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

REPLY BRIEF

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I. TOWD POINT MISCHARACTERIZES THE ISSUE OF K&R'S STANDING.

As its first Argument, Towd Point disputes K&R's "standing" to challenge the Superior Court's Order appointing the Receiver:

> In challenging the foreclosure of a senior mortgage holder, it is the junior lienholder's affirmative duty to establish its own standing by proving that the lien that it seeks to enforce was properly perfected in accordance with 14 M.R.S. § 4651- A(5) [requiring a notice of lien].

Towd Point misapplies the doctrine of standing. Standing refers to a party's interest in the litigation. As explained in *Mortg. Elec. Registration Sys., Inc. v. Saunders,* 2010 ME 79, ¶ 14, 2 A.3d 289, and as cited in *Bank of America, N.A. v. Greenleaf,* 2014 ME 89, ¶7, 96 A.3d 700:

> As a prudential matter, "we may limit access to the courts to those best suited to assert a particular claim." "[S]tanding" defines those best-suited parties; it refers to the minimum interest or injury suffered that is likely to be redressed by judicial relief. Every plaintiff seeking to file a lawsuit in the courts must establish its standing to sue, no matter the causes of action asserted[1].

To the contrary, Towd Point's exegesis of the doctrine, at p. 27 of Appellee's Brief, states that K&R has the burden of establishing that ". . . it properly perfected its lien **by sending notice** to Bodwell in accordance with 14

[1] The Law Court has applied the rationale of "standing" to defendants only in the context of a criminal defendant needing to demonstrate a right to privacy when pursuing a motion to suppress evidence. *State v. Lovett*, 2015 ME 7, ¶8, 109 A.3d 1135. The United States District Court for the District of Maine, has required a party-in-interest in a foreclosure action to show his interest in the property. *1900 Capital Trust III v. Sidelinger*, 2021 U.S. Dist. LEXIS 123878, fn. 1. Here, Towd Point does not dispute K&R's record interest in the mortgaged premises.

M.R.S. § 4651-A(5)." (emphasis supplied). However, none of the cases cited stands for this proposition.

Rather, K&R has demonstrated the "minimum interest" required for standing. In this case, Towd Point joined K&R as a party-in-interest to its foreclosure action by virtue of K&R's judgment execution lien filed in the York County Registry of Deeds. At ¶31 of the Complaint, Towd Point alleged

> APPLICATORS SALES & SERVICE, INC. is a Party-in-Interest pursuant to a Writ of Execution in the amount of $13,900.43 dated August 3, 2010, which is recorded in the York County Registry of Deeds in Book 5909, Page 869 and is in ninth position behind Plaintiff's Mortgage.

(A. 46). K&R then judicially admitted the first clause of Complaint ¶31 in its Answer[2]. Further, Towd Point's own ¶15 of its Statement of Facts in Appellee's Brief recites what Towd Point alleged at ¶31 of its Complaint.

Towd Point relies on the doctrine of standing simply because of its burden-shifting characteristic. Since the doctrine does not apply in the context of this case, it is Towd Point's burden of proof, not K&R's "affirmative duty" on the question of statutory notice. In *ABN Amro Mortgage Group v. Willis et al.*, 2003 ME 98, 829 A.2d 527, Defendant mortgagor Richard Willis raised several affirmative defenses to the foreclosure action, among which was that the mortgagee had failed to comply with the notice provision of 14 M.R.S. §6111(1).

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[2] "Applicators admits the allegations of ¶¶ 8 and 31 of the Complaint, except that it lacks knowledge or information sufficient to form a belief about the truth of the allegation that it is 'in ninth position behind Plaintiff's Mortgage' ". Answer at ¶1.

The Law Court held that the statutory notice required by §6111(1) was indeed an affirmative defense that Willis had the burden of proving (citing *Patten v. Milam*, 480 A.2d 774, 776 (Me. 1984). *ABN Amro*, *supra*, at ¶5. Since Willis did not present evidence at trial that the statutory notice had not been given, the Law Court upheld the trial court's grant of a foreclosure judgment to the mortgagee.[3]

The procedural posture of this case differs from that in *ABN Amro*. Here K&R is not claiming that Towd Point provided no Notice of Right to Cure Default. While Towd Point's Complaint for Foreclosure contains no challenge that K&R's judgment lien is void, *ABN Amro* will govern should Towd Point make this challenge in the future.

As it has at every available opportunity, Towd Point has thrown in the "red herring" of K&R's "standing". In its (1) Opposition to K&R's Motion for Findings of Fact & Conclusions of Law (A. 178), (2) Opposition to K&R's Motion to Dismiss (p. 4), and (3) Memorandum of Law In Support of Summary Judgment

[3] It was not until the enactment of PL 2009, c. 402 §17 that 14 M.R.S. §6321 was amended to place the burden on the foreclosing mortgagee to prove compliance with the notice requirement of §6111(1): "The mortgagee shall further certify and provide evidence that all steps mandated by law to provide notice to the mortgagor pursuant to section 6111 were strictly performed." However, even with the burden now on the foreclosing mortgagee, a mortgagee that fails to provide a statutorily compliant Notice of Right to Cure Default does not have its action dismissed for lack of standing. *See*, *Finch v. U.S. Bank, N.A.*, 2024 ME 2, 307 A.3d 1049.

(unnumbered pp. 3-4), Towd Point has made this argument, and in each instance K&R has responded with a citation to *ABN Amro Mortgage Group*[4].

Inexplicably, Appellee's Brief ignores the adverse precedent of *ABN Amro Mortgage Group* and fails to address it. This is a serious ethical lapse. As discussed by Justice Alexander, the following is among the questions that ". . . can be usefully addressed to support competent, ethical appellate briefing:"

> Has adverse precedent been properly addressed, or has it been ignored? M.R. Prof. Conduct 3.3(a)(1), (2) and Reporter's Notes to Rule 3.3; *Borowski v. Depuy, Inc.*, 850 F.2d 297, 305 (7th Cir. 1988).

Maine Appellate Practice (Sixth Edition), Alexander, D., § 706 (2022).

For the foregoing reasons, the Law Court may dispense with Towd Point's arguments about K&R's "standing."

II. THE DEATH KNELL EXCEPTION APPLIES TO THIS INTERLOCUTORY APPEAL.

A. THE APPELLEE'S BRIEF'S INAPPROPRIATE INTRODUCTION.

The Appellee's Brief, at pp. 27-28, discusses the viability of this interlocutory appeal, stating:

> The Court's clear statement that the "Proceeds of any sale are to be held in escrow by the Receiver pending Order of the Court regarding distribution," (A. 19), was sufficient to ensure that any lien K & R has on the Property, would transfer to the proceeds to be held by the Court Appointed Receiver. Because the sale proceeds will be held in escrow by the Receiver and the Court will determine how those proceeds will

[4] See K&R's (1) Reply to Opposition to Rule 52(a) Motion, pp. 3-4; (2) Reply to Opposition to Motion to Dismiss, pp. 2-3; and (3) Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment, ¶9.

> be distributed, K & R's argument suggesting that it will not be able to establish a perfected security interest in the proceeds under the Uniform Commercial Code without having control of the deposit account in which the proceeds are held is wholly insufficient to demonstrate any irreparable loss of rights so as to justify immediate appellate review of the Trial Court's interlocutory Order appointing the Receiver under the Death Knell Exception to the Final Judgment Rule.

Towd Point cites no authority for this proposition. Without a specific request and reference, Towd Point implicitly invites the Law Court to review an exposition of authorities contained in the Introduction to the Brief. However, this is clearly improper appellate procedure, and the Law Court should not accede to it.

Preliminarily, M.R. App. P. 7A(a)(1)(A-H) specifies the sections for the appellant's brief. The third and seventh sections are an Introduction and an Argument. The Introduction is optional. The Argument is mandatory. Here is the relevant text of the Rule:

> **(C)** A short introduction stating the nature of the case. This section is optional.
> . . .
> **(G)** An argument. The argument shall contain the contentions of the appellant with respect to the issues presented and the reasons supporting each contention, with citations to the authorities upon which the appellant relies. The argument for each issue presented shall begin with a statement of the standard(s) of appellate review applicable to that issue.

The sections of the appellee's brief are set forth in M.R. App. P. 7A(b):

> The brief of the appellee shall conform to the requirements of subdivision (a) of this Rule, except that a statement of the issues and standards of appellate review or of the facts or procedural history of the case need not be included unless the appellee is dissatisfied with the statements of the appellant.

Rule 7A was amended is 2022 "to add the option of including a short introduction stating the nature of the case . . . ." Advisory Note – June 2022:

> "An introduction, if included, should be a short statement summarizing the procedural posture of the appeal. For example, "This is an appeal from the grant of the insurer's motion for summary judgment in a slip-and-fall action," or "This a theft case in which the defendant appeals from the denial of a motion to suppress statements allegedly obtained in violation of his right against self-incrimination," or "The mother appeals after the trial court granted the father's post-divorce motion to amend the divorce judgment to give the father final decision-making authority over medical decisions for the parties' minor children."
> *Id*.

Compare the Introduction in the Appellee's Brief to the requirements of the Rule 7A: the Introduction runs for seven pages (1943 words), and cites numerous authorities to support a multitude of observations and arguments ranging from, *inter alia*:

1. the Superior's Court's equitable jurisdiction;
2. the powers of a Receiver;
3. the doctrine of "custodial legis";
4. exceptions to the final judgment rule;
5. the Superior Court's Order of December 9, 2024;

6. a discussion of photographs in the trial court record;
7. the discretion exercised by the Superior Court;
8. the efforts expended by the Receiver; and
9. the harm suffered by Towd Point from the "unnecessary" delay caused by K&R's appeal.

None of this is appropriate for an Introduction. The effect of this approach by Towd Point is that Section B of the Argument in Appellee's Brief is devoid of the requisite "citations to the authorities" upon which the Appellee relies, as required by M.R. App. P. 7A(b), with respect to the language quoted above regarding the viability of this appeal. Towd Point's approach is also prejudicial to K&R's formulation of this Reply Brief as it obscures which arguments in the Introduction are intended to apply to which sections of the Argument. Furthermore, as Justice Alexander says,

> Respect for the direction of [Rule 7A] and its supporting Advisory Notes regarding the organization and contents of the brief is important to support the credibility of the arguments presented.

Maine Appellate Practice, *supra*, Rule 7A Comments, § 7A.2 (2022).

B. THE APPLICABILITY OF THE DEATH KNELL EXCEPTION.

The gravamen of K&R's appeal is that the Superior Court did not have the authority in this residential foreclosure action to appoint, prior to judgment, a Receiver with a power of sale. Once the Receiver sells the mortgaged real estate, the sale cannot be undone. As much as it would like a buyer at a Receiver's sale to take on the carrying costs of the property as soon as possible, Towd Point does not

address all the circumstances that render its approach ill-suited to fully protect the rights of junior parties-in-interest and the mortgagor himself.

Justice Horton noted in his Order of June 2, 2025, following the Superior Court's denial of K&R's Motion to Dismiss,

> [i]t is not clear that K&R would have any basis to (or would seek to) maintain its interlocutory appeal if Towd were to drop its effort to sell the property before judgment and pursue a conventional foreclosure judgment. Still, because Towd still seeks a pre-judgment sale of the property, there remain substantial legal issues, including whether the trial court can authorize a sale of abandoned before entry of a foreclosure judgment, particularly given that the effect of abandonment on the equity of redemption is to shorten it, not eliminate it. *See* 14 M.R.S. § 6326(4)(B).

While the Superior Court's denial of K&R's Motion to Dismiss affects the legal analysis, what remains true is that the denial itself may be appealed. Also, as noted in Appellant's Brief, p. 18,

> 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.

Moreover with sale of the property occurring prior to judgment, this scenario presents the very circumstances that the Law Court considered in *In re Bailey M,* 2002 ME 12, ¶ 8, 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.

III. APPELLEE'S BRIEF IS REPLETE WITH FACTUAL ERRORS AND MISSTATEMENTS.

Section C of the Appellee's Brief, pp. 29-36, asserts that the Superior Court did not abuse its discretion in granting Towd Point's Motion to Appoint a Receiver. This section makes numerous factual errors and misstatements.

A. MISRELIANCE ON PHOTOGRAPHS.

At p. 31, K&R's Appellant's Brief states that the Affidavit signed by Matthew Kelly (A. 76), a paralegal employed by Towd Point's legal counsel, provided the entirety of the alleged factual support adduced by Towd Point in support of its Motion for Appointment of Receiver. While Appellee's Brief does not directly refute this statement, it does go on at length discussing (1) certain photographs accompanying Mr. Kelly's Affidavit (A. 120-122) and (2) the photographs of Exhibit A attached to the Affidavit of Tasha Massey (A. 129-177). Appellant claims that these photographs are evidence of a "marijuana grow operation".

However, none of these photographs, much less their interpretation, were competent evidence before the Superior Court. Mr. Kelly's Affidavit[5] does not

[5] Mr. Kelley's Affidavit is captioned "Affidavit in Support of Consent Motion for Order of Abandonment and Receivership".

even mention the three photographs that accompanied his Affidavit. He does not refer to them as an Exhibit. He does not attempt to authenticate them or describe what they depict. The photographs are not part of Exhibit A to the Kelly Affidavit (A. 79 – 82), because that document is self-described as containing four pages. The two pages of photographs within those four pages bear a page number and the logo of the company that prepared the document. In other words, these photographs are mere surplusage.

As to the photographs contained within Exhibit A to the Tasha Massey Affidavit, that entire Affidavit is not competent evidence. Towd Point adduced her Affidavit as part of its November 8, 2024 Reply to K&R's Opposition to the Motion for Appointment of Receiver. 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 also not properly before the Court because:

1. it should have been submitted with Towd Point's October 22, 2024 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's 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] (A. 36),
4. Towd Point did not request or receive leave of court to file the Massey Affidavit, and

5. the trial court's Order of December 6, 2024 specifically stated that it was issued "[h]aving reviewed Plaintiff's Motion with supporting Affidavit" (*i.e.*, the Matthew Kelly Affidavit) (A. 19).

Moreover, Towd Point concedes that these photographs require expert interpretation, which the Massey Affidavit did not provide. Appellant's Statement of Fact #37 states that "closer examination" is required to decipher that the photographs depict marijuana growing activity.

B. CONFIRMATION OF "VACANCY".

At p. 29 of its Brief, Towd Point claims that its Motion for Appointment of Receiver sought "confirmation of vacancy pursuant to 14 M.R.S. § 6327". While section 1 of this Motion did allege, "upon information and belief",[6] that the mortgaged premises were vacant (A. 50), nowhere within the four corners of that document is there a request that the trial court find that the premises were "vacant", much less "abandoned". Neither did the "Proposed Order" (A. 83).

Further, §6327 contains no provision for the trial court to "confirm", or to find, that a property is vacant. Section 6326(3) does provide that the court may

[6] This allegation is based upon ¶4 of and Exhibit A to the Kelly Affidavit (A. 79). However, ¶4 avers that "Plaintiff inspected the property, confirmed its vacancy, and completed an inspection report, attached . . . as Exhibit A." However, as discussed at p. 33 of Appellant's Brief, Exhibit A to the Kelly Affidavit 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 was not competent evidence for the trial court to consider.

determine that a property is "abandoned", but Towd Point did not pursue that relief, and the Superior Court did not so find.

C. THE CANARD OF K&R'S "OBJECTION".

On four separate occasions in Appellee's Brief, Towd Point refers to K&R's objection to having the case go to trial on November 5, 2024 as based upon the "alleged procedural errors" of the absence of a scheduling order and pre-trial conference[7]. This is nonsense.

The transcript of the hearing that day shows that the Superior Court recognized that the court was ". . . scheduled for a [] damages hearing after the [] defendant was defaulted." (A. 24). The Court then references that Attorney Greenberg objected to a "final foreclosure hearing today" due to a the absence of a scheduling order and of the opportunity for discovery. *Id*. However, once Attorney Greenberg spoke to the issue, after a previous period of off-the-record discussion, he clarified: "But the most important thing is the notice of hearing [on default judgment] did not specify that there would be a trial affecting my client's interests." (A. 29). Attorney Greenberg elaborated on the several aspects of the case that should preclude trial on November 5, 2024, with the trial court agreeing with him that there would be no trial that day. (A. 36).

Notably, Attorney Greenberg did not object to the hearing that day on Towd Point's Motion for Appointment of Receiver, although there had been no prior notice given by the Court of a hearing on that motion. (A. 31).

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[7] See Appellee's Brief at pp. 11 and 12 (Introduction), p. 19 (Statement of Fact #30), and at p. 30 (Argument).

Also notably, although no damages hearing was conducted on November 5, 2024, Towd Point submitted an Order for Default Judgment on November 8, 2024 (A. 12). The Court granted that Order on November 12, 2024 (A. 12-13).

By failing to advise the Law Court of the fact of the "most important" basis for K&R's objection to trial on November 5, 2024, and for persisting in characterizing the objection as based on much less substantial grounds, Towd Point violated what Justice Alexander has stated is competent, ethical appellate briefing:

- Does the brief, although an advocacy document, adequately outline the factual and procedural history of the case? (citation omitted).
- Are any important facts or procedural events omitted from the discussion?

Maine Appellate Practice, *supra*, § 706 (2022).

D. NO FACTUAL SHOWING OF ANY INADEQUACY IN TOWD POINT'S REMEDIES AT LAW.

Pages 30-36 of Appellee's Brief discuss the Superior Court's equitable jurisdiction and how certain other courts have found no adequate remedy at law in appointing a Receiver. Completely absent from this discussion, from Towd Point's Motion for Appointment of Receiver, and from the Trial Court's Order of December 6, 2024 is a factual showing that Towd Point's remedies at law are inadequate, as required by 14 M.R.S. §6051 (1995).

Appellant's Brief, at pp. 24-27, shows why Towd Point's remedies at law are adequate. In the absence of dispute, the Law Court may correctly infer that Towd Point concedes this vital point of law.

IV. APPELLEE MIS-INSISTS THE SUPERIOR COURT MADE ADEQUATE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

The final section of Appellee's Brief, Section D, pp. 36-37, is a recitation of alleged facts and circumstances from which Towd Point concludes that the Superior Court's did not abuse its discretion in denying K&R's Motion for Findings of Fact and Conclusions of Law. However, Towd Point does not argue that the Superior Court made any conclusions of law that demonstrated its correct understanding of the controlling law.

For the sake of brevity and compliance with the page limit of M.R. App. P. 7A(f)(1), K&R makes only the following comments to this final section of Appellee's Brief (to matters already discussed in Appellant's Brief and this Reply):

1. "In light of the fact that K & R served and filed its opposition informally during the hearing and formally following the hearing, it was appropriate that the Plaintiff file a Reply with even further photographic documentation of the Property's condition to address any concerns beyond a shadow of doubt that the property was abandoned and appointment of a Receiver was necessary."

Comment: The transcript of the November 5, 2025 shows that Attorney Longoria offered to file a "supplemental memo of law" to K&R's Objection. She made no mention of a further Affidavit. (A. 35). The Superior Court declined her offer: "I don't need further briefing . . ." (A. 36).

2. ". . . K&R did not timely object to the Proposed Order . . ."

Comment: K&R preserved the issues raised in this Appeal by its timely Objection to Motion for Receiver (A. 123). Towd Point's Proposed Order (A. 85)

was consonant with Towd Point's Motion and with the Superior Court's ruling granting that Motion. It did not require further objection.

CONCLUSION

As Justice Horton observed in his Order denying Towd Point's Motion for Leave for Trial Court Action on Motion to Sell, dated June 2, 2025, Towd Point ". . . has not made any showing that the law even permits the trial court to act in the manner [Towd Point] asks this Court to allow." This observation is also true as to the trial court's authority to appoint a Receiver in the first place.

Respectfully Submitted,

Date: November 13, 2025

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