

STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
CIVIL ACTION
Docket No. RE-12-260

NM-CUM-10/4/2013

TD BANK, N.A.,

Plaintiff

v.

MICHAEL W. SAWYER and
HEATHER L KIRK,

Defendants

ORDER ON PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

4 OCT '13 4:29

TD BANK, N.A.,

Party-In-Interest

The plaintiff seeks a summary judgment on its complaint for foreclosure. For the following reasons, the motion is denied.

The plaintiff has failed to establish the amount due on the mortgage note. See Chase Home Fin. LLC v. Higgins, 2009 ME 136, ¶ 11, 985 A.2d 508. The plaintiff relies on a "Payoff Quote" to establish the amount due. (Ross. Aff. Ex. E). This document appears to have been created in anticipation of litigation. No explanation or other business records were provided. See M.R. Evid. 803(6); M.R. Civ. P. 56(e); HSBC Mortgage Servs., Inc. v. Murphy, 2011 ME 59, ¶ 17, 19 A.3d 815.

The plaintiff has failed to provide "evidence of properly served notice of default and mortgagor's right to cure in compliance with statutory requirements. . . ." Chase Home Fin. LLC v. Higgins, 2009 ME 136, ¶ 11, 985 A.2d 508; see 14 M.R.S. § 6111(3). The Law Court has held that an assertion that a notice was sent by certificate of mailing is not conclusive "without a copy of the certificate itself." Camden Nat. Bank v. Peterson, 2008 ME 85, ¶ 25, 948 A.2d 1251. The plaintiff has provided a copy of the certificate of

mailing for the notice to each defendant, but the dates on the Postal Service's stamps are illegible. (Ray Aff. Ex. B; Ross Aff. Ex. D.)

The plaintiff is listed as the plaintiff and the party-in-interest in this case.¹ Attorney Ray is not qualified to testify about the order of priority. (Pl.'s S.M.F. ¶ 20; Ray Aff. ¶¶ 2, 16.) Although the statement of material facts also cites the affidavit of Mr. Ross on the issue of the order of priority, Mr. Ross does not discuss this issue. (Pl.'s S.M.F. ¶ 20; Ross Aff.)

Defendant Heather L. Kirk is represented by counsel. Defendant Michael W. Sawyer has not appeared. Although the plaintiff states that the parties attended mediation, the mediation reports show that only defendant Kirk attended. (Pl.'s S.M.F. ¶ 16; Mediation Reports filed 12/11/12 and 3/22/13.) The plaintiff has provided no affidavit regarding military service. See 50 U.S.C. Appx. § 521.

The entry is

The Plaintiff's Motion for Summary Judgment is DENIED.

Dated: 10-3-13



Nancy Mills
Justice, Superior Court

¹ The same address is provided for both in the proposed judgment.

TD BANK NA VS MICHAEL W SAWYER ET AL
UTN:AOCSSr -2012-0071763

CASE #:PORSC-RE-2012-00260

<u>01</u>	<u>0000003886</u>	<u>RAY, JULIANNE</u>			
		<u>ONE CANAL PLAZA SUITE 900 PO BOX 426 PORTLAND ME 04112-0426</u>			
	<u>F</u>	<u>TD BANK NA</u>	<u>PL</u>	<u>RTND</u>	<u>07/08/2013</u>
<u>02</u>	<u>0000009871</u>	<u>LOGAN, SCOTT J</u>			
		<u>75 PEARL STREET SUITE 212 PORTLAND ME 04101</u>			
	<u>F</u>	<u>HEATHER L KIRK</u>	<u>DEF</u>	<u>RTND</u>	<u>01/17/2013</u>
<u>03</u>	<u>0000010012</u>	<u>WILLIAMS, STEPHANIE</u>			
		<u>ONE CANAL PLAZA SUITE 900 PO BOX 426 PORTLAND ME 04112-0426</u>			
	<u>F</u>	<u>TD BANK NA</u>	<u>PL</u>	<u>RTND</u>	<u>07/26/2012</u>