STATE OF MAINE BUSINESS AND CONSUMER COURT

Cumberland, ss.

HEIDI PUSHARD and JEFFREY PUSHARD

Plaintiffs

v. Docket No.: BCD-CV-15-28

BANK OF AMERICA, N.A.

Defendant

ORDER ON PENDING MOTIONS

This case is before the court on the Motion for Summary Judgment filed by Plaintiffs Heidi and Jeffrey Pushard and the Motion for Judgment on the Pleadings Or, In The Alternative, Motion for Summary Judgment On Plaintiffs' Complaint filed by Defendant Bank of America, N.A. Oral argument was held February 17, 2016, after which the court took the matter under advisement.

I. Background

The material facts are not genuinely in dispute.

On December 12, 2006, Heidi Pushard and Jeffrey Pushard ("the Pushards" or "Plaintiffs") entered into a 30-year loan agreement with Countrywide Home Loans, Inc. ("Countrywide"). The Pushards executed a note payable to Countrywide in the amount of $145,000.00 (the "note"), to be repaid through periodic monthly payments through 2037. The note was secured by a mortgage on the Pushards' residence in favor of Mortgage Electronic Registration Systems, Inc. ("MERS"), as nominee for Countrywide, its successors and assigns ("the mortgage"). The mortgage was subsequently assigned from Countrywide to Bank of America, N.A. ("Defendant" or "the Bank"). Although the parties evidently disagree about

whether an assignment was properly made from MERS to Countrywide, this Order treats the Bank as the holder of the note and mortgage.[1]

According to the Bank, the Pushards have paid nothing on the promissory note since 2008. In May 2011, the Bank sent a notice of right to cure default to the Pushards, as required by the Maine residential foreclosure statute that makes service of a notice of right to cure default a prerequisite to acceleration of payments due on the note and foreclosure of the mortgage. *See* 14 M.R.S. § 6111(1). In October 2011, the Bank commenced a foreclosure action against the Pushards in the Androscoggin County Superior Court, docketed as AUBSC-RE-11-160.

The Bank's initial and amended complaints in the foreclosure action requested a judgment of foreclosure in the amount of what the Bank claimed was the entire balance due on the note, meaning that the Bank was claiming to have accelerated payment of the note. A trial in the case was held in February 2014.

On October 9, 2014, the court granted judgment against the Bank and in favor of the Pushards, concluding that the Bank's notice of right to cure default did not comply with the requirements of section 6111, and "[a]ccordingly, the court cannot grant a judgment of foreclosure to the Plaintiff." *See* Order, *Bank of America, N.A. v. Heidi Pushard, et. al.*, Me. Super. Ct., And. Cty., Docket No. AUBSC-RE-11-160 (Oct. 9, 2014) (MG Kennedy, J.). The court also ruled that that the Bank failed to prove the amount due on the note as of the date of trial. *Id.*

Notwithstanding the judgment against it, the Bank takes the position that the Pushards remain liable on the note, and that the mortgage still encumbers the mortgaged property. The Pushards' position is the opposite—that the note and mortgage are no longer enforceable, and

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[1] In the foreclosure action the Bank commenced against the Pushards, the Order granting judgment to the Pushards concluded: "When Countrywide assigned the mortgage to Bank of America it had an ownership interest in the mortgage to assign, since it was the lender and mortgagee." *See* Order, *Bank of America, N.A. v. Heidi M. Pushard, et. al.*, Me. Super. Ct., And. Cty., Docket No. AUBSC-RE-11-160 (Oct. 9, 2014).

that they therefore are entitled to have a release of the mortgage filed in the registry of deeds, so that it no longer appears in the registry as an encumbrance on their title.

The Pushards filed s Complaint for Declaratory, Injunctive and Other Relief on March 25, 2015, and subsequently filed a First Amended Complaint. The four counts of the First Amended Complaint seek to have the court declare the note and mortgage unenforceable and also seek to hold the Bank liable for slander of title and for violating a Maine statute that requires a lender to discharge a mortgage "[w]ithin 60 days after full performance of the conditions of the mortgage . . ." *See* 33 M.R.S. § 551. They seek to enjoin the Bank from enforcing the note and mortgage and to compel the Bank to record a release of the mortgage, and also seek damages.

The Bank has brought counterclaims for breach of contract, declaratory judgment, and unjust enrichment.

The Pushards' summary judgment motion asks for summary judgment on both their First Amended Complaint and the Bank's counterclaims. The Bank has moved for judgment on the pleadings, and in the alternative, for summary judgment on the Pushards' First Amended Complaint, but not on its own counterclaims.

II. Discussion

a. Standards of Review

The standard of review for the Bank's motion for judgment on the pleadings pursuant to Rule 12(c) of the Maine Rules of Civil Procedure is whether the pleading to which the motion is directed, viewed in a light most favorable to the non-moving party, states any cognizable claim. *See Town of Eddington v. University of Maine Foundation*, 2007 ME 74,, §5, 926 A.2d 183, 184; *Heber v. Lucerne–in–Me. Vill. Corp.*, 2000 ME 137, ¶ 7, 755 A.2d 1064, 1066.

The standard of review on a Rule 56 motion is different: "Summary judgment is properly granted if the record reflects that there is no genuine issue of material fact and the

movant is entitled to a judgment as a matter of law." *Angell v. Hallee*, 2014 ME 72, ¶ 16, 92 A.3d 1154 (quotation omitted). "A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive." *Id.* (quotation omitted).

b. Ripeness and Justiciability

The Pushards contend that, based on the res judicata effect of the October 9, 2014 judgment against the Bank in the foreclosure action, the note and mortgage are no longer enforceable or binding on them, and that the Bank is therefore obligated to release the mortgage so it no longer encumbers their property.

The Bank contends that the issue of res judicata is not ripe for review, and will only be ripe if and when Bank commences another foreclosure action against the Pushards.

The Bank's argument rests largely on the Law Court decisions in *Wells Fargo Bank, N.A. v. Girouard* and *U.S. Bank, N.A. v. Tannenbaum*, in each of which the Law Court declined to decide whether an underlying judgment against a foreclosing lender would bar a future foreclosure action. *See Wells Fargo Bank, N.A. v. Girouard*, 2015 ME 116, ¶ 10, 123 A.3d 216 ("Consideration of this issue is necessarily speculative, because, if the issue arises at all, it will be generated by events that have not yet happened and at present are entirely hypothetical. Therefore, we do not address this issue, leaving it to another day if it becomes an actual controversy."); *accord*, *U.S. Bank, N.A. v. Tannenbaum*, 2015 ME 141, ¶ 6 n.3, 126 A.3d 734.

However, the Pushards make a persuasive argument for a different outcome. They say that the continuing pendency of what they say is an unenforceable mortgage in the registry of deeds constitutes a present cloud upon their title and prevents them from selling their property.

Furthermore, the Pushards' First Amended Complaint asserts a claim for slander of title.[2] Neither *Girouard* nor *Tannenbaum* appears to have involved a slander of title claim by the borrower.

In the court's view, the Pushards' claim that the mortgage constitutes a slander of their title presents a justiciable controversy, regardless of whether the Bank intends to bring a future foreclosure action. "A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts. Accordingly, rights must be declared upon the existing state of facts and not upon a state of facts that may or may not arise in the future.'" *Madore v. Maine Land Use Regulation Comm'n*, 1998 ME 178, ¶7, 715 A.2d 157 (citation omitted). Here, even if the Bank were content to do nothing to enforce the loan, the mortgage remains on record in the registry of deeds as a present encumbrance on the Pushards' property. Their slander of title claim is therefore based on existing circumstances, and is not contingent upon the occurrence of any future event, such as a new foreclosure action by the Bank.

This, in turn, means that the Bank's Motion for Judgment on the Pleadings must be denied, because the Pushards' First Amended Complaint states a cognizable claim for relief. The analysis turns to the parties' cross motions for summary judgment, beginning with the Pushards' claim in Count II of the First Amended Complaint that the Bank's refusal to release the mortgage violates 33 M.R.S. § 551.

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[2] "'[S]lander of title' is a form of the tort of injurious falsehood that protects a person's property interest against words or conduct which brng or tend to bring the validity of that interest into question." *Colquhoun v. Webber*, 684 A.2d 405, 409 (Me. 1996). The elements of a slander of title claim are that: "(1) there was a publication of a slanderous statement disparaging claimant's title; (2) the statement was false; (3) the statement was made with malice or made with reckless disregard of its falsity; and (4) the statement caused actual or special damages.'" *Rose v. Parsons*, 2013 ME 77, ¶13, 76 A.3d 343 (*quoting Colquhoun*, 684 A.2d at 409).

c. The Pushards' Section 551 Claim

Count II of the First Amended Complaint asserts that the Bank is in violation of 33 M.R.S. § 551 because the note and mortgage are not enforceable against the Pushards, and the Bank is therefore required to release the mortgage, which the Bank admittedly has not done.

Section 551 states in pertinent part:

> Within 60 days after full performance of the conditions of the mortgage, the mortgagee shall record a valid and complete release of mortgage together with any instrument of assignment necessary to establish the mortgagee's record ownership of the mortgage. If a release is not transmitted to the registry of deeds within 60 days, the [mortgagee] and any servicer are jointly and severally liable to an aggrieved party for damages equal to exemplary damages of $200 per week after expiration of the 60 days, up to an aggregate maximum of $5,000 for all aggrieved parties or the actual loss sustained by the aggrieved party, whichever is greater.

33 M.R.S. § 551 (2015) (ellipses omitted).

Regarding section 551, the Bank argues that the Pushards are not entitled to a release because the statutory predicate of "full performance of the conditions of the mortgage" has not been met. The Pushards claim that all conditions of the mortgage should be deemed fully performed because the mortgage is no longer enforceable, but they concede they have not made all payments due on the note.

The Bank's reading of the statute is the right one--to interpret the term "full performance of the conditions of the mortgage" to include situations in which a mortgage is unenforceable or void, which is essentially the Pushards' position, is not a reasonable interpretation of the statute. Because they have not shown that the conditions of the mortgage have been fully performed, the Pushards are not entitled to a release of the Bank's mortgage under section 551, nor have they made a prima facie showing, for purposes of defeating the Banks's Motion for Summary Judgment, that the Bank has violated the statute.

However, that conclusion does not end the analysis. Section 551 is not the exclusive basis for obtaining release of an unenforceable mortgage, and in fact, as just noted, is not

intended for that purpose. The Pushards' claim for slander of title is an alternate avenue to the same relief—proof of slander of title does not require proof of full performance of the conditions of the encumbrance at issue in order to compel its release or obtain damages. Thus, the Pushards' slander of title claim requires the court to decide whether the mortgage is indeed unenforceable against them, such that they are entitled to have the mortgage released on grounds other than section 551.

d. Whether the Res Judicata Effect of the Foreclosure Judgment in *Bank of America, N.A. v. Pushard* Entitles Pushards to A Release of the Mortgage?

The sole basis for the Pushards' slander of title claim is that, under the doctrine of res judicata, the judgment in the Bank's unsuccessful foreclosure action bars the Bank from bringing a new foreclosure action, and thus that the note and mortgage are no longer enforceable against them. Their argument rests on the Law Court decision in *Johnson v. Samson Constr. Corp.*, 1997 ME 200, 704 A.2d 866. The analysis turns to the res judicata effect of the judgment against the Bank, in light of *Samson.*

In *Samson*, the mortgagee's initial foreclosure action was dismissed for failure to comply with a procedural order. 1997 ME 220, at ¶3, 704 A.2d at 867-68. The dismissal was with prejudice, meaning that it operated as an adjudication on the merits of the dismissed claim. 1997 ME 220, at ¶8, 4, 704 A.2d at 869. The mortgagee brought a second foreclosure action. 1997 ME 220, at ¶4, 704 A.2d at 867-68. The Superior Court dismissed the case, concluding that the second action was barred under the claim preclusion branch of res judicata. *Id.* The Law Court affirmed. *Id.*

The key to the outcome in *Samson* is that, before commencing the first foreclosure action, the lender accelerated payment of the entire balance due on the installment note. The Law Court explained that "[o]nce [the lender] triggered the acceleration clause of the note and the entire debt became due, the contract became indivisible. The obligations to pay each installment merged into one obligation to pay the entire balance on the note. " 1997 ME 220,

¶8, 704 A.2d at 869. Because the note in *Samson* had been accelerated, the entire debt could be, and was, litigated. *See Samson*, 1997 ME 220 at ¶¶4, 8, 704 A.2d at 868-69. Thus, the dismissal of the initial foreclosure action operated as an adjudication on the merits of the borrower's entire liability on the note, leaving the lender with no further claim to be litigated.

The Law Court held that, under the claim preclusion branch of res judicata, the dismissal barred any future foreclosure action. "Claim preclusion bars the relitigation of a claim if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been litigated in the first action." 1997 ME 220, ¶6, 704 A.2d at 868, *quoting Machias Sav. Bank v. Ramsdell*, 1997 ME 20, ¶1, 689 A.2d 595, 599.

Here, the first two of the three enumerated elements of claim preclusion are plainly met: the Bank's unsuccessful foreclosure action involved the same parties and resulted in a valid final judgment. However, the third element—what was litigated, or could have been litigated, in the foreclosure action—distinguishes this case from the *Samson* case.

The reason for the difference is that, in *Samson*, the lender actually accelerated payment of the entire balance due on the note and the claim that was later dismissed was for the entire debt. Here, no acceleration of payment on the Pushards' note has occurred. The defective notice of right to cure meant the Bank could not accelerate payments on the note or claim the entire balance due on the note. *See* Order, *Bank of America, N.A. v. Heidi Pushard, et. al.*, Me. Super. Ct., And. Cty., Docket No. AUBSC-RE-11-160 (Oct. 9, 2014) (MG Kennedy, J.). *See also* 14 M.R.S. § 6111.

It should be noted that the argument the Pushards make in this case is the exact opposite of the argument they made in the foreclosure action. They argued in the foreclosure action that no acceleration of payment on the note had occurred, despite the Bank's attempt to do so, and persuaded the Superior Court to rule in their favor based on that argument. Here,

they argue that the Bank did accelerate. The Bank did attempt to accelerate payment on the note, but that is irrelevant. The acceleration either happened or it did not happen, and the foreclosure court ruled that it did not happen. *See id.* That aspect of the judgment against the Bank is indeed res judicata. As a matter of judicial estoppel, this court might have declined to consider the Pushards' argument on this case for the opposite of what they argued in the foreclosure action, but the court has elected to consider the argument and has found it to be without merit—no acceleration of the Pushards' note occurred.

Without an acceleration of payments on the note, the only claim that was or could have been litigated in the Bank's foreclosure action was the Bank's claim for what was due on the note at the time. The Pushards' liability for the entire debt could not be litigated, and in fact was not litigated. *See Estate of Weatherbee*, 2014 ME 73, ¶13, 93 A.3d 248, 252-53 (claim not barred in subsequent litigation because there was no lawful basis for litigating the claim in the prior case).

Thus, the judgment in favor of the Pushards does not, and could not, preclude a claim by the Bank for amounts coming due on the note after the 2014 foreclosure judgment. Moreover, a new event of default would give rise to a new right to accelerate. *See Wilmington Trust Co. v Sullivan-Thorne*, 2011 ME 94, ¶12, 84 A.3d 371), *quoting Afolabi v. Atlantic Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006).

For these reasons, assuming that *Samson* remains the law in Maine,[3] it is distinguishable from this case. Because the Pushards have not alleged or argued any further basis for their

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[3] The Law Court opinion in *Wilmington Trust Company v Sullivan-Thorne* cites with approval two cases that stand firmly for the proposition that a judgment against a lender in a foreclosure action does not necessarily preclude the lender from enforcing the note and mortgage in the event of a different alleged default than was alleged in the first action, even when the lender has accelerated the note in the initial action. The citation, with the parenthetical quotes that the Law Court chose to include, is as follows:

> *Singleton v. Greymar Assocs.*, 882 So. 2d 1004, 1008 (Fla. 2004) ("We can find no valid basis for barring mortgagees from challenging subsequent defaults on a mortgage and note solely because they did not prevail in a previous attempted foreclosure based upon a separate alleged

claim that the note and mortgage cannot be enforced against them, the court concludes that the note and mortgage remain enforceable.

III. Conclusion

Based on the foregoing analysis and based on the undisputed facts, the court concludes that Bank is not required to release its mortgage, either under 33 M.R.S. § 551 or on any other basis. The Pushards are not entitled to the declaratory and injunctive relief they seek in Count I and Count III of their First Amended Complaint; nor have they made a prima facie showing of either a violation of 33 M.R.S. § 551 as alleged in Count II, or slander of title as alleged in

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> default."); *Afolabi v. Atl. Mortg. & Inv. Corp.*, 849 N.E.2d 1170, 1175 (Ind. Ct. App. 2006) (concluding that "subsequent and separate alleged defaults under [a] note create[] a new and independent right in the mortgagee to accelerate payment on the note in a subsequent foreclosure action.").

2011 ME 94, ¶ 12, 84 A.3d 371.

In *Wilmington*, the Law Court distinguished the *Samson* case by noting that the lender in *Wilmington*, unlike the lender in *Samson*, never actually accelerated the note but only stated its intent to do so. 2011 ME 94, ¶ 12 n.4, 84 A.3d 371. However, the two cases cited with approval by the Law Court, *Singleton* and *Afolabi*, cannot be distinguished on that ground—each involved a prior foreclosure action in which the lender accelerated the note and sought the entire balance on the note, and in which the lender lost, either through dismissal or judgment, on procedural grounds. The parenthetical reference in *Afolabi* that the Law Court chose to quote—a "*new and independent right* in the mortgagee to accelerate payment on the note in a subsequent foreclosure action" (emphasis added)—is contrary to the very premise of the Pushards' position in this case, which is that payments on a note cannot be accelerated more than once.

What is unclear about the *Samson* case is whether the lender's second foreclosure action involved exactly the same claim, including the same alleged default, as was alleged in the first—the opinion suggests as much in noting that the prior "judgment bars the complaint in this action which alleges precisely what the complaint in the first action alleged . . ." 1997 ME 220 at ¶ 8, 704 A.2d at 869. But if the second foreclosure action in *Samson* involved a different alleged default, then the result in *Samson* would be open to question. The reason is that any breach of contract claim involves proof of a breach as an element of the claim. This means that a claim alleging one breach is not the same claim as a claim alleging a different breach, and judgment on one does not preclude litigation of the other, if the other could not have been raised in the underlying case. When a plaintiff seeks to terminate a continuing contract based upon a breach, which is in fact the gist of any foreclosure action, a judgment against the plaintiff is res judicata as to that claim of breach, but, unless the contract is invalidated or terminated, the judgment leaves the underlying contract in place, and does not preclude a future action based on a new breach that could not have been litigated in the first action.. That is the holding in both *Singleton* and *Afolabi*, which is why the Law Court's favorable citation, with the parenthetical quotations the court chose to include—is of interest.

However, whether the Law Court's favorable reference to *Afolabi* and *Singleton* signals any departure from *Samson* is ultimately immaterial for purposes of this case, because *Samson* is distinguisbable from this case.

Count IV, for purposes of defeating the Bank's summary judgment motion. Because the note and mortgage remain enforceable, the Pushards also are not entitled to summary judgment on the Bank's counterclaim.

IT IS HEREBY ORDERED.

1. Plaintiffs' Motion for Summary Judgment is denied.

2. Defendant's Motion for Judgment on the Pleadings is denied.

3. Defendant's Motion for Summary Judgment is granted on all counts of Plaintiffs' First Amended Complaint.

The Bank's counterclaim remains pending, so this Order does not constitute an appealable final judgment. The Clerk will schedule a conference of counsel to discuss a schedule for further proceedings.

Pursuant to M.R. Civ. P. 79(a), the Clerk is hereby directed to incorporate this Order in the docket by reference.

Dated March 15, 2016

__________/s___________________
A. M. Horton
Justice, Business and Consumer Court