that an assignment from MERS did not constitute proof of ownership of the mortgage as long as the plaintiff could show it owned the requisite interest in the note to satisfy the requirements of 14 M.R.S. § 6321. The judgment accords with the longstanding equitable title theory pursuant to which the beneficial interest in the mortgage follows the note the mortgage secures. *See Culhane v. Aurora Loan Servs. of Neb.*, 708 F.3d 282, 291-93 (1st Cir. 2013); *Wyman v. Porter*, 108 Me. 110, 79 A. 371, 374-75 (1911); *Jordan v. Cheney*, 74 Me. 359, 361-62 (1883); RESTATEMENT (THIRD) OF PROP.: MORTGS. § 5.4 cmt. e (Am. Law Inst. 2011). Unlike the problem identified for MERS as plaintiff seeking foreclosure in *Saunders*, U.S. Bank had the requisite interest in the Note and was appropriately assigned the Mortgage.

While *Greenleaf I* ruled that this thinking was incorrect, the decision in *Greenleaf I* reflects an evolution of legal reasoning taking place after the decision in *Saunders* issued. To the extent that Reagan's standing objection in 2013 can be viewed clearly articulating the argument that this Court accepted in 2014 in *Greenleaf I* (which, as noted, is not reflected in the record), such prescience would not form a basis for disturbing the finality of the decision. If it were, then there could be no end to Rule 60(b)(6) motions. Any time the law evolved, all final decisions issued prior to that date could potentially be unraveled if the losing party had articulated (however vaguely) an argument deemed, years later, to fall within the ballpark of the new ruling.

CONCLUSION

For the reasons contained in the Red Brief and this Response, U.S. Bank respectfully requests that the Court affirm the judgment of the District Court denying Reagan's motion for relief pursuant to Me. R. Civ. P. 60(b)(5) and (6).

DATED: July 21, 2016



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CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2016, I have caused the foregoing to be sent by email and U.S. Mail to counsel for Appellant at the following address:

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