

STATE OF MAINE  
CUMBERLAND, ss

SUPERIOR COURT  
CIVIL ACTION  
Docket No. RE-11-505  
JAW-CUM-12/13/2013

BANK OF AMERICA, N.A.,  
Plaintiff

v.

JUDGMENT

KAY CHOM and DA HEM,  
Defendants

STATE OF MAINE  
Cumberland Co. Clerk's Office  
DEC 13 2013  
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### INTRODUCTION

On October 10, 2013, the parties appeared for a bench trial for a foreclosure action, which was filed on October 7, 2011 pursuant to 14 M.R.S. § 6321, et seq. At trial, the plaintiff, Bank of America, presented a witness from Green Tree Servicing, the servicer for the defendants' loan. The plaintiff sought to introduce business records with the foundational testimony of a field representative from Green Tree Servicing. The defendants objected, arguing that the representative could not authenticate the business records. The defendants also requested that the court dismiss the matter with prejudice and award the defendants attorney fees. The plaintiff argued that the matter should be dismissed without prejudice.

### DISCUSSION

#### A. Admissibility of Business Records

The admissibility of business records is governed by Rule 803(6), which provides foundational requirements that must be established by a qualified witness. M.R. Evid. 803(6). The rule states in part,

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business, and if it was the regular practice of that business to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with Rule 902 (11), Rule 903 (12) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

*Id.* The Law Court has emphasized that the witness must have firsthand knowledge of the business's practices. *Beneficial Maine Inc. v. Carter*, 2011 ME 77, ¶ 14, 25 A.3d 96; *HSBC Mortgage Servs. V. Murphy*, 2011 ME 59, ¶10, 19 A.3d 815.

Notably, in foreclosure actions, the qualified witness "need not be an employee of the record's creator." *Beneficial Maine*, 2011 ME 77, ¶ 13, 25 A.3d 96. An employee from a business that receives records from another business, can be a qualified witness "if the foundational evidence from the receiving entity's employee is adequate to demonstrate that the employee had sufficient knowledge of both businesses' regular practices to demonstrate the reliability and trustworthiness of the information."<sup>1</sup> *Id.*

Here, the plaintiff was not able to authenticate the business records it sought to introduce into evidence. The representative from Green Tree Servicing did not have firsthand knowledge of the business practices regarding the creation and maintenance

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<sup>1</sup> In *Beneficial Maine*, the Law Court stated that the following foundational elements were required from an affiant employed by a company who received business records from another business:

- the producer of the record at issue employed regular business practices for creating and maintaining the records that were sufficiently accepted by the receiving business to allow reliance on the records by the receiving business;
- the producer of the record at issue employed regular business practices for transmitting them to the receiving business;
- by manual or electronic processes, the receiving business integrated the records into its own records and maintained them through regular business processes;
- the record at issue was, in fact, among the receiving business's own records; and
- the receiving business relied on these records in its day-to-day operations.

2011 ME 77, ¶ 14, 25 A.3d 96.

of business records, as required by Rule 803(6). M.R. Evid. 803(6); *Beneficial Maine Inc. v. Carter*, 2011 ME 77, ¶ 14, 25 A.3d 96; *HSBC Mortgage Servs. V. Murphy*, 2011 ME 59, ¶10, 19 A.3d 815. Therefore, the Green Tree representative was not a qualified witness under Rule 803(6), and the business records are not admissible.

The Green Tree representative is also not qualified to testify about any of the business records that had been transferred from Bank of America to Green Tree Servicing. The representative did not have the foundational knowledge required for the authentication of business records that have been transferred between two businesses. *See Beneficial Maine*, 2011 ME 77, ¶¶ 13-14, 25 A.3d 96.

#### **B. Award of Attorney's Fees and Dismissal**

At trial, the defendants' attorney argued that the case should be dismissed with prejudice, and that the defendants should receive an award of attorney fees. In response, the plaintiff argued that the matter should be dismissed without prejudice. Here, the court may use its discretion to both award attorney's fees and dismiss the action with prejudice.

According to statute, the court has the discretion to award the defendants attorney's fees and reasonable court costs if the mortgagee "does not prevail, or upon evidence that the action was not brought in good faith. 14 M.R.S. § 6101. The court also may deny the award of attorney's fees and costs to the mortgagee. *Id.* Here, the mortgagee, plaintiff Bank of America, did not prevail, and thus the court may award attorney's fees and reasonable court costs to the defendants. *See id.*

Regarding dismissal, Rule 41 states that "[f]or failure of the plaintiff to prosecute for 2 years or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant." M.R. Civ. P. 41(b)(2). Additionally, the rule provides that

Unless the court in its order for dismissal otherwise specifies, a dismissal under [Rule 43(b)] and any dismissal not provided for in this rule other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

M.R. Civ. P. 41(b)(2). A dismissal with prejudice is considered a severe penalty if imposed as a sanction before a party has been heard on the merits, and the Law Court has expressed that this form of sanction should only be used in narrow circumstances. *Saucier v. State Tax Assessor*, 1998 ME 61, ¶ 6, 708 A.2d 281; *Fallon v. Casco-Northern Corp.*, 462 A.2d 53, 56 (Me. 1983). If the defendants are seeking disposal of the case after the plaintiff has been fully heard, the correct terminology for a motion to dismiss complaint at completion of plaintiff's case is motion for judgment as matter of law. M.R. Civ. P. 50(d); *Smith v. Welch*, 645 A.2d 1130, 1131 n.1 (Me. 1994).<sup>2</sup>

This matter was scheduled for trial on October 10, 2013. Notice was given to all the parties and all parties, as well as an interpreter for the defendants, was present for trial. Plaintiff had an opportunity to be fully heard on their complaint for foreclosure and the issues raised by defendants; however, plaintiff was not able to establish its case because of its evidentiary issues with regard to business records. The court may enter judgment on the merits against the plaintiff if the court finds against the plaintiff on any issue that under the substantive law is an essential element of the foreclosure claim. *See*

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<sup>2</sup> Rule 50(d) provides that

In an action tried by the court without a jury, a motion may be made at any time for judgment as a matter of law on any claim. The motion shall specify the claim or claims as to which judgment is sought and the issue or issues as to which it is contended that the law and the facts entitle the moving party to judgment. Before considering the motion, the court shall ascertain that the party opposing the motion has been fully heard with respect to the issue or issues raised. If the court finds against the party opposing the motion on any issue that under the substantive law is an essential element of any claim, the court may enter judgment as a matter of law against that party on that claim. Alternatively, the court may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits, the court shall upon request make findings as provided in Rule 52(a).

M.R. Civ. P. 50(d). As the plaintiff was not able to introduce its business records into evidence, the defendant is entitled to judgment as a matter of law. *See id.*

The entry is:

1. Judgment for the defendant on the Complaint for Foreclosure and Sale.
2. Defendants are awarded their reasonable attorney's fees. Counsel for defendant to submit an attorney's fees affidavit and proposed order within 30 days of this order.

Date: December 13, 2013



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Joyce A. Wheeler, Justice  
Maine Superior Court

Bank of America NA-Monica Shoenbaum Esq  
-Jeffrey Hardiman Esq  
Da Hem-Frank D'Alessandro Esq  
Kay Chom-Pro Se