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Bank of America, N.A. v. Greenleaf – Ten Years Later and Still Standing

In the wake of the financial crisis of 2008 and the ensuing wave of foreclosures tied to dubious mortgage lending practices, the Law Court issued several pro-borrower decisions that imposed strict requirements on foreclosing lenders and draconian consequences for relatively minor mistakes. This trend goes back to the 2014 decision in *Bank of America, N.A. v. Greenleaf,*[1] which made it harder for foreclosure plaintiffs who were not the original lender to prove ownership of the mortgage in situations where the chain of assignments between the original lender and the foreclosure plaintiff included an assignment by Mortgage Electronic Registration Systems[2] (MERS) as opposed to one directly from the original lender.

Then in *KeyBank National Association v. Estate of Quint*[3] the Court required foreclosing lenders to call witnesses with firsthand knowledge of the record-keeping practices of all prior lenders and loan servicers to get payment history records into evidence. And in *Pushard v. Bank of America, N.A.*[4] the Court held that a judgment for a foreclosure defendant, even if based on a technical defect in the lender's notice of default and right to cure, would have *res judicata* effect and bar any subsequent action to enforce the lender's rights under the mortgage. A decade later, *Greenleaf* continues to make trouble for the Maine foreclosure bar. But recent Law Court decisions have eased the burden on foreclosing lenders by changing the rules stated in *Quint* and *Pushard*. These decisions suggest that *Greenleaf* too could be subject to reconsideration.

With *Greenleaf*, *Quint*, and *Pushard*, the Law Court presumably acted on an understandable impulse to hold banks accountable in response to the mortgage lending crisis brought on in large part by their own actions. Ruling against certain lenders during this timeframe was understandable given the proliferation of questionable lending practices and inadequate recordkeeping. The Law Court had good reason to guard against "haphazard practices among many of the national mortgage servicers."[5] In doing so, however, the Court tipped the scales too far against lenders and deviated from prior precedent in the process. Now that the Law Court has started to return to long-held legal principles, Maine is poised to end the *Greenleaf* standing problem as well.

Greenleaf

The defendant in *Greenleaf* appealed a foreclosure judgment in Bank of America's favor, claiming that the bank lacked standing because it relied on an assignment of mortgage from MERS, as nominee for the original lender, and lacked an assignment directly from the original lender.[6] The defendant argued that the MERS assignment was insufficient to give the bank standing to foreclose.[7] The question before the Court: what rights did MERS have under the mortgage that it could legally transfer to Bank of America? The answer: recording rights only.[8]

Greenleaf held that the MERS assignment transferred to Bank of America only the right to record the mortgage, not ownership rights in the mortgage. That was so even though it was undisputed that Bank of America owned the underlying promissory note, and, historically, ownership of the mortgage follows ownership of the note.[9] The holding that MERS assignments do not transfer ownership rights created a major standing problem that lenders have lived with ever since, as lenders seeking to foreclose on mortgages are often at the end of chains of assignments that include an assignment by MERS, which under *Greenleaf* is ineffective to transfer ownership rights in the mortgage. For ten years, mortgage lenders have been unable to foreclose on certain properties, including vacant properties, simply because the chain of assignments connecting the current mortgage holder to the original lender includes a MERS assignment.

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The Law Court has issued course-correcting decisions with respect to other obstacles its post-financial crisis jurisprudence placed in the path of foreclosing lenders. It has yet to address the problem *Greenleaf* created. But these recent decisions suggest that further course correction is possible.

From *Quint* to *Shone*

In 2020, in *Bank of New York Mellon v. Shone*,[10] the Law Court examined the business records exception to the rule against hearsay under Maine Rule of Evidence 803(6) as it applied to a foreclosing lender's introduction into evidence of the "integrated" business records of prior loan servicers. *Shone* held that a prior servicer's business records become integrated with the current servicer's business records, such that the testimony of the current servicer is sufficient to satisfy the "integrated business records" exception to the hearsay rule.[11]

The *Shone* case diverged from precedent set in *Quint*[12] and its predecessors,[13] which had required testimony about both the originating and receiving entities' record-keeping practices to lay the foundation for the business records exception. Under *Quint*, counsel had to call multiple witnesses – a witness from every prior servicer in the loan's history. This practice was burdensome and costly and ran afoul of Maine's historical law on the integrated business records hearsay exception.[14] *Shone* streamlined the process of getting loan history documents into evidence by holding that business records from a prior servicer are admissible once they are properly integrated into the business records of the receiving entity.[15]

In overruling *Quint*, the *Shone* Court acknowledged the doctrine of *stare decisis,* but declared that "[t]he question before us is less a matter of honoring *stare decisis* than a matter of resolving the sharp and hitherto unexplained conflict between the two interpretations of rule 803(6) that we have endorsed at various time since 1984."[16] The *Shone* case marked the beginning of a sea change in foreclosure jurisprudence, as the Law Court began to correct some of the problems its *Greenleaf* and post-*Greenleaf* jurisprudence had created for lenders seeking to foreclose on delinquent borrowers. The Law Court signaled in *Shone* that it was open to additional corrective action provided the same could be accomplished within the parameters of *stare decisis*.

From *Pushard* to *Finch*

On January 11, 2024, in *Finch v. U.S. Bank, N.A.*,[17] the Law Court issued a 4-3 decision overruling its "draconian" holding in *Pushard v. Bank of America, N.A.*[18] *Pushard* held that any failure to comply with the strict requirements of 14 M.R.S. § 6111 (the foreclosure demand letter statute) not only results in a judgment for the defendant, but also, under principles of *res judicata*, precludes the lender from enforcing the note and the mortgage in a subsequent foreclosure action.[19] The *Pushard* Court further held that in the event of a judgment for a foreclosure defendant based on a defective Section 6111 notice, a discharge of the mortgage is required, because the "note and mortgage are unenforceable and [the borrowers] hold title to their property free and clear of the Bank's mortgage encumbrance."[20] Because the notice requirements of Section 6111 are very strictly construed, this meant that even a small typographical error in a demand letter could result, not just in the failure of that particular foreclosure action, but in the lender forever forfeiting its rights in the property and the delinquent borrower ending up with a "free house."

The Law Court in *Finch* looked at the same issue and reached a different conclusion, holding that a mortgagor is not automatically entitled to a discharge of the mortgage when a lender fails to provide a demand letter that complies with Section 6111.[21] *Finch* characterized evidence of a proper

Section 6111 notice as "a precondition to the commencement of a suit," and held that failure to meet that requirement "does not have claim-preclusive effect."[22] Because a proper Section 6111 notice is a precondition to the acceleration of the balance due on the loan that happens in a foreclosure, for "claim preclusion purposes, the fact that the Bank could not accelerate the note balance or enforce the mortgage means that the Bank's claim for the full amount due on the note and for foreclosure of the mortgage was not and could not have been litigated."[23] And if the foreclose claim was not litigated due to the plaintiff's failure to meet a condition precedent, no claim preclusion can occur. In other words, *Pushard* is overruled.

Contrary to the view taken in the dissenting opinion, which laments that *stare decisis* is being eviscerated and that the *Finch* decision is a "retreat from the principles of judicial restraint,"[24] the majority thoroughly reconciled its decision with *stare decisis*. Echoing the precedential principles discussed in *Shone,* the majority noted that *Finch* was not a departure from current Maine law, but a return to principles articulated by the Law Court in prior rulings that are consistent with the law in every other jurisdiction in the country.[25]

***Stare Decisis* and Standing to Foreclose**

The Law Court's decisions in *Shone* and *Finch* represent a long overdue shift in foreclosure jurisprudence, mitigating the *res judicata* and business records problems *Pushard* and *Quint* created. But the problem at the heart of *Greenleaf*—MERS assignments and standing—remains. The *Greenleaf* Court found that Bank of America lacked standing because it pivoted from the long-held theory that ownership of the mortgage follows ownership of the note. This was not a decision based on sound *stare decisis* principles, but one that overturned a rule that lenders and mortgage holders had relied on for many years. Suddenly, lenders were required under *Greenleaf* to obtain assignments of mortgages from original lenders, for whom MERS was held to be merely the nominee. The problem was that by 2014 many of the original lenders no longer existed, as the mortgage crisis had put many of them out of business.

One workaround that was being used was the filing of declaratory actions against defunct lenders to compel them to issue assignments or have the court issue a default declaratory judgment to stand in the place of the original lender's assignment of mortgage. In *Beal Bank USA v. New Century Mortgage Corporation*,[26] however, the Law Court held that a foreclosing lender's equitable interest in the mortgage does not equate to ownership of the mortgage and does not allow actions by the foreclosing lender to compel the mortgage's assignment.[27] In so holding the Court disregarded this "equitable trust" doctrine, under which the mortgagee holds the mortgaged property in trust for the noteholder, even as the note is transferred.[28] After *Beal Bank*, lenders no longer had a mechanism for a substitution of an assignment.

The standing issues stemming from *Greenleaf* were exacerbated by *Beal Bank* and remain problematic. As a result, a substantial and growing number of properties that have been abandoned by non-performing borrowers have sat vacant, with the lenders remaining unable to proceed with foreclosure due to the standing problem *Greenleaf* creates. According to attorneys at the three largest foreclosure law firms in Maine,[29] each of these firms has a significant number of files that are affected by the MERS standing problem, and many involve vacant or abandoned properties. Assignments from original lenders simply cannot be procured. Without a workaround such as the pre-*Beal Bank* declaratory judgment actions, these properties cannot be foreclosed upon and sold.

Based on the approach to *stare decisis* outlined in *Finch*, *stare decisis* principles do not warrant adherence to *Greenleaf* and *Beal Bank*. The Law Court said in *Finch*: "*stare decisis* does not carry the same force and weight in every context, and there are well-established factors that help guide the ultimate determination of whether to revise precedent."[30] The factors the Court identified suggest that *stare decisis* does not stand in the way of overruling *Greenleaf*:

1. **Consistency**. The Law Court may overrule a decision if it is inconsistent with earlier precedent. In overruling *Pushard*, the *Finch* Court stated that *stare decisis* "does not oppose revision of precedent that is itself a recent aberration from longstanding legal principles."[31] With respect to *Greenleaf* and *Beal Bank*, prior precedent dating back more than 100 years held that a noteholder owns the beneficial interest in the mortgage securing the note.[32] Consistency arguments weigh in favor of corrective action with respect to standing to foreclose.
2. **The law in other jurisdictions**. *Stare decisis* should not apply when precedent is against the "tide of critical or contrary authority from other jurisdictions," as was the case with *Pushard*.[33] Similarly, Maine is in the minority in holding that ownership of the mortgage is separate from ownership of the note and in disregarding the equitable trust doctrine with respect to notes and mortgages,[34] making *Greenleaf* and *Beal Bank* ripe for revision.
3. **Workability**. When precedent is unworkable in practice, it may be overruled. *Finch* said of the results of the *Pushard* decision: "title to the mortgaged property is put into limbo, with neither the borrower nor the lender able to market the property."[35] The same is true with respect to properties impacted by MERS

assignments. Denying standing to foreclosing lenders leaves properties in limbo and thus is not workable in practice, particularly when there is a shortage of houses on the market.

4. **Reliance.** Where precedent cannot in good faith be reasonably relied upon, it may be overruled. As discussed in *Finch*, defaulting borrowers might have hope for a "free house," but that hope is not a reasonable expectation that requires continued adherence to *Greenleaf* going forward.

5. **Policy.** When prior precedent fails to promote sound public policy, it may be overruled. In the ten years since *Greenleaf*, regulations and oversight have worked to keep lenders in check, and we have not seen nearly the level of bad conduct that existed prior to *Greenleaf*.[36] *Greenleaf's* protection is no longer sound policy; instead it punishes today's lenders for actions taken by other entities many years ago.

It is time for the Law Court to turn over a new leaf with respect to MERS assignments and the ownership of mortgages. More than four years ago, at least one Law Court Justice agreed.

***U.S. Bank v. Gordon* and Justice Horton's Concurrence**

In 2020, in *U.S. Bank v. Gordon*,[37] the Law Court revisited the issue of foreclosure assignment chains and ruled that a MERS assignment can be ratified by the original lender to confirm that the original lender intended to assign all of its interests in the mortgage to MERS and any subsequent assignee, not just the right to record.[38] The *Gordon* majority held that ratification of the mortgage assignment passed legal title of the mortgage to the foreclosing entity, thereby establishing standing to foreclose.[39] Justice Horton indicated that he would have gone even further; he would have held that the original MERS assignment of mortgage should suffice under Maine law to establish standing.[40] Justice Horton's conclusion is contrary to *Greenleaf*, which he rightly declared to be a substantive departure "from our longstanding precedent and from the modern rule regarding transfer of mortgages."[41] This is because, historically, ownership of a mortgage automatically followed ownership of the note the mortgage secured. [42]

Justice Horton's concurrence was also critical of the *Beal Bank* decision for this same flaw: "Our decisions since *Greenleaf* appear to assume that an assignment of the mortgage note, instead of carrying with it ownership of the mortgage, severs ownership of the mortgage from ownership of the mortgage note regardless of the intentions of the parties to the assignment . . . [t]his is contrary to our precedent and the modern rule on the transfer of mortgages," which is the long-standing principle that ownership of the mortgage follows ownership of the note.[43] Justice Horton points out that *Beal Bank* simply relied on *Greenleaf*, as opposed to sound *stare decisis* principles, in abrogating the equitable trust doctrine: "We did so for the stated purpose of conforming the law to our new 'bifurcated standing analysis' in *Greenleaf*."[44]

Greenleaf is not protected by principles of *stare decisis*, and by the same logic, neither is *Beal Bank*.

Conclusion

As we learned from the Law Court's analysis in *Finch*, it is not sound policy for a court to render a decision merely to comport with *stare decisis* principles when the underlying precedent is flawed. Justice Horton "would revisit our recent mortgage law jurisprudence in the interest of *stare decisis*." In his view, "[d]ue to the inherently draconian consequences of foreclosure and for other reasons, we should, and we do, require strict compliance by the plaintiff in any foreclosure action, and we can do so in keeping with longstanding precedent."[45] Ten years later, it is time for the Law Court to do just that. Justice Horton's concurrence in *Gordon* should be the basis for new law overruling *Greenleaf* and *Beal Bank* the next time the Law Court has an opportunity to do so. The problem, however, is that foreclosing mortgagees lacking assignments of mortgages from original lenders are not going to file foreclosure cases, for fear of sanctions. Thus, it is not clear how the issue might again come before the Law Court.

Alternatively, the Maine Legislature should take action to correct the problem. In 2015, in response to real estate title issues arising out of *Greenleaf*, the Legislature enacted new legislation clarifying the authority of nominee mortgagees like MERS to execute assignments, discharges, and partial releases.[46] The new statute's treatment of assignments, however, applied only to assignments that were the subject of a final foreclosure judgment entered prior to the statute; there is no retroactive impact on other MERS assignments.[47] New legislation could give retroactive recognition to a nominee's rights under an assignment of a mortgage, holding those rights to be sufficient to confer ownership and standing to foreclose. The Legislature also has the option of codifying the equitable trust doctrine. Either way, the standing issues in *Greenleaf* remain a problem, and principles of *stare decisis* weigh against maintaining *Greenleaf* as precedent.

ENDNOTES

1 2014 ME 89, 96 A.3d 700.

2 The MERS system was implemented in the 1990s to "streamline the mortgage process by eliminating the need to prepare and record paper assignments of mortgage . . . MERS acts as nominee and as mortgagee of record for its members

nationwide and appoints itself nominee, as mortgagee, for its members' successors and assigns, thereby remaining nominal mortgagee of record no matter how many times loan servicing, or the debt itself, may be transferred." *Mortg. Elec. Registration Sys., Inc. v. Saunders*, 2010 ME 79, ¶ 8, 2 A.3d 289 (quoting *MERSCORP, Inc. v. Romaine*, 8 N.Y.3d 90, 828 N.Y.S.2d 266, 861 N.E.2d 81, 86 (2006) (Kaye, C.J., dissenting)).

3 2017 ME 237, 176 A.3d 717.

4 2017 ME 230, 175 A.3d 103.

5 *See* Thomas A. Cox & L. Scott Gould, *In Defense of* Greenleaf*: A Response to Standing to Foreclose,* 30 Me. Bar. J. 18, 21 (2015)

6 *Bank of America, N.A. v. Greenleaf*, 2014 ME 89, ¶¶ 1-2, 96 A.3d 700.

7 *See id.*

8 *Id.* ¶ 17.

9 *Wyman v. Porter*, 79 A. 371, 374 (1911) ("the security follows the debt"); *see also* John J. Aromando, *Standing to Foreclose in Maine:* Bank of America, N.A. v. Greenleaf*,* 29 Me. Bar J. 186, 188 (2014) (it is "illogical to require 'ownership' of the mortgage, separate and distinct from the note, as a condition of standing to foreclose. Maine law has been clear on this for many years: the mortgage follows the note").

10 2020 ME 122, 239 A.3d 671.

11 *Id.* ¶ 1.

12 *KeyBank Nat'l Ass'n v. Est. of Quint*, 2017 ME 237, 176 A.3d 717.

13 *See, e.g.*, *Beneficial Maine, Inc. v. Carter,* 2011 ME 77, 25 A.3d 96.

14 *See, e.g.*, *Northeast Bank & Trust Co. v. Soley*, 481 A.2d 1123 (Me. 1984) (in which the Law Court adopted the integrated business records exception to the hearsay bar to conform state law with widely accepted interpretations of the identical Federal Rule of Evidence 803(6)).

15 *Shone*, 2020 ME 122, ¶ 30, 239 A.3d 671. In so ruling, the Law Court addressed the discrepancies with respect to the interpretation of Rule 803(6), as between Maine state courts and federal courts. In *U.S. Bank Trust, N.A. v. Jones*, 925 F.3d 534, 537 (1st Cir. 2019), the First Circuit analyzed Federal Rule of Evidence 803(6) and rejected the multiple servicer witness requirement set by the Law Court, instead ruling that the records were admissible as long as they were integrated, verified, and relied upon by the subsequent holder—the business offering them into evidence. With *Shone*, the Law Court adopted the First Circuit's approach.

16 *Shone*, 2020 ME 122, ¶ 23, 239 A.3d 671 (citing *Northeast Bank & Trust Co. v. Soley*, 481 A.2d 1123, 1127 (Me. 1984)).

17 2024 ME 2, 307 A.3d 1049.

18 2017 ME 230, 175 A.3d 103.

19 *Id.* ¶ 35 (citing *Federal National Mortgage Association v. Deschaine*, 2017 ME 190, ¶¶ 35-37, 170 A.3d 230).

20 *Id.* ¶ 36.

21 *Id.*

22 *Id.* ¶ 49.

23 *Id.* ¶ 7.

24 *Id.* ¶ 90.

25 *Id.* ¶¶ 42-47.

26 2019 ME 150, ¶ 15, 217 A.3d 731.

27 *Id.*

28 *See id.* ¶ 8.

29 Those firms are Brock & Scott, PLLC, Korde & Associates, PLLC, and Doonan, Graves & Longoria LLC.

30 *Finch*, 2024 ME 2, ¶ 40, 307 A.3d 1049.

31 *Id.* ¶ 42, 307 A.3d 1049.

32 *See supra* note 9.

33 *Finch*, 2024 ME 2, ¶ 43, 307 A.3d 1049.

34 *See U.S. Bank N.A. v. Gordon*, 2020 ME 33, ¶ 19, 227 A.3d 577 ("The modern majority rule on the transfer of mortgages . . . provides simply that a transfer of ownership of the note transfers ownership of the mortgage."); *see also* Restatement (Third) of Property: Mortgages § 5.4(a) (Am. Law Inst. 1997) ("A transfer of an obligation secured by a mortgage also transfers the mortgage.").

35 *Finch*, 2024 ME 2, ¶ 45, 307 A.3d 1049.

36 An indicator of decreased lender misconduct in Maine can be seen from improved lender performance in the court-sponsored foreclosure mediation program, a major component of state foreclosure practice. Maine's court-sponsored foreclosure mediation program is known as the Foreclosure Diversion Program, or FDP mediation. FDP Manager Laura Pearlman notes that the courts have seen fewer reports of noncompliance in foreclosure mediations in the last several years than back in the pre-*Greenleaf* era, and that they are now rare, although there is also a significantly lower foreclosure filing volume.

37 2020 ME 33, 227 A.3d 577.

38 *Id.* ¶ 11, 227 A.3d 577.

39 *Id.*

40 *Id.* ¶¶ 14, 30 (Horton, J., concurring).

41 *Id.* ¶ 15.

42 *Id.* ¶ 14.

43 *Id.* ¶ 25.

44 *Id.* (citing *Beal Bank USA v. New Century Mortg. Corp.*, 2019 ME 150, ¶¶ 10, 14-15, 217 A.3d 731.)

45 *Id.* ¶ 29.