

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-378

KATHERINE FRATELLO,

Appellant,

-- against --

RUSSELL MAN,

Appellee.

ON APPEAL FROM THE SUPERIOR COURT (CUMBERLAND)

BRIEF OF APPELLANT KATHERINE FRATELLO

Jeffrey Bennett, Esq.
Attorney for Appellant
Legal-Ease, LLC
MALLSIDE PLAZA
198 Maine Mall Rd., Box #2
South Portland, Maine 04106
jbennett@legal-ease.com

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Summary of Case

This appeal arises from the Superior Court's denial of Plaintiff Katrina Fratello's Special Motion to Dismiss Defendant Russell Mann's counterclaim under Maine's Anti-Slapp statute, 14 M.R.S. § 556. The Plaintiff sued the Defendant for failure to pay a promissory note and provide a mortgage as stated in the promissory note. App. 28-32. The Defendant brought a single count counterclaim for breach of contract alleging that the Plaintiff breached the contract by sending the Defendant the Default Notice. App. 43-46. The specific allegations of the Defendant's counterclaim appear below with the referenced counterclaim paragraph numbers:

- 169. On November 15, 2023, Plaintiff **unlawfully sent a "Notice of Default" and demand for payment** (hereinafter "Default Letter").
- 170. The **Default Letter** inaccurately stated that Defendant owed two payments to Plaintiff in the amount of 1,598.08.
- 171. The **Default Letter** unlawfully assessed a \$100 late fee.
- 172. The **Default Letter** unlawfully assessed attorney's fees and costs in the amount of \$3,220.

App. 61.

The entirety of the Defendant's material allegations on this appeal appear in these four paragraphs. The Plaintiff's Default Notice, which is a required precondition to filing suit and an element of the Plaintiff's Complaint and claim for

enforcement of a promissory note,¹ was followed by Plaintiff's filing of the Complaint. The Default Notice, which is a mandatory element of a complaint and action to enforce a promissory note, is therefore inextricably intertwined with Plaintiff's Complaint and, as such, is protected petitioning activity. *Pollack v. Fournier*, 2020 ME 93, ¶¶ 18 & 19, 237 A.3d 149, 153 (Me. 2020).

The Plaintiff filed a Special Motion to Dismiss under Maine's Anti-Slapp statute, asserting that the Default Notice was protected "petitioning activity."

The Superior Court ruled, incorrectly, that while the Plaintiff's *Complaint* constituted protected "petitioning activity", the Default Notice did not. Consequently, the Superior Court allowed the Defendant's counterclaim to stand. The Plaintiff now appeals the Superior Court's Order. 14 M.R.S. § 556 authorizes immediate appellate review.

Statement of Issues Presented for Review

1. Did the Plaintiff's Default Notice followed by the filing of her Complaint constitute protected "Petitioning Activity?"

¹ See ¶11 of the Note (App. 3); See 9-A M.R.S 510 ; 511(¶¶ 1,2), 14 M.R.S 6111; see also *Pushard v. Bank of Am, NA.*, 2017 ME 230, 175 A. 3rd 103 (stating Title 14 M.R.S. § 6111 provides that, with respect to residential mortgages, a mortgagee "may not accelerate maturity of the unpaid balance of the obligation or otherwise enforce the mortgage because of a default" without first giving the mortgagor adequate notice of the default as described in the statute).

Summary of the Argument

In her Special Motion to Dismiss (hereinafter “Plaintiff’s Motion”), the Plaintiff submitted an affidavit which attested to the fact that her Default Notice was a material communication necessary to this suit, which was then followed by filing a Complaint. The affidavit stated:

All demands for payment, requests to provide a mortgage, and all other communications related to Defendant's non-payment and failure to provide a mortgage, and the Notice of Default, Right to Cure, and Demand for Payment (Exhibit 4 to Plaintiff’s Motion) and were communicated to Defendant in preparation for and in the context of this litigation.

App. 112, ¶12

Because the Plaintiff’s Default Notice was followed by the filing of a Complaint, the Plaintiff’s Default Notice is protected “petitioning activity” under Maine’s Anti-Slapp statute, 14 M.R.S. § 556, and her conduct - sending a Default Notice - is protected from suit. *Pollack v. Fournier*, 2020 ME 93, ¶¶ 18 & 19; 237 A.3d 149, 153 (Me. 2020).²

The Default Notice is a necessary pre-condition to filing suit and a required element of Plaintiff’s claim and Complaint to enforce the Promissory Note. App. 30 (Promissory Note at ¶ 11); see 9-A M.R.S 510 and 511(Par. 1, 2); see also 14 M.R.S

² A distinguishing point between *Pollack* and the case at bar is that while the pre-suit statutory notice in *Pollack* to start the accrual of prejudgment interest was *permissive*, the pre-suit Default Notice in this case is a *mandatory* first step a plaintiff must take before filing a complaint to enforce a promissory note.

6111. The Superior Court erred in holding that while Fratello's Complaint was protected petitioning activity, her Default Notice was not petitioning activity. App. 12 (last line of P.12)

A review of Mann's one count counterclaim against Fratello demonstrates that his counterclaim is *entirely* based on Fratello's service of the Default Notice:

- 169. On November 15, 2023, Plaintiff **unlawfully sent a "Notice of Default" and demand for payment** (hereinafter "Default Letter").
- 170. The **Default Letter** inaccurately stated that Defendant owed two payments to Plaintiff in the amount of \$1,598.08.
- 171. The **Default Letter** unlawfully assessed a \$100 late fee.
- 172. The **Default Letter** unlawfully assessed attorney's fees and costs in the amount of \$3,220.
- 176. Defendant was damaged by Plaintiff's actions by being unlawfully assessed late fees and lender's attorney fees and costs.
- 177. Defendant was damaged by Plaintiffs actions by needing to hire an attorney to defend this matter.

All of Defendant Mann's allegations are based on the Default Notice. Once Fratello filed her Complaint, of which the Default Notice is a required element and precondition to filing suit, the Default Notice became "one" with the Complaint and protected "petitioning activity." *Pollack*, at ¶¶18 & 19.

Further, it cannot be said or rationally alleged that Fratello's claims are devoid

of any factual support or basis in law. Both Fratello and Mann admit in their pleadings the execution of the Note. Mann cannot and does not deny that he only tendered one Note payment and that his one payment was made by a check that was initially dishonored for several months by his bank. App. 110-112 (Affidavit of Fratello) (See also Pollack 18-19, *infra*). Mann cannot and does not deny that he failed to sign and provide a notarized mortgage acceptable for recording at a County Registry of Deeds. See Promissory Note at ¶ 6 (requiring that a mortgage be provided as security) App. 28-32.

While Mann does make an extraordinary argument that no actual “mortgage” was required because the unnotarized Note itself is somehow a mortgage, a Registry of Deeds can only accept notarized documents for recording and the Note is not notarized.³

Additionally, Defendant must also demonstrate that he suffered an actual injury from his receipt of the Demand Notice. 14 M.R.S §556. While he claims he is “injured” by potentially being assessed late fees and attorneys’ fees, he has yet to actually pay any or to be found liable for them in Court. Importantly, and notably, Defendant’s liability for late fees and attorneys’ fees are derivative of the terms of

³ Contrary to Defendant Mann’s assertion, only notarized documents are accepted for recording at a Registry of Deeds. 33 M.R.S. § 203

the Promissory Note and the Complaint, and *not* exclusively derivative of the Default Notice. The damages that he alleges are the amounts that he will have to pay if he loses this suit and the terms of the note are enforced against him. Mann simply does not have a current actual injury derivative of the Default Notice.

ARGUMENT

The Superior Court Erred in Denying the Plaintiff's Special Motion to

Dismiss

1. **The Plaintiff's Default Notice together with her filing of the Complaint constitute protected "Petitioning Activity" and are protected by Maine's Anti-Slapp Statute 14 M.R.S. § 556. The Superior Court was compelled to grant Plaintiff, Fratello's, Special Motion to Dismiss.**

The issue in this case is straightforward. Did the Superior Court err by denying the Plaintiff's Special Motion to Dismiss?

Standard of Review

The Law Court reviews the Superior Court's decision on an anti-SLAPP special motion to dismiss *de novo*. *Gaudette v. Davis*, 2017 ME 86, ¶ 18 n.8, 160 A.3d 1190; *see Nader v. Me. Democratic Party (Nader II)*, 2013 ME 51, ¶ 12, 66 A.3d 571. It also reviews *de novo* whether the claims asserted against the moving

party are based on "petitioning activity." *Gaudette*, 2017 ME 86, ¶ 16, 160 A.3d 1190.

a. Maine's Anti-Slapp Statute

Maine's anti-SLAPP statute provides that when a "moving party [Fratello] asserts that the civil actions [Defendant's counterclaim} . . . against the moving party [Fratello] are based on the moving party's [Fratello's] exercise of the moving party's [Fratello's] right of petition under the Constitution of the United States or the Constitution of Maine, the moving party [Fratello] may bring a special motion to dismiss." 14 M.R.S. § 556 provides that "[t]he court **shall** grant the special motion, unless the party against whom the special motion is made [Mann] shows that the moving party's [Fratello's] exercise of its right of petition [Fratello's Complaint and Demand] were devoid of any reasonable factual support or any arguable basis in law **and** that the moving party's acts cause actual injury to the responding party." **(emphasis added)** The law defines "a party's exercise of its right of petition" very broadly and encompasses written or oral statements in six different categories:

[1] "any written or oral statement made before or submitted to a legislative, executive or judicial body, or any other governmental proceeding";

[2] "any written or oral statement made in connection with an issue under consideration or review by a legislative, executive or judicial body, or any other governmental proceeding";

[3]: "any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive or judicial body, or any other governmental proceeding";

[4] "any statement reasonably likely to enlist public participation in an effort to effect such consideration"; or

[5]"any other statement falling within constitutional protection of the right to petition government."

14 M.R.S. § 556

As stated in *Klein v. Demers- Klein*, 2019 Me. Super. Lexis 66 ⁴, ¶ 10, CUMSC -CV-18-0377, (Klein 1) Section 556 of Maine's Anti-Slapp statute **explicitly** protects written and oral statements **made preparatory to, submitted to, or during a judicial proceeding**. (Emphasis added). In *Klein*, ¶ 10, the Court (Hon. Andrew Horton, Justice) directly cited the language of Section 556 as authority for its holding:

When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss. The special motion may be advanced on the docket and receive priority over other cases when the court determines that the interests of justice so require. The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the

⁴ Mark Klein v. Jessica Demers-Klein and Amanda Myers, 2019 Me. Super. Lexis 66, CUMSC-CV-18-0377, Order on Defendants' Pending Motions, dated April 17, 2019, at pages 17-18; 14 M.R.S. § 556; affirmed Maine Supreme Judicial Court. Decision No. Mem 20-20, (March 3, 2020).

facts upon which the liability or defense is based.

14 M.R.S. § 556.

Fratello's alleged conduct, which forms the sole basis of Defendant Mann's counterclaim, service of the Default Notice, combined with the filing of this civil action, is **precisely** the conduct protected by Section 556. *Pollock* at ¶¶ 18 & 19. Further, Fratello's pre-suit Default Notice is an element of her claim and Complaint and a mandatory condition precedent to filing her suit. App. 27 (Note at ¶ 11); 9-A M.R.S 510 and 511(Par. 1 & 2); see also 14 M.R.S 6111. As such, the Default Notice is inseparable from the Complaint and is protected "petitioning activity."

In resolving a Special Motion to Dismiss, Maine Courts follow a three-step process. See *Gaudette v. Davis*, 2017 ME 86, ¶¶ 5-12, 160 A.3d 1190. In *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, ¶ 10; 202 A.3d 1189, 1193 (internal cites omitted) the Law Court said of the procedure under 14 M.R.S. § 556,

The application of the anti-SLAPP statute results in an inherent tension between the coexisting constitutional right to freedom of speech and the right to access the courts to seek redress for claimed injuries. Accordingly, in addressing a special motion to dismiss, the reviewing court must be careful to recognize these competing rights and work to achieve an appropriate balance. In an effort to achieve this balance, we require that the reviewing court use a three-step burden-shifting procedure.

At the first step, the special movant, Fratello, must establish, as a matter of law, that "the claims against [her] are based on [her] exercise of the right to petition pursuant to the federal or state constitutions." *Gaudette v. Davis*, 2017 ME 86, ¶¶ 16-

17, 160 A.3d 1190, 1198 (quoting *Morse Bros. v. Webster*, 2001 ME 70, ⁴¹[19, 772 A.2d 842). If the special movant fails to make the showing, the anti-SLAPP statute does not apply and the Special Motion to Dismiss must be denied. See *Gaudette I*, 2017 ME 86, ¶ 16, 160 A.3d 1190; *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26 at ¶ 11, 202 A.3d 1189, 1194.

If the special movant (Fratello) makes that showing, the inquiry moves to step 2, at which step the burden shifts to the Defendant, [Mann], to make a prima facie showing that Fratello's "petitioning activity" (i.e. her service of the Default Notice, together with her filing of the Complaint) was "devoid of any reasonable factual support or any arguable basis in law" *Gaudette v. Davis*, 2017 ME 86 at 4(117) **and** that the "petitioning activity" caused the Defendant, [Mann], an actual injury. *Id.* (quoting *Nader v. Me. Democratic Party (Nader I)*, 2012 ME 57, **if** ¶ 16, 29-38, 41 A.3d 551). If the Defendant, [Mann], fails to carry his burden, the special motion to dismiss must be granted. *Id.* The Superior Court never reached the issues of Mann's burden because the Superior Court incorrectly ruled that while the Complaint did constitute petitioning activity, the Default Notice did not.

If the Defendant, [Mann], carries his burden, then the inquiry proceeds to the third step, at which the court, on motion of any party, "permits the parties to undertake a brief period of limited discovery, the terms of which are determined by the court after a case management hearing, and at the conclusion of that limited

discovery period, the court conducts an evidentiary hearing." *Gaudette v. Davis*, 2017 ME 86, ¶ 18; 160A.3d 1190, 1198 (quoting *Morse Bros v. Webster*, 2001 ME 70).

3. The Superior Court Erred in Denying the Plaintiff's Special Motion to Dismiss

Reviewing this matter de novo, the analysis begins with the first step—whether Plaintiff, Fratello, has established as a matter of law, that the conduct upon which Mann's claim is based – service of the Default Notice - qualifies as protected "petitioning activity". If this Court agrees that Fratello's Default Notice is protected "petitioning activity", then Mann must demonstrate that Fratello's claims are completely devoid of any reasonable factual support or arguable basis in law **and** that he suffered actual injury from Fratello's service of the Demand Notice.

By her Default Notice and Complaint, Fratello seeks to enforce a Promissory Note executed by Mann. The Default Notice is a necessary condition precedent to filing a Complaint to enforce a promissory note and is an element of the claim that must be pled and proven to succeed. While there was/is a dispute about whether Mann did or did not timely make the first Note payment, there is no dispute that Mann failed to make any subsequent payment. There is also no dispute that Mann's issuing bank dishonored his check for his first payment for several months and only honored the check after this lawsuit was filed. App. 110-112 (See pages 18-19,

infra). There also is no dispute that Mann failed to sign and provide a notarized Mortgage. *Id.* Prior to instituting suit, Fratello served Mann with her Default Notice. After Mann did not respond, Fratello filed her Complaint. The Default Notice, being a required element of the Complaint, is joined with the Complaint and is, therefore, protected “petitioning activity.” *Pollock*, at ¶¶ 18 & 19.

It is incongruous that the Superior Court ruled that the Complaint, a necessary element of which is the Default Notice, was protected petitioning activity, but the Default Notice itself was not.

The second question to be resolved is whether Fratellos’ Default Notice and Complaint are devoid of any factual basis. The Superior Court did not reach this issue. However, Fratello has plead and sworn to Mann’s execution of the note and failure to timely pay or provide the Mortgage, thus providing a factual basis for her claims. Moreover, it is beyond dispute that Defendant Mann has not made a payment on the Note with the exception of the first payment – which was received late because Mann’s bank would not honor the check - and never provided a proper or recordable Mortgage. Mann admits in his pleadings the execution of the Note and he cannot dispute that his issuing bank did not honor his check for the first payment for several months and/or that he has not made any additional payments and/or that

a notarized recordable Mortgage was not executed and provided. App. 58-60⁵ (Mann Counterclaim) and App. 110-113 (Fratello Affidavit).

Should Mann argue that his facts demonstrate that Fratello's position is devoid of factual basis, or alternatively that the Court should only consider his submissions of facts and not those of Fratello in making the determination, *Klein v. Demers- Klein* 2019 Me. Super. LEXIS 67, CUMSC-CV-18-037 ¶¶ 3,4 (Klein 2) held that a reviewing court on a Special Motion to Dismiss should look at the entire record, not just that of the party opposing the motion to determine the extent to which the movant's position is devoid of a factual basis. While Footnote 5 addresses various points in support of the Plaintiff's case for default on the promissory note, Plaintiff's Affidavit, (App. 110-113), submitted in support of her Special Motion to Dismiss provides:

- The Defendant executed a promissory note on August 22, 2023, in the amount of \$60,000, (¶ 2).
- On August 22, 2023, Plaintiff loaned the Defendant \$60,000.00 (¶ 3).
- The first payment on the Note was due on October 15, 2023 (¶ 4).

⁵ Mann's Answer and Counterclaim APP 44-59 admits the existence of the Promissory Note, Counterclaim ¶ 148, and that he received the loan proceeds from Katherine of \$60,000.00, Answer ¶ 5. Mann does not and cannot contest that he failed to execute a Mortgage and that he has not made payments for November 2023, December 2023, January 2024, February 2024, March 2024, and April 2024, and since.

- On or about September 29, 2023, Mann gave the Plaintiff a cashier's check made payable to himself or the Plaintiff in the amount of \$3500.00; (¶ 5).
- The check represented both the first payment (the only one ever tendered) plus repayment of other debts owed to her by Mann (¶ 5).
- The check was refused for deposit by both Plaintiff's bank and the Defendant's issuing credit union (¶ 6).
- The defendant's credit union said that it would only honor the check if the Defendant was present with her at the credit union with her (Par ¶ 6).
- Despite requests by the Plaintiff, the Defendant refused to come to the credit union (¶ 6).
- Defendant refused to provide a mortgage on his property to secure the loan, despite having been sent one by the Plaintiff (through her counsel) (¶¶ 8,9, 10).
- Defendant has not made any payments on the note for the months of November 2023 through April 2024 (the month the case was filed) nor has he provided a mortgage (¶ 10).

As set forth in Footnote 5, the Defendant admits he signed the note and obtained the money, that he did not provide a mortgage (contending in his pleadings that the note itself sufficed as a mortgage even though it could not be recorded as it

was not notarized (33 M.R.S. § 203)). App. 117 (Mann Answer and Counterclaim, ¶ 1)

Given the above, it cannot be said that Fratello's claims are devoid of any factual or legal support. While Mann may claim that he was not in default and that the Default Notice sent to him was unnecessary, the existence of a dispute does not render the basis of Plaintiff's claims devoid of any factual or legal basis.

Mann must also demonstrate that he has actually suffered an injury from being served the Default Notice. He claims he is damaged by potentially being assessed late fees and attorneys' fees; however, he has not actually paid any such fees or been ordered to pay any such fees. Additionally, to the extent Mann alleges he is paying defense attorneys' fees, those attorneys' fees are in defense of the Promissory Note and Complaint, and not simply the Default Notice. Mann has not suffered any actual injury attributable to the Default Notice.

4. The Superior Court's Error

The Superior Court ruled that while Fratello's Complaint *was* petitioning activity, Mann's counterclaim was directed, not at the filing of the Complaint, but at the Default Notice. App. 12 (Order pp. 4-5,); (Paragraphs 169-177 of Mann's Counterclaim. App. 61) Specifically, the Court stated:

Although Ms. Fratello's Complaint is petitioning activity, Mr. Mann's Counterclaim is not "based on" the filing of her Complaint. 14 M.R.S. § 556. The

substance of Mr. Mann's breach of contract claim is not directed at the filing of the Complaint; rather, it centers on conduct that predates the filing of the Complaint. *Cf. Hearts with Haiti, Inc.*, 2019 ME 26, ¶¶ 14-15, 202 A.3d 1189 (concluding that the complaint was not "based on . . . petitioning activities" because only a "small portion" of the alleged defamatory conduct may have included petitioning activity); *Town of Madawaska*, 2014 ME 121, ¶¶ 6, 13-14, 103 A.3d 547 (holding that a land use enforcement action by a town against landowners who had a history of disputes with the town was not "based on" those disputes).

Order, pp 4-5

The Court's ruling is irreconcilable with *Pollack v Fournier*, 2020 Me. 93, which expressly held that a permissive communication when followed by a Complaint, constituted protected "petitioning activities". *Pollack*, ¶¶ 18 & 19. Here the connection between Fratello's pre-suit Default Notice and Complaint is closer, and actually, inseparable, because in order to enforce a Promissory Note, a pre-suit Demand is mandatory and is an element of the Plaintiff's Complaint and claim that a Plaintiff must pled and establish to enforce a Promissory Note App. 28-32, ¶ 11. ⁶ As such, Fratello's Default Notice is protected "petitioning activity" and her Special Motion to Dismiss should have been granted.

⁶ This paragraph states that If the Borrower is in default under this Note or is in default under another provision of this Note, and such default is not cured within the minimum allotted time by law after written notice of such default, then Lender may, at its option, declare all outstanding sums owed on this Note to be immediately due and payable.

CONCLUSION

The Superior Court's Order denying the Plaintiff's Special Motion to Dismiss must be reversed and the Superior Court must be directed to grant the Plaintiff's Special Motion to Dismiss, together with an award of costs and attorneys' fees as authorized by 14 M.R.S. § 556.

DATED in South Portland, Maine on the 27th day of November 2024

Respectfully Submitted,
Katherine Fratello,
By counsel,

Jeffrey Bennett, Esq. #7223

Legal-Ease, LLC
MALLSIDE PLAZA
198 Maine Mall Rd., Box #2
South Portland, Maine 04106
jbennett@legal-ease.com

CERTIFICATE OF SERVICE

I hereby certify that on November ___, 2024 I served true copies of the above Appellant's Brief and Appendix, by providing electronic copies and paper copies to Defendant's Counsel: **Matthew Bowen, Esq.**

Jeffrey Bennett, Esq., #7223