MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court docket number Yor-24-569

TOWD POINT MORTGAGE TRUST 2019-4

Plaintiff/Appellee

v.

LESLIE BODWELL

Defendant

K&R HOLDINGS, INC.

Party-in-Interest/Appellant

BRIEF FOR APPELLANT

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INTRODUCTION

This Brief proceeds in three parts. First, in response to Justice Horton's Order of February 12, 2025, Appellant reiterates and expands upon the arguments presented to the Law Court to show cause why this appeal should not be dismissed as interlocutory. These arguments focus upon the death knell exception to the final judgment rule, and are updated to take account of (1) the trial court's denial of Appellant's Motion to Dismiss, (2) the absence of clarification from the trial court of its Order for Abandonment and Appointment of Receiver (entered December 9, 2024) as to whether, in the event of the Receiver's sale of the property, "all secured claims would be transferred from the property to the proceeds of sale", and (3) the nature and extent of the "irreparable harm" that Appellant will suffer if the Receiver sells the property.

Second, Appellant's Brief concerns whether the trial court exceeded its statutory and equitable authority in issuing its Order for Abandonment and Appointment of Receiver..

Third, Appellant will address the trial court's denial of its Motion for Findings of Fact and Conclusions of Law with respect to its Order for Abandonment and Appointment of Receiver. In particular, this portion of Appellant's Brief will discuss the trial court's assertion that ". . . its findings on the record at the hearing on November 5, 2024, and in the Order for Abandonment and Appointment of Receiver . . . . are sufficient for appellate review.

Additionally, K&R notes that certain matters are not now before the Law Court in this appeal, *i.e.*, K&R's Motion to Dismiss, as denied by the trial court,

and Towd Point's Motion for Summary Judgment, awaiting hearing and decision in the trial court.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

1. On April 8, 2005, Defendant Leslie Bodwell borrowed $250,000.00 from Amerihome Mortgage Company, LLC (A. 43, 91), as secured by a mortgage on his residence at 249 Wells St., No. Berwick, Maine, recorded in the York County Registry of Deeds at Book 14433, Page 0038 (A. 44, 58, 60).

2. Appellant K&R Holdings, Inc. f/k/a Applicators Sales & Service, Inc., [hereinafter "K&R"] is a Party-in-Interest pursuant to a judgment execution lien in the amount of $13,900.43 against Defendant Bodwell's interest in the mortgaged premises, as recorded in the York County Registry of Deeds at Book 15909, Page 869 (A. 46).

3. The mortgage was variously assigned, culminating in a curative Quitclaim Assignment to Appellee Towd Point Mortgage Trust 2019-4 [hereinafter "Towd Point"] dated August 9, 2022, as recorded in the York County Registry of Deeds at Book 19089, Page 373. (A. 44, 99).

4. Towd Point commenced its foreclosure action on 08/09/2023 (A. 5).

5. K&R filed its Answer to the Complaint on 08/23/2023. (A. 5).

6. Party-in-Interest Bank of New York Mellon filed its Answer to the Complaint on 09/18/2023 (A. 5).

7. Party-in Interest Internal Revenue Service was dismissed from the case by Order entered 10/05/2023 (A. 7).

8. Party-in-Interest Ford Motor Company was removed from the case by Order entered 10/19/2023 (A. 8).

9. The trial court ordered the default of Defendant Bodwell and the remaining Parties-in-Interest by Order entered 02/16/2024 (A. 10).

10. A hearing on default judgment regarding the defaulted Parties-in-Interest was scheduled for 11/05/24. (A. 10).

11. Towd Point filed a Motion for Order of Abandonment and Receivership on 10/24/2024 (A. 11, 49).

12. Towd Point's Motion for Order of Abandonment and Receivership was supported by the Affidavit of Matthew Kelly (A. 76), a paralegal at the law firm of Doonan, Graves & Longoria, LLC (A. 77, 78).

13. Mr. Kelly's Affidavit references a "property inspection report" attached to his Affidavit as Exhibit A. (A. 77, 79).

14. At the hearing held 11/05/24, K&R filed its opposing memorandum to the Motion for Order of Abandonment and Receivership. (A. 12, 31).

15. At the hearing held 11/05/24, the trial court approved the Motion for Order of Abandonment and Receivership subject to the terms of a final order. (A. 37).

16. No hearing on Default Judgment was held on 11/05/24. (A. 12, 36).

17. The trial court issued a Default Judgment of Foreclosure and Sale, as to Defendant Bodwell and the other Parties-in-Interest previously ordered defaulted, on 11/12/2024, as entered on the docket on 11/19/2024. (A. 12-13).

18. The trial court issued its Order on Motion for Abandonment and Appointment of Receiver on 12/06/2024, as entered on the docket on 12/09/2024. (A. 13, 18).

19. The Order on Motion for Abandonment and Appointment of Receiver appointed Benjamin P. Campo, Jr., Esq. as Receiver of the mortgaged premises and delineated the Receiver's powers as

1) the authority to control, secure and maintain the premises, and further
2) the authority to clean and make necessary repairs and maintenance expenditures for the overall preservation of the property, and further
3) the authority to market and sell the property upon approval of any proposed purchase and sale agreement by this Honorable Court, and further
4) the Proceeds of any sale are to be held in escrow by the Receiver pending Order of this Court regarding distribution.
(A. 19).

20. K&R filed a Motion to Dismiss, challenging the Quitclaim Assignment of Mortgage to Towd Point and alleging Towd Point's lack of standing, on 12/13/2024. (A. 13).

21. K&R filed a Notice of Appeal on 12/16/2024 (A. 13).

22. K&R filed a Motion for Findings of Fact and Conclusions of Law on 12/16/2024. (A. 14).

23. Towd Point filed a Motion for Summary Judgment on 12/16/2024. (A. 14).

24. The Law Court issued an Order on 02/12/2025 allowing the trial court to consider the pending Motion to Dismiss. (A. 15, 88).

25. The trial court issued an Order denying the Motion to Dismiss on 03/06/2025, as entered on the docket on 03/07/2025. (A. 16).

26. As filed in the trial court on 06/09/2025, the Law Court issued an Order on 06/02/2025 denying Towd Point's Motion (previously filed in the Law Court) for Leave for Trial Court Action on [the Receiver's] Motion to Sell. (A. 17).

27. The trial court issued an Order denying the Motion for Findings of Fact and Conclusions of Law on 07/10/2025, as entered on the docket on 07/10/2025. (A. 17, 20).

28. The trial court's Order denying the Motion for Findings of Fact and Conclusions of Law stated, in pertinent part,

> The Court made its findings on the record at the hearing on November 5, 2024, and in the Order for Abandonment and Appointment of Receiver. In this Court's judgment, those findings are sufficient for appellate review.

(A. 20).

ISSUES PRESENTED FOR REVIEW

1. Issue Presented: Is K&R's appeal barred by the final judgment rule?

2. Issue Presented: Did the trial court abuse its discretion in granting Towd Point relief pursuant to 14 M.R.S. §6327 or pursuant to its equitable jurisdiction?

3. Issue Presented: Are the trial court's findings of fact and conclusions of law insufficient for appellate review?

ARGUMENT

I. K&R'S APPEAL COMES WITHIN THE "DEATH KNELL" EXCEPTION TO THE FINAL JUDGMENT RULE.

A. STANDARD OF REVIEW: DE NOVO[1]

B. BACKGROUND:

Previously, the Law Court issued an Order on December 30, 2024 requiring K&R to submit a memorandum "showing cause why its appeal should not be dismissed as interlocutory." K&R timely submitted the memorandum, dated January 10, 2025, and by its Order of February 12, 2025 (A. 88), the Law Court (1) authorized the Superior Court to act upon K&R's pending motion to dismiss and on any "motion to clarify the court's order of December 6, 2024" and (2) allowed this appeal to proceed, "but K&R Holdings, Inc. shall include in its brief an argument as to why this appeal should not be dismissed as interlocutory." The following argument repeats many of the points made in K&R's memorandum to show cause, but (1) takes account of the trial court's denial of K&R's motion to dismiss and of the absence of a motion to clarify, and (2) elaborates on the "irreparable harm" to K&R's secured interest in the mortgaged premises.

C. THE CONTOURS OF THE DEATH KNELL EXCEPTION.

[1] The trial court has made no determination on the question of law whether K&R's appeal comes within the "death knell" exception to the final judgment rule. The Law Court makes its own determination on this issue.

While interlocutory, K&R's appeal falls squarely within an exception to the "final judgment rule" articulated by the Law Court in *Andrews v. DEP*, 1998 ME 198, ¶4, 716 A.2d 212: "The death knell exception 'permits an appeal from an interlocutory order where substantial rights of a party will be irreparably lost if review is delayed until final judgment.' " (citation omitted).

Further, the

> death knell exception permits us to immediately review an interlocutory order "when failure to do so would preclude any effective review or would result in irreparable injury." (citations omitted). The exception is only available when the injury to the plaintiff's claimed right would otherwise be "imminent, concrete, and irreparable." (citation omitted).

In re Bailey M, 2002 ME 12, ¶ 7, 788 A.2d 590.

> A right will be "irreparably lost" for purposes of the death knell exception if we could not effectively provide a remedy to the appellant if we ultimately decided to vacate the interlocutory determination after a final judgment.

Id. at ¶ 8.

Several decisions of the Law Court have applied the death knell exception, *e.g*. *Bailey*, *supra* (mother's claim to open child protection proceeding); *Andrews v. DEP*, *supra* at ¶ 4 (claim of qualified immunity); *Cook v. Cook*, 574 A.2d 1353, 1354 (Me. 1990) (claim of marital property interest); and *Moffett v. City of Portland, Me*., 400 A.2d 340, 343 n.8 (1979) (claim of privileged statements).

D. K&R'S PROPERTY INTEREST.

In this appeal, K&R claims that its secured, and perfected,[2] property interest in the subject mortgaged premises will be lost pursuant to a further order of the trial court approving a purchase and sale agreement submitted by the Receiver. If this appeal is not decided at this time, then before the Law Court could consider a future appeal from an order approving the Receiver's sale of the premises, the Receiver will have already consummated the sale and K&R's claim to its property interest will have been mooted.

K&R's judgment execution lien is a property interest worthy of this Court's protection, as it was for real estate attachments in *Foisy v. Bishop*, 232 A.2d 797, 798 (Me. 1967) (order vacating an attachment falls within the "collateral order" exception to the final judgment rule since "great and irreparable loss may otherwise result").[3] *See also Sprague v. Washburn*, 447 A.2d 784, 786 n.6 (Me. 1982) ("Orders dissolving or denying attachment and trustee process are appealable") (citations omitted).

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[2] Generally speaking, an additional step must be taken to perfect a secured interest in real estate, such as a mortgage. That additional step is recording the instrument in the appropriate Registry of Deeds. But 14 M.R.S. §4651-A(1) provides the means by which K&R's writ of execution against Defendant Bodwell simultaneously became secured, and perfected. Perfection establishes the relative priority of the secured interest. No perfection, no priority. *Cf., Yeadon Fabric Domes, Inc. v. Me. Sports Complex, LLC*, 2006 ME 85, ¶16, 901 A.2d 200.

[3] K&R submits that the collateral order exception to the final judgment rule is also applicable to this appeal, but the death knell exception is more apt. In *Fleet Bank v. Zimelman*, 575 A.2d 731, 733 (Me. 1990), the Law Court upheld the collateral order exception to an appeal of an Order denying a Motion for Appointment of Receiver, ruling that the appeal met the exception's three requirements: (1) the order appealed from "involves a claim separable from and collateral to the gravamen of the lawsuit, (2) it presents a major and unsettled question of law, and (3) there would be irreparable loss of the rights claimed in the absence of immediate review." This appeal meets these requirements as well. However, the death knell exception is more directly on point because in this case K&R also faces the prospect of loss of effective appellate review of the trial court Order dated December 6, 2024.

E. THE EFFECT OF SALE.

Arguendo, a further order of the trial court approving a purchase and sale agreement submitted by the Receiver must contain a proviso to convey marketable title that the sale will be free and clear of "all interests of the parties in interest joined in the [foreclosure] action", just as would occur pursuant to 14 M.R.S. § 6323(1) regarding the foreclosure sale procedures following the expiration of the period of redemption.[4] Once the sale occurs, K&R will become an unsecured creditor.

Per the trial court's Order, the proceeds of the Receiver's sale of the property will be held in escrow pending the court's further order regarding distribution. However, as an unsecured creditor, K&R will have no secured interest in these proceeds, and the funds themselves will be subject to the claims of Defendant Bodwell's current creditors or even a trustee in bankruptcy.[5]

F. THE EFFECT OF A LIEN ON THE PROCEEDS OF SALE.

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[4] Phrased in terms of the powers of the court acting properly within its equity jurisdiction, "When a court of equity orders property in its custody to be sold, the court itself as vendor confirms the title in the purchaser. Neither the court nor [the receiver] gives a legal title to the purchaser because neither the court nor its officer has legal title to give . . . . A court of equity acts by a process of injunction against the owner and against the parties to the suit and protects the purchaser against interference and assures him a quiet title and quiet enjoyment." *See* 2 *Clark on Receivers* §487 (1959).

[5] After the sale of the premises, should Plaintiff's Complaint be dismissed, as requested in K&R's Motion to Dismiss for lack of standing, or should judgment be rendered against Plaintiff after trial for its inability to prove the elements of the foreclosure action, the subsidiary Order dated December 6, 2024 will be dissolved and any funds held in escrow, no longer subject to any secured claim, would be subject to be paid to Defendant Bodwell.

The Law Court's Order of 02/12/2015 states, at p.1 ¶3, "[a]lthough the [Superior Court] order [of December 6, 2024] is not explicit, the underlying assumption appears to be that all secured claims would be transferred from the property to the proceeds of sale." Recognizing, at p.2 ¶2, the "uncertainty about whether [K&R's] lien claim would attach to the proceeds of sale", the Law Court's Order authorized the Superior Court to act "on any motion to clarify the court's order of December 6, 2024". However, no party filed such a motion and the Superior Court did not clarify its Order. As the Superior Court's Order stands, K&R will be unsecured in the proceeds of a sale. Accordingly, in the event of a sale, K&R will suffer irreparable harm.

However, the absence of clarification of the Order of December 6, 2024 does not change the result of the analysis of appealability. First, as the Law Court noted in its Order of 02/12/2025, ". . . if the property is sold and the foreclosure is later dismissed on [K&R's] motion, the court may never get to approve the distribution of proceeds." Page 2, ¶1. While the Superior Court has denied K&R's Motion to Dismiss, that denial can certainly be challenged on appeal. Second, Towd Point may be unable to prove at trial the essential elements of its foreclosure action, thereby resulting in a dismissal with prejudice in the Superior Court or on appeal. Either way, there will be no ultimate distribution of proceeds except perhaps an entire distribution to Defendant Bodwell.

Even had the Superior Court clarified its Order to the effect that "all secured claims would be transferred from the property to the proceeds of sale", none of the secured claims would be perfected. Upon sale of the property, the secured claims

would cease to be secured interests in real estate. They would become secured claims on the equitable interests of the parties in the escrow deposit account established by the Receiver to hold the proceeds of the sale. Perfection of such security interests is not accomplished by recording an instrument, or even the Court's Order, at the Registry of Deeds. It can only be accomplished by "control".

G. MAINE'S UNIFORM COMMERCIAL CODE APPLIES TO SECURITY INTERESTS IN DEPOSIT ACCOUNTS.

Assuming *arguendo* that the Superior Court clarified its Order and created an equitable lien on the proceeds of sale of the property by the Receiver, those proceeds would be placed in escrow in a bank deposit account with Towd Point, Defendant Bodwell, K&R, and the other parties-in-interest having an equitable interest in the funds. While Article 9-A does not apply to the mortgages, judgment liens, and their real property collateral,[6] it does apply to the proceeds of sale placed into a deposit account and subject to the trial court's equitable lien.[7]

With respect to the deposit account,[8] 11 M.R.S. §9-1314(1) (2023) provides:

> A security interest in . . . deposit accounts may be perfected by control of the collateral under section . . . 9-1104 . . . .

In turn 11 M.R.S. §9-1104(2)(b) (2023) provides:

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[6] 11 M.R.S. §9-1109(4)(k) (1999).

[7] 11 M.R.S. §9-1315(3) (1999), pertaining to the temporary perfection of a security interest in proceeds, is inapplicable because the "original collateral" is real property.

[8] 11 M.R.S. §9-1102(29) (1999) defines "deposit account" as "a demand, time, savings, passbook or similar account maintained with a bank. "Deposit account" does not include investment property or accounts evidenced by an instrument."

> A secured party has control of a deposit account if:
> . . .
> (b). The debtor,[9] secured party and bank have agreed in a signed record that the bank will comply with instructions originated by the secured party directing disposition of the funds in the deposit account without further consent by the debtor.

H. K&R's Equitable Interest In The Deposit Account Will Be Unperfected.

Since K&R, as a Secured Party under the Superior Court's hypothetical equitable lien, must have "control" over the Deposit Account, its security interest will be unperfected. One cannot imagine a situation where the parties will agree that K&R could direct the disposition of the Deposit Account without the consent of the Receiver, much less the consent of other secured parties and the Superior Court. Accordingly, K&R's security interest will be unperfected.

I. K&R's Loss Of Perfection Is An Irreparable Harm.

Returning to the elements of the "death knell" exception, the foregoing analysis demonstrates that, absent immediate appellate review, K&R will suffer harm in the event of the Receiver's sale of the property that cannot be adequately remedied. Even with the hypothetical status of an equitable lien holder in the proceeds from the Receiver's sale, it will not have a perfected security interest. Thus, it will have no priority over competing claims to the deposit account.

J. A Trustee In Bankruptcy May Avoid K&R's Equitable Lien.

[9] In this scenario, the Debtor is the Receiver.

Under 11 M.R.S. §1317(1)(b)(i) (1999), "A security interest . . . is subordinate to the rights of . . . a person who becomes a lien creditor[10] before . . . [t]he security interest is perfected . . . ". Pursuant to 11 U.S.C. §544 (1979), a Trustee in bankruptcy has the status of a hypothetical judgment lien creditor and bona fide purchaser as of the date of filing of the petition, and may subordinate and avoid transfers of property that are subject to an unperfected equitable lien. *Fangio v. DivLend Equip. Leasing, LLC*, 2016 Bankr. LEXIS 935, *20, (Bankr. D. No. NY 2016).

Should the Superior Court impose an equitable lien on the proceeds of the Receiver's sale of the property, Towd Point, Defendant Bodwell, K&R, and every other party-in-interest would have an equitable interest in the deposit account holding the funds. Should any of these parties face a bankruptcy, the Trustee will have the power to subordinate their interest and avoid the transfer of the funds to the bank account in favor of general unsecured creditors.

This illustrates the risk and harm faced by K&R for purposes of the death knell exception analysis. Similarly, there is risk of harm from an attaching judgment creditor seeking trustee process or a turnover order.

Appellant's Brief now proceeds to a discussion of the merits of K&R's appeal.

II. THE SUPERIOR COURT ERRED BY ISSUING AN ORDER PURSUANT TO 14 M.R.S. §6327 AND LACKED GROUNDS FOR AN EQUITABLE REMEDY.

[10] A trustee in bankruptcy is defined as a "lien creditor" in 11 M.R.S. §9-1102(52)(c) (1999).

A. STANDARD OF REVIEW: DE NOVO[11]

B. TOWD POINT SOUGHT RELIEF PURSUANT TO 14 M.R.S. §6327.

On October 24, 2024 Towd Point filed its Motion for Order of Abandonment and Receivership [hereinafter the "Motion"]. The Motion requests the entry of an Order pursuant to "An Act to Preserve the Value of Abandoned Properties by Allowing Entry by Mortgagees". (A. 49). This was the title of the legislation that enacted 14 M.R.S. §6327 (2020) via PL 2019, c.647.

The Motion further requests that the Order pursuant to §6327 include

> an Order of Abandonment, property preservation [sic] to appoint Benjamin P. Campo , Jr., Esq., as Receiver, in light of documented presumption of abandonment pursuant to 14 MRSA § 6327 (March 18, 2020) until resolution of this matter.

C. THE TRIAL COURT'S ORDER ON MOTION FOR ABANDONMENT AND APPOINTMENT OF RECEIVER.

Towd Point filed its proposed Order On Motion For Abandonment And Appointment of Receiver (A. 85) on 11/8/2024, and on 12/6/2024 the trial court signed it, adopting the exact text of the proposed Order. The Order granted Towd Point's Motion and for "good cause" appointed Attorney Campo "Receiver of the Property". The operative language of the Order regarding the Receiver's "powers" is as follows:

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[11] The Law Court reviews questions of law *de novo*. *State v. O'Connor*, 681 A.2d 475, 476 (Me. 1996).

5) the authority to control, secure and maintain the premises, and further

6) the authority to clean and make necessary repairs and maintenance expenditures for the overall preservation of the property, and further

7) the authority to market and sell the property upon approval of any proposed purchase and sale agreement by this Honorable Court, and further

8) the Proceeds of any sale are to be held in escrow by the Receiver pending Order of this Court regarding distribution.[12]

Unfortunately for the Appellee, §6327 does not grant authority to the Court to order any of these things.

D. THE SUPERIOR COURT HAS NO ROLE UNDER §6327.

Title 14 M.R.S. §6327 is a self-help measure for mortgagees acting through loan servicers.[13] Per the Summary of Committee Amendment "A" to LD 1963:

> This amendment replaces the bill. It allows a mortgage loan servicer to take certain actions to preserve the value of residential property that is the subject of a foreclosure action if the mortgages premises are presumed abandoned.

The statute affords no operational role to the judiciary in the implementation of this statutory preservation process. The loan servicer files the requisite Affidavit (§6327(1)), invokes a Presumption of Abandonment when appropriate

[12] Note that the Order makes no determination that the Property has been abandoned per 14 M.R.S. §6326(3) (2013).

[13] In its Notice of Right to Default, Towd Point admitted that it was using the loan servicer Select Portfolio Services, Inc. Page 1, first paragraph (A. 74).

(§6327(2)), and the "mortgage loan servicer or its designee may enter the property for the purpose of abating any identified nuisance, preserving property or preventing waste and may take steps to secure the property . . ." (§6327(1)).

Given this statutory regime, where the judiciary plays no role, the trial court had no discretion to act upon Towd Point's Motion by appointing a Receiver. No showing of "good cause" could bestow authority on the trial court to "engraft a judicially created" remedy upon the statutory scheme. *Cf., Bell v. Walton*, 2004 ME 146, ¶11, 861 A.2d 687.

That is unless Towd Point had made a showing that §6327 did not provide a "plain, adequate and complete remedy at law" pursuant to the Superior Court's equitable jurisdiction and 14 M.R.S. §6051 (1995).

E. THE ALTERNATE GROUNDS FOR AN EQUITABLE REMEDY.

Towd Point's Motion did not invoke the trial court's equity jurisdiction, and the trial court's Order of December 6, 2024 did not rely upon it. Nevertheless, K&R is cognizant that the Law Court may affirm a lower court's ruling on alternate grounds if it determines that, as a matter of law "that there is another valid basis for the judgment." *Connary v. Shea*, 2024 ME 57, ¶16, 320 A.3d 429. Hence, the following discussion:

In general the Superior Court has equity jurisdiction, at common law, and pursuant to the terms of 14 M.R.S. §6051. In particular §6051(1) and (13) state:

> The Superior Court shall have jurisdiction to grant appropriate equitable relief in the following cases:

> **1. Foreclosure of mortgages.** For the foreclosure of mortgages of real and personal property and for redemption of estates mortgaged.
>
> . . .
>
> **13. Equity jurisdiction.** And have full equity jurisdiction, according to the usage and practice of courts of equity, in all other cases where there is not a plain, adequate and complete remedy at law.[14]

While sub-section 13 ostensibly applies to cases other than foreclosure, Maine's Business and Consumer Court has indicated that sub-sections 1 and 13 may be read together. *66 Medawisla, LLC v. Delaney*, Business and Consumer Court of Maine, Doc. No. BCD-RE-2022-00008, p.25 (March 21, 2024) (awarding equitable partition by sale where foreclosure was not a viable remedy and a physical division under the statute was impractical or injurious.) To the same effect is *Bonnie v. Polli*, Cumberland County Superior Court, Doc. No. RE-07-179, p.12 (May 12, 2008).

Furthermore, the Law Court's has stated

> Our cases express the "axiomatic" principle that an ***equitable remedy*** will be granted only where there is ***not*** an adequate ***legal remedy***. (citation omitted). So too, a party will ***not*** be awarded an equitable form of relief when the party fails to timely pursue a ***legal remedy*** available to it. (citation omitted). Limiting a litigant's access to courts of equity serves to encourage the diligent pursuit of ***legal remedies***. (citation omitted).

[14] "An injury for which there is no adequate remedy at law is an irreparable injury. (citation omitted). Thus, proof of irreparable injury is a prerequisite to the granting of [equitable] relief." (citation omitted). *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (1980).

Core Fin. Team Affiliates, LLC v. Me. Med. Ctr., 2024 ME 78, ¶28, 327 A.3d 79. (emphasis in original).

Applying this framework to the three elements of the Receiver's authority per the trial court's order dated December 6, 2024, *supra*, it is readily apparent that an adequate legal remedy exists for each aspect. First as to the Receiver's authority to "control, secure and maintain the premises", pursuant to the terms of the Mortgage, Towd Point "may enter and inspect the Property" and with reasonable cause "may inspect the interior of the improvements on the Property". Section 7 (A. 64). Also, Towd Point may "do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property". Section 9 (A. 64).[15] These contractual provisions, together with 14 M.R.S. §6327, provide Towd Point with a full complement of steps that may be taken to protect and preserve Towd Point's interests. Towd Point has not availed itself of these measures.

Second, as to the Receiver's authority to "clean and make necessary repairs and maintenance expenditures for the overall preservation of the property, the same contractual and statutory provisions allow Towd Point to preserve the property and prevent waste. Towd Point has not availed itself of these measures.

Third, as to the Receiver's authority to "market and sell the property upon approval of any purchase and sale agreement" by the trial court, Towd Point failed to seek relief per the statutory provisions of 14 M.R.S. §6326. Towd Point obtained

[15] Section 6327(12) states: "The provisions of this section do not preempt, supersede or otherwise render inapplicable any rights granted to a mortgagee under the mortgage". Notably the residential Mortgage in this case does not provide Towd Point with the remedy of the appointment of a Receiver as was the case with the commercial mortgage in *Fleet Bank of Maine v. Zimelman*, *supra*, n.3. Towd Point could not act on its own to appoint a judicial Receiver, and the Mortgage provided no support for Towd Point's Motion to have the court do so.

no judicial determination of abandonment with its concomitant acceleration of priority of the foreclosure case on the court's docket and the shortening of the period of redemption.[16]

Moreover, a sale by the Receiver will have no provision for a redemption period at all, and the method of private sale does not conform to §6323's requirement of a public sale.[17]

In sum, Towd Point's Motion and the trial court's Order do not address Towd Point's legal remedies or their adequacy. The only remaining question is whether the evidentiary record, as expressly found by the trial court, supports a conclusion of law that Towd Point's legal remedies are inadequate.[18]

III. THE SUPERIOR COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE INSUFFICIENT.

A. STANDARD OF REVIEW: ABUSE OF DISCRETION[19]

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16 14 M.R.S. §6326(4)(A) and (B).

17 *Cf*., *United States Dep't of Hous. & Urban Dev. v. Union Mortgage Co*., 661 A.2d 163, 166 (1995

18 In *U.S. Bank Trust, N.A. v. Leo*, No. 2:23-cv-00459-NT, 2024 U.S. Dist. LEXIS 206470, at **14, 16 (D. ME. Nov. 14, 2024)(affirmed by District Court Judge, 2024 U.S. Dist. LEXIS 222745 (Dec. 10, 2024), the Magistrate Judge approved the appointment of a Receiver, with the authority to collect monthly rental payments "from the tenants to be allocated for expenses toward maintenance, property insurance, and property taxes" and to market and sell the property upon approval by the Court. Inexplicably, in considering the adequacy of the legal remedies, the Court did not consider Maine's statutory provisions governing Foreclosure Proceedings by Civil Action, 14 M.R.S. §§6321-6327. The Court deemed proven that the legal remedies were inadequate because the Bank faced the "possibility" that it might not be made whole by a sale of the property after a judgment of foreclosure due to the mortgagor's discharge in bankruptcy, the long length of time since default, and "the large amount of money that U.S. Bank Trust and its predecessors ha[d] advanced for taxes and insurance." In this case, there has been no showing of Towd Point's financial exposure and no issue of rent collection.

19 *Peters v. Peters*, 1997 ME 34, ¶34, 697 A.2d 1254.

B. THE LAW COURT CANNOT INFER FINDINGS FROM THE EVIDENCE IN THIS RECORD.

The trial court's Order on Motion For Abandonment and Appointment of Receiver [hereinafter "Order 1"] was entered on the docket on December 9, 2024. On December 16, 2024, K&R timely filed a Motion under Rule 52, M.R. Civ. P. for Findings of Fact and Conclusions of Law. In accordance with Rule 52, K&R's Motion specified sixteen requested findings of fact and nine conclusions of law. The trial court denied this Motion by Order issued July 10, 2025 [hereinafter "Order 2"].

Because K&R timely filed its Rule 52 Motion that the trial court later denied, the Law Court "cannot infer findings from the evidence in this record." *Barron v. Barron*, 2025 ME 51, ¶2.[20] Rather,

> The court [is] required to "ensure that the . . . judgment is supported by *express* factual findings that are based on record evidence, are sufficient to support the result, and are sufficient to inform the parties and any reviewing court of the basis for the decision." *Ehret v. Ehret*, 2016 ME 43, ¶ 9, 135 A.3d 101 (emphasis added). Accordingly, "if the judgment does not include specific findings that are sufficient to support the result, appellate review is impossible."

Id. Further, the trial court's findings of fact must (1) be based upon competent evidence in the record, *State v. Greenleaf*, 2004 ME 149, ¶13, 863 A.2d 877, and (2) "demonstrate that the court applied a correct understanding of the controlling law". *Id.* at ¶29.

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[20] As of this writing, the citation to the Atlantic Reporter has yet to be published.

C. THE TRIAL COURT'S FINDINGS OF FACT.

In denying K&R's Motion for Findings of Fact and Conclusions of Law, the trial court stated:

> The Court made its findings on the record at the hearing on November 5, 2024, and in the Order for Abandonment and Appointment of Receiver. In this Court's judgment, those findings are sufficient for appellate review.

1. THE HEARING ON NOVEMBER 5, 2024

The transcript of the 11/5/2025 hearing indicates that the trial court did not use the word "find" or "finding" or "findings" during the colloquy concerning Towd Point's Motion for Order of Abandonment and Appointment of Receiver. Instead that the trial court stated:

> But I – I think based – I am going to grant the motion for order of abandonment or receivership based on the grounds that I [sic] set forth in the motion. I do not need further briefing on that. (A. 36).

The trial court explicitly referred to Towd Point's Motion to provide the factual basis for its Order. That motion will be examined in due course, but there is one other statement in the transcript from the trial court that should be mentioned. Immediately following the above quoted language, the trial court stated:

> But if you could submit, Attorney Longoria, a more detailed order.
> And I understand this is over Attorney Greenberg's objection on behalf of his client. But I think if we're going to delay the final

resolution of this, there should be an attempt to preserve the property. (A. 36).

Here the trial court drew a conclusion from implicit underlying facts. Since the trial court had ruled that a trial of the foreclosure action would not take place on 11/5/2024, the conclusion was that Towd Point had demonstrated that preservation of the property was necessary in the interim period prior to the actual trial. For the trial court, presumably, the factual basis for this conclusion was to be found in Towd Point's Motion.

2. THE ORDER ON MOTION FOR ABANDONMENT AND APPOINTMENT OF RECEIVER

As drafted by counsel for Towd Point, the trial court's December 6, 2024 Order on Motion for Abandonment and Appointment of Receiver stated:

> The appointment is based on exigent circumstances as outlined in the motion, and as discussed during the November 5, 2025, hearing.[21] (A. 18).

This statement merely characterizes as "exigent" certain foundational facts referenced as "outlined" in Towd Point's Motion.

The trial court's Order of December 6, 2024 also stated:

> This Court finds that good cause exists to appoint a receiver in an effort to preserve the Plaintiff's interest in the Property, as well as any

[21] The imprecise reference to the "discuss[ion] during the November 5, 2025, hearing" is problematic because no evidence was adduced on 11/5/2025. Counsel made their arguments, but the trial court, as cited *supra*, based its granting of the Towd Point Motion on the "grounds" set out in that motion. The statements and arguments of counsel are not evidence. *Pullen v. Bartlett*, 507 A.2d 1070, 1071 (1986).

interest the junior lien holder or Party-in-Interest may have, and to avoid potential harm and potentially diminished value. (A. 19).

Here, the finding of "good cause" is actually a conclusion by the trial court that a factual predicate has been established that meets a legal or equitable standard, or otherwise justifies the exercise of the court's discretion. *Cf*., Rule 55(c), M.R. Civ. P.[22] As the foregoing discussion regarding 14 M.R.S. §6327 reveals, the trial court has no discretion regarding that legal self-help remedy. Therefore, the only "good cause" that could justify the trial court's sound exercise of its discretion would be in the context of an equitable remedy.

D. TOWD POINT'S SUPPORTING AFFIDAVIT TO ITS MOTION.

Towd Point's Motion was supported by an Affidavit signed by Matthew Kelly, a paralegal employed by Towd Point's legal counsel. (A. 76). This Affidavit provided the entirety of the alleged factual support adduced by Towd Point in support of its Motion.[23]

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[22] Setting Aside Default. For good cause shown, the court may set aside an entry of default and, if judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

[23] As part of its Reply to K&R's Opposition to the Motion, on November 8, 2024 Towd Point filed the Affidavit of Tasha Massey, a realtor who took photographs of the premises three months before on August 5, 2024. (A.129, 130). As Affiant, Ms. Massey opined, without foundation as an expert witness pursuant to Rule 702, M.R. Evidence, that the photos were evidence of a "large scale marijuana growing operation" at the then-vacant premises. This Affidavit was not properly before the Court because (1) it should have been submitted with Towd Point's Motion pursuant to Rule 7(b)(3), M.R. Civ.P. ("When a motion is supported by affidavit, the affidavit shall be served with the motion.", (2) the Massey Affidavit was not in response to any "new matter" presented by K&R in its Objection, (3) the trial court had expressly stated at the hearing on November 5, 2024 that "I do not need further briefing on [the grounds set out in Towd Point's Motion], (4) Towd Point did not request or receive leave of court to file the Massey Affidavit, (5) the trial court's Order of December 6, 2024 stated that it was issued "[h]aving reviewed Plaintiff's Motion with supporting Affidavit" (*i.e*., the Matthew

These are the relevant statements from Mr. Kelly's Affidavit:

> 4. On September 10, 2024, Plaintiff inspected the property, confirmed its vacancy and completed a property inspection report, attached as Exhibit A.
> 5. Upon further information, the occupants who were residing in the property had been engaging in growing marijuana inside the property on a large scale.
> 6. The Borrower has not answered or otherwise appeared in this matter and has been defaulted pursuant to this Court's Order dated February 13, 2024, and docketed on February 16, 2024, and through her Counsel has communicated his consent to this motion and the foreclosure in general.
> 7. Appointment of a Receiver is necessary in order to take any actions necessary to preserve and protect the property, as well as market and list the property to maximize the sale price and return to this vacant property.

Preliminarily, Mr. Kelly does not establish a foundation for any of these statements. He does not recite that he has personal knowledge of any of the facts, nor describe how his employment as a paralegal would provide him with such personal knowledge.[24] He does not demonstrate that he is a "qualified witness" with respect to any of the law firm's business records.[25] He does not claim to be

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Kelley Affidavit). Certain other photographs accompanied Matthew Kelly's supporting Affidavit (A. 120), but these also were not properly before the trial court. They were not referenced as an exhibit by the Kelly Affidavit, nor authenticated, nor otherwise qualified as competent evidence.

[24] Rule 602, M.R. Evidence.

[25] Rule 803(6)(D), M.R. Evidence.

an "expert" witness by virtue of his "knowledge, skill, experience, training, or education".[26]

Addressing paragraph numbers 4 – 7 of Mr. Kelly's Affidavit in turn:

> 4. Exhibit A to the Affidavit (A. 79) shows that Plaintiff did not inspect the property. The Exhibit purports to be a "No Contact Inspection" done on 09/10/2024 by Thomas Leggett of the Safeguard Team for a client named "Residential RealEstate Review Management, Inc. It does describe the Occupancy Status of 249 Wells St. (presumably the mortgaged premises) as Vacant, with an unmaintained yard with tall grass of 3 inches, and an Exterior Condition showing Neglect. However, this Exhibit is not authenticated or shown to be a business record of Towd Point or of its law firm. As such, it is not competent evidence for the trial court to consider.
>
> 5. Mr. Kelly recites that "[u]pon further information" prior occupants of the property were engaged in large scale marijuana growing. However, he does not state that he believes this information to be true in the body of the Affidavit, thereby rendering the Affidavit fatally defective in this regard. *Ingalls v. Brown*, 460 A.2d 1379, 1380-1381 (Me. 1983) citing *Englebrecht v. Development Corporation for Evergreen Valley*, 361 A.2d 908, 911 (Me. 1976). Moreover, the Rules of Civil Procedure do not allow averments upon "information and belief", that an affiant believes to be true, in the circumstances of Towd Point's Motion. The Civil Rules do allow such averments with respect to motions for approval of attachments (Rule 4A), replevin (Rule 64), and temporary restraining orders (Rule 65). Otherwise, personal knowledge is required.

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[26] Rule 702, M.R. Evidence.

6. While Mr. Kelly professes that Defendant Bodwell's counsel has communicated Defendant's "consent to this motion", he does not claim that the communication was in writing, or made to him orally, or that he otherwise has personal knowledge of it. If it were in writing, it should have been attached to the Affidavit as an exhibit.[27]

7. Regarding the tautology of Mr. Kelly's assertion that the appointment of a Receiver was "necessary" because it was "necessary", this was not so much a statement of fact as an improper legal conclusion that only a Receiver can perform the functions of preservation and protection of the property. As to the marketing and listing the property for sale, clearly Mr. Kelly is offering his opinion that a Receiver will "maximize the sale price and return" on the property. Nothing in his Affidavit renders Mr. Kelly competent to express this expert opinion,[28] an opinion that, of course, would require, *e.g.*, insight into the real estate market conditions regarding private versus public sales, the trend of residential home prices in York County, and the ability of Towd Point to purchase the property at a public sale and then re-sell it privately.

E. FURTHER DEFICIENCIES WITH THE KELLY AFFIDAVIT.

The foregoing analysis demonstrates that the Kelly Affidavit contained no competent evidence upon which the trial court could exercise its discretion to issue an order for equitable relief.

Moreover, certain of its suppositions are contrary to the relevant statutory provisions. For instance, an inspection report showing only vacancy and neglect and a mere oral statement of the mortgagor indicating a "clear intent to abandon

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27 Rule 1002, M.R. Evidence.

28 Rules 701 and 702, M.R. Evidence.

the premises", together with evidence of illegal activity would not suffice to allow Towd Point's loan servicer to act to protect and preserve the property pursuant to 14 M.R.S. §6327.[29] That statute requires an Affidavit upon personal knowledge, with the presence and determination of a "public official" that the premises are abandoned, multiple indicia of abandonment, and the written statement of the mortgagor indicating clear intent to abandon.

Additionally, the Kelly Affidavit provided no basis upon which the trial court could have concluded that "good cause" was shown to excuse, limit, or modify the statutory requirements.

F. THE TRIAL COURT'S DENIAL OF K&R'S MOTION FOR FINDINGS OF FACT AND CONCLUSIONS WAS AN ABUSE OF ITS DISCRETION.

The trial court based its Order of December 6, 2024 on the "grounds" asserted by Towd Point in its Motion. To the extent Towd Point sought statutory relief pursuant to 14 M.R.S. §6327, that statute afforded the court no role and no discretion in the appointment of a Receiver. To the extent the Law Court considers whether the trial court had "good cause" to grant equitable relief, the evidence adduced by Towd Point was not competent and was insufficient.

Given that the trial court's findings of fact and conclusions of law must be based on competence evidence and must demonstrate that the trial court correctly understood the controlling law, the trial court's denial of K&R's Motion for

[29] Self-help by Towd Point pursuant to the terms of the Mortgage would be justified.

Findings of Fact and Conclusions of Law was an abuse of its discretion and in error.

CONCLUSION

For the foregoing reasons, K&R requests the Law Court to (1) vacate the December 6, 2024 Order of the York County Superior Court that granted Towd Point's Motion for Order of Abandonment and Receivership, and (2) remand this case to the Superior Court for the entry of an order denying Towd Point's Motion for Order of Abandonment and Receivership, and for further proceedings consistent with the Law Court's decision on this appeal.

Date: September 2, 2025

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