STATE OF MAINE
YORK, SS.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-14-102

WALTER KNOPE and
DOROTHY KNOPE

Plaintiffs,

v.

ORDER

GREEN TREE SERVICING, LLC,

Defendant.

I. Background

A. Procedural Posture

Plaintiffs Walter and Dorothy Knope ("the Knopes") brought this action against Green Tree Servicing, LLC ("Green Tree") seeking declaratory relief arising out a note and mortgage on their home at 15 Hillside Drive, Eliot, Maine ("the Eliot property"). Specifically, the Knopes demand an accounting[1] and a declaratory judgment stating how

[1] The Knopes seek an accounting under 14 M.R.S. § 6301:

> Any mortgagor or other person having a right to redeem lands mortgaged may demand of the mortgagee or person claiming under the mortgagee a true account of the sum due on the mortgage, and of the rents and profits, and money expended in repairs and improvements, if any. If the mortgagee unreasonably refuses or neglects to render such an account in writing, or in any other way by default prevents the plaintiff from performing or tendering performance of the condition of the mortgage, the mortgagor may bring a civil action for the redemption of the mortgaged premises within the time limited in former section 6204, and therein offer to pay the sum found to be equitably due, or to perform any other condition, as the case may require. Such an offer has the same force as a tender of payment or performance before the commencement of the action. The action must be sustained without such a tender, and thereupon the mortgagor is entitled to judgment for redemption and costs.

much they owe on the mortgage. Prior to filing this action, the Knopes tried unsuccessfully to work out payment options with Green Tree.

The Knopes commenced this action May 30, 2014—less than one month after Green Tree filed an action on May 4, 2014 to foreclose on the Eliot property. Green Tree failed to answer the Knopes' complaint and a default entered. Before the court is Green Tree's motion to set aside the default, motion to dismiss for failure to state a claim, and the Knopes' motion for default judgment.

B. Facts

The Knopes' primary residence is in Sandwich, Massachusetts and the Eliot property is their second home. An oil company failed to make a scheduled delivery to the Eliot property and as a result the pipes burst in January 2013. The incident caused substantial water damage. After the Knopes' insurer refused to pay their claim, they filed an action to recover for the damages from the incident. The Knopes eventually settled with the insurer for a sum less than their total loss. As a result of expenses associated with hiring legal counsel to sue the insurer and repair the Eliot property, the Knopes fell behind on the mortgage with Green Tree. The Knopes tried without success to defer the mortgage and work out practicable payment arrangements.

II. Discussion

A. Compulsory Counterclaim

Green Tree moves to dismiss alleging that the claims that form the basis of this suit are compulsory counterclaims in the foreclosure action. In ruling on a motion to dismiss, the court takes the allegations in the complaint as admitted and determines

whether the nonmoving party states a cognizable claim. *Savage v. Maine Pretrial Servs., Inc.*, 2013 ME 9, ¶ 2, 58 A.3d 1138.

Rule 13(a)(1) states in relevant part "a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject mater of the opposing party's claim." M.R. Civ. P. 13(a)(1). Because the Knopes' claims in this action arise out of the transaction or occurrence as the foreclosure action—the note and mortgage on the Eliot property—Green Tree contends the Knopes are barred from litigating their claims here.

Green Tree's argument is premature. In *KeyBank National Association v. Sargent*, the Law Court affirmed dismissal of claims where they should have been raised in a previous foreclosure action in which judgment already entered. 2000 ME 153, ¶ 25, 758 A.2d 528. Judgment has not yet entered in the foreclosure action. Additionally, the language of the rule explicitly contemplates a pleading as the vehicle for asserting a compulsory counterclaim. M.R. Civ. P. 13(a)(1) ("[A] *pleading* shall state as a counterclaim . . . ."). The Knopes apparently have not yet been served with a pleading in which to assert the claims; the rule would therefore not apply. Yet even assuming the claims are compulsory counterclaims, Green Tree's motion to dismiss is moot if the court declines to set aside the default.

B. Default Judgment

The court has the power under Rule 55(b)(2) to enter a default judgment. Prior to judgment, a party may move to set aside an entry of default "[f]or good cause shown."

M.R. Civ. P. 55(c). "Good cause" requires "a good excuse for his or her untimeliness." *Levine v. KeyBank Nat. Ass'n*, 2004 ME 131, ¶ 13, 861 A.2d 678 (citation omitted).

Green Tree cites "inadvertence" as an excuse. Green Tree acknowledges receipt, but asserts the complaint "was never identified or transferred properly to Green Tree's legal department for processing." (Def.'s Mot. Set Aside Default 4.) According to Green Tree, this "administrative error" was not willful or intentional and is therefore "good cause" sufficient to set aside the default. (Def.'s Mot. Set Aside Default 4-6.)

An administrative error is not a good excuse. In *Levine v. KeyBank National Association*, KeyBank misplaced a trustee summons, failed to timely respond, and a default entered. The court rejected KeyBank's argument that losing a summons on one occasion within a high-volume judgment processing system with a "generally miniscule error rate" constituted "good cause." *Levine*, 2004 ME 131, ¶¶ 16, 21-22, 861 A.2d 678.

Green Tree, like KeyBank, uses processing protocols whereby complaints are forwarded between different departments within the company. Also like KeyBank, Green Tree offers no reasonable explanation for why the complaint was never forwarded to the appropriate department to respond.[2] *Levine*, 2004 ME 131, ¶ 21, 861 A.2d 678. Once the error was discovered, Green Tree did respond expeditiously. By this time, however, the deadline had already passed.

Green Tree cites federal cases and cases from other jurisdictions to urge this court to consider whether the default was "willful or intentional" as part of the "good cause"

[2] There is a divergence between Green Tree's motion and the supporting affidavit as to where the complaint was lost in the process. The motion states there was an error in transferring the complaint "from the process group to the coordinator of legal defense at Green Tree." (Def.'s Mot. Set Aside Default 2.) The affidavit claims that the complaint was in fact transferred to the coordinator of legal defense, but was never forwarded to outside counsel in Maine. (Aff. David Schwartz ¶¶5-6.) The difference may not be material; it does further evidence confusion in this processing system.

inquiry. *See, e.g., Bergeron v. Henderson*, 185 F.R.D. 10, 12 (D. Me. 1999); *Gorski v. Dep't of Corr.*, 204 F.R.D. 23, 25 (D. N.H. 2000). These cases construed the federal version of Rule 55(c). Where the Maine rule is modeled on the federal rule, federal law can provide "valuable guidance." *Mondello v. Gen. Elec. Co.*, 650 A.2d 941, 944 n.3 (Me. 1994). In light of *Levine*, however, whether Green Tree willfully or intentionally failed to respond does not remedy the fact there was no reasonable excuse and thus no good cause for the default. Green Tree fails to meet its burden under Rule 55(c) and a default judgment is warranted. M.R. Civ. P. 55(b)(2).[3]

III. Judgment, Impracticability of Performance, and Conclusion

In light of the foregoing, the Knopes are entitled to judgment by default. Having resolved the water damage and insurance issues with the Eliot property, the Knopes wish to bring the mortgage current. From this record, however, the court is unable to enter a declaratory judgment as to the amounts owed under the note and mortgage. The court therefore will conduct a hearing to determine the nature and extent of the appropriate remedy before entering the judgment. M.R. Civ. P. 55(b)(2); *McNutt v. Johansen*, 477 A.2d 738, 740-41 (Me. 1984) (holding the court has discretion to hold an evidentiary hearing prior to entering a default judgment).

The factual allegations in the Knopes' complaint are now findings of fact and not subject to challenge at the hearing. *McAlister v. Slosberg*, 658 A.2d 658, 660 (Me. 1995). In entering judgment, the court is not bound by any legal conclusions contained in the pleading. *Larrabee v. Penobscot Frozen Foods, Inc.*, 486 A.2d 97, 98 & n.2 (Me. 1984).

---

[3] Although Green Tree emphasizes the strength of the defense to the claims and the lack of prejudice to the Knopes, the court need not reach these issues because there was no good excuse for the underlying default. *Levine*, 2004 ME 131, ¶ 22, 861 A.2d 678 (declining to address whether KeyBank had a meritorious defense where it failed to first establish "good cause").

The complaint alleges "charges for late fees and other charges that are not properly attributable to the Note and Mortgage." (Compl. ¶ 12.) It is unclear exactly what charges these allegations concern and the court will require further clarification prior to entry of judgment. The complaint also alleges "there are other charges attributable to this Note and Mortgage that should not be allowed due to the damage to the Knopes' home and other circumstances that prevented [them] from performing . . . on the Note and Mortgage." (Compl. ¶ 13.) This allegation is fleshed out in Count III, where the Knopes assert they should be excused from certain fees under a theory of impracticability of performance—a legal conclusion that is not rendered binding by the default. Under this count, the Knopes seek a declaration that they did not breach their obligations under the note and mortgage. The Knopes request that they be excused from the fees assessed by Green Tree during the time they tried to rectify the water damage and insurance coverage issues. This claim is, as a matter of law, doubtful for three reasons.

First, the Knopes assert impracticability offensively. Impracticability of performance is a *defense* that entirely discharges a party's contractual obligations due to "the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made . . . unless the language or the circumstances indicate the contrary." *Bouchard v. Blunt*, 579 A.2d 261, 264 n.3 (Me. 1990) (quoting *Restatement (Second) of Contracts* § 261 (1981)). In the few cases in which the defense was raised, the Law Court has yet to recognize it. *See, e.g., Coastal Ventures v. Alsham Plaza, LLC*, 2010 ME 63, ¶ 19 n.6, 1 A.3d 416; *Bouchard*, 579 A.2d at 264 n.3.

Second, the Knopes do not seek to discharge the entire mortgage obligation; they appear to assert only that the contract was impracticable for a finite period of time. While the Restatement recognizes temporary impracticability, once the circumstances giving rise to impracticability cease, the party must perform in full. *Restatement (Second) of Contracts* § 269. Thus even assuming the mortgage contract was temporarily impracticable, any defense to payments of fees is now unavailable because the Knopes resolved the insurance dispute and repaired the property.

Third, the note and mortgage terms expressly contemplate damage to the property, the need for insurance coverage, and the Knopes' responsibility for securing insurance coverage. The risk of loss from a denial of insurance coverage and the subsequent financial consequences rested with the Knopes, who contracted for their own insurance. *Restatement (Second) of Contracts* § 261 cmt. (b) ("[M]ere . . . financial inability do not usually effect discharge under the [impracticability of performance] rule stated in this Section.").

Under the terms of the note and mortgage, the Knopes may well be responsible for costs properly incurred by Green Tree in trying to protect its security interest. While the court understands the Knopes' frustration with their insurance company that precipitated their financial difficulties, Green Tree was not responsible for that dispute and not obligated to provide forbearance or deferment of the mortgage. Notwithstanding the above analysis, the Knopes' theory of impracticability of performance and Green Tree's response will be considered at the hearing prior to entry of judgment.

The entry shall be:

The Defendant's motion to dismiss is DENIED. The Plaintiff's motion for default judgment is at this time DENIED pending a hearing to determine the amounts currently due and owing under the note and mortgage.

SO ORDERED.

DATE: November 26, 2014

John O'Neil, Jr.
Justice, Superior Court

CV-14-102

ATTORNEY FOR PLAINTIFFS:
PATRICK BEDARD
LAW OFFICE BEDARD & BOBROW
PO BOX 366
ELIOT ME 03903

ATTORNEYS FOR DEFENDANT:
CATHERINE A MOHAN
MCCARTER & ENGLISH
CITYPLACE I
185 ASYLUM ST
HARTFORD CT 06103

RICHARD BRIANSKY (PRO HAC VICE)
MCCARTER & ENGLISH LLP
265 FRANKLIN STREET
BOSTON MA 02110-3113