

STATE OF MAINE
CUMBERLAND, ss.

MAINE DISTRICT COURT
DISTRICT NINE
DIVISION OF NORTHERN CUMBERLAND

FEDERAL NATIONAL MORTGAGE
ASSOCIATION

Plaintiff

v.

NICOLLE M. BRADBURY

Defendant

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**MEMORANDUM OF DEFENDANT
IN OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT**

SUMMARY OF ARGUMENT

I. THE SUMMARY JUDGMENT STANDARD AND PLAINTIFF'S REQUIRED PROOF.

II. THE PLAINTIFF'S STATEMENT OF MATERIAL FACTS DOES NOT SHOW THAT PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

III. THE AFFIDAVIT RELIED UPON BY PLAINTIFF TO SUPPORT ITS STATEMENT OF MATERIAL FACTS IS SUBSTANTIALLY AND MATERIALLY DEFICIENT.

A. AFFIDAVITS SUPPORTING SUMMARY JUDGMENT MOTIONS MUST COMPLY WITH THE REQUIREMENTS OF M.R.Civ.P 56(e).

B. THE PLAINTIFF'S AFFIDAVIT IS NOT BASED UPON PERSONAL KNOWLEDGE AS REQUIRED BY M.R.Civ.P. 56(e).

C. BUSINESS RECORDS REFERRED TO AND RELIED UPON IN THE PLAINTIFF'S AFFIDAVIT ARE NOT ATTACHED AS REQUIRED BY M.R.Civ.P. 56(e).

IV. THERE ARE GENUINE ISSUES OF MATERIAL FACT.

V. SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANT PURSUANT TO M.R.Civ.P 56(c).

VI. CONCLUSION

AUGUMENT

I. THE SUMMARY JUDGMENT STANDARD AND PLAINTIFF'S REQUIRED PROOF

In deciding a plaintiff's summary judgment motion, the court must "first determine the elements of the causes of action at issue . . ." *Curtis v. Porter*, 2001 ME 55, ¶ 8, 784 A.2d 18, 22. The elements of a cause of action for a foreclosure, such as this one, which must appear in a plaintiff's statement of material facts, and which must be supported by proper affidavits, M.R.Civ.P. 56(e), are the following:

1. There was a note signed by the defendant and secured by the mortgage being sued upon;
2. The plaintiff is in possession of the note, 11 M.R.S.A. §§ 1-201(20) & 3-1301(1)¹;
3. The note is endorsed to the plaintiff or is endorsed in blank, 11 M.R.S.A. §§ 1-201 & 3-1301(1), or the plaintiff is otherwise a party entitled to enforce the note 11 M.R.S.A. § 3-1301(2);
4. The plaintiff is the owner of the mortgage by virtue of being the named mortgagee or by being the assignee of the mortgage, or is otherwise entitled to enforce, the mortgage, 14 M.R.S.A. § 6321;
5. There has been a default under the note and/or mortgage, ¶ 22 of Mortgage;
6. The plaintiff has sent, or delivered, to the defendant the required notice informing the defendant of the default, and of his right to cure and reinstate the loan, and a statement of the plaintiff's right to accelerate if the default is not cured. 14 M.R.S.A. § 6111 and ¶ 22 of Mortgage;
7. The failure of the defendant to cure after notice of default, 14 M.R.S.A. § 6321 & ¶ 22 of Mortgage;
8. The amount due under the note and mortgage, 14 M.R.S.A. § 6321.

¹ While a foreclosure case is an equitable proceeding, *Kennebec Federal Savings & Loan v. Kueter*, 1997 ME 123, ¶ 7, 695 A.2d 1201, affecting real estate, if the obligation secured by the mortgage is a negotiable instrument, the UCC applies to it. 11 M.R.S.A. § 3-1102. See also *FDIC v. Houde*, 90 F.3d 600, 30 U.C.C. Rep. Serv. 2d (Callaghan) 549 construing Maine law.

If a plaintiff seeking a judgment of foreclosure fails to put all of "the material facts before the court, . . . , the motion will not be granted, regardless of the adequacy, or inadequacy, of the non-moving party's response." *Levine v. RBK Caly Corp.*, 2001 ME 77, ¶5, 770 A. 2d 653, 655.

If the Plaintiff's Statement of Material Facts puts before the court all of the elements of the cause of action upon which Plaintiff seeks judgment, the court must then determine whether there is a genuine issue as to any of those facts. Summary judgment is appropriate only "if the record reflects that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." *Burdzel v. Sobus*, 2000 ME 84, ¶6, 750 A. 2d 573, 575 (citation omitted). Conversely, summary judgment is improper if there remains a genuine issue of material fact. *Brawn v. Oral Surgery et al*, 2003 ME 11, ¶15, 819 A. 2d 1014, 1022. "A material fact is one having the potential to affect the outcome of the suit." *Burdzel*, 2000 ME 84 at ¶6, 750 A.2d at 575. "A genuine issue exists when the evidence requires a fact finder to choose between competing versions of the truth." *Platz Associates v. Finley*, 2009 ME 55, ¶ 10, 973 A.2d 473, quoting *Farrington's Owners' Ass'n v. Conway Lake Resorts, Inc.*, 2005 ME 93, ¶ 9, 878 A.2d 504, 507. The movant is entitled to judgment as a matter of law only if the court determines, after "viewing the evidence and all reasonable inferences therefrom most favorable to the party opposing the motion, (that) a jury could not reasonably find for that party on an issue that under the substantive law is an essential element of the claim." M.R.Civ.P. 50(a).

II. THE PLAINTIFF'S STATEMENT OF MATERIAL FACTS DOES NOT SHOW THAT PLAINTIFF IS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Plaintiff has failed to establish all of the essential elements of a cause of action for foreclosure. The essential proof missing from the Plaintiff's Statement of Material Facts (hereinafter "Supp. S.M.F."), and also missing from the supporting affidavits, is an assertion that the Plaintiff is in possession of the note.

For the Plaintiff to be entitled to summary judgment, it must show, in the Supp. S.M.F., that the Plaintiff is a "person entitled to enforce" the note. For a party to be entitled to enforce an instrument, it must either be a holder, or a "nonholder *in possession* of the instrument who has the rights of a holder." 11 M.R.S.A. §3-1301(1) & (2).² The term "holder" "with respect to a negotiable instrument means the person *in possession* if the instrument is payable to bearer or, in the case of an instrument payable to an identified person, if the identified person is *in possession*." 11 M.R.S.A. §1-201(20), (emphasis added.)

There is no assertion in the Supp. S.M.F. (or in the supporting affidavits) that the Plaintiff is in possession of the note. There is, in ¶3 of the Supp. S.M.F., the assertion "the Note was subsequently assigned to FNMA by the endorsement as set forth on the Note Endorsement attached to the Note." But, endorsement is only one half of the required proof for a party to be entitled to enforce the note. Under virtually identical circumstances, a failure by the moving party to prove possession of the note was recently determined to be a basis for denial of summary judgment sought by a party trying to enforce a note in *US Bank National Association v. Jaenisch*, DOV-RE-09-23 (Dist. Ct. Dover-Foxcroft, Stitham, J., 7/31/09). The Plaintiff's failure to establish that it has the right to enforce the note means that it has failed to establish that it is entitled to a foreclosure judgment as a matter of law.

The failure of the Plaintiff to include an essential element of its cause of action in its statement of material facts should be the end of the inquiry for the trial court under the holdings of the Law Court in *Curtis v. Porter, supra.* and *Levine v. RBK Caly Corp, supra.* That failure requires the denial of the motion for summary judgment. The

² 11 M.R.S.A. §3-1301 of the Maine UCC provides as follows:

"Person entitled to enforce" an instrument means:

- (1). The holder of the instrument;
- (2). A nonholder in possession of the instrument who has the rights of a holder; or
- (3). A person not in possession of the instrument who is entitled to enforce the instrument pursuant to section 3-1309 or 3-1418, subsection (4). A person may be a person entitled to enforce the instrument even though the person is not the owner of the instrument or is in wrongful possession of the instrument.

Defendant, however, must address the other deficiencies in the Plaintiff's motion papers in order to preserve these issues. *Town of Orient v. Dwyer*, 490 A.2d 660, 662 (Me. 1985).

III. THE AFFIDAVIT RELIED UPON BY PLAINTIFF TO SUPPORT ITS STATEMENT OF MATERIAL FACTS IS SUBSTANTIALLY AND MATERIALLY DEFICIENT.

A. AFFIDAVITS SUPPORTING SUMMARY JUDGMENT MOTIONS MUST COMPLY WITH THE REQUIREMENTS OF M.R.Civ.P 56(e).

The requirements of M.R.Civ. P. 56(e) are simple and clear:

1. Summary judgment affidavits must "be made upon personal knowledge."
2. They must "set forth facts as would be admissible in evidence . . ."
3. They must show "affirmatively that the affiant is competent to testify to the matters stated therein," and
4. "Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

These have been the announced requirements of the Law Court for well over 40 years. See cases ranging from 1967, *Steeves v. Irwin*, 233A.2d 126, 130 (Me. 1967), (affidavits "must present admissible evidence and must not only be made on personal knowledge of the affiant, but must show that the affiant possesses the knowledge asserted"), to June of this year, *Platz Associates v. Finley*, 2009 ME 55, ¶16, 973 A. 2d 743, ("affidavits must 'be made on personal knowledge,' must 'set forth such facts as would be admissible in evidence,' and must show affirmatively that the affiant is competent to testify to the matters stated therein") quoting current Rule 56(e).

B. THE PLAINTIFF'S AFFIDAVIT IS NOT BASED UPON PERSONAL KNOWLEDGE AS REQUIRED BY M.R.Civ.P. 56(e).

The plaintiff relies upon the affidavit of Jeffery Stephan dated August 5, 2009. He asserts that he has custody of the records relating to mortgage at issue in this case and that "(m)y knowledge as to the facts set forth in this affidavit is derived from my personal knowledge of those records." Stephan Aff. ¶ 1. Thus, Stephan establishes immediately that he has *no personal knowledge of anything stated in his affidavit*-- he has only hearsay

knowledge of what he might have learned from reading the business records. It is not proper for Mr. Stephan to make "statements purporting to describe the substance or interpret the contents of documents." *Town of Orient v. Dwyer*, 490 A.2d 660, 662 (Me. 1985) citing 10A C. Wright, Miller & Kane, *Federal Practice & Procedure*, §2722 at 56-58. "(T)he testimony of the proponent (of the business records) is only admissible to the extent that it lays a sufficient foundation for the *document* that is being offered in evidence unless some other exception to the hearsay rule exists." *Washington Mutual Bank v. Morin*, 2007 Me. Super. LEXIS 250 (York Sup. Ct., Brennan, J., 12/27/07). What Judge Brennan determined in that case applies with equal force here--there is "no other exception to the hearsay rule" that would render Mr. Stephan's statements admissible.

Stephan Aff., ¶ 1 asserts that the "records were made at or near the time of the event, transaction, or from information transmitted by, a person with personal knowledge of the events recorded therein." But there is nothing in his affidavit to show that he was in any position to know that such assertions are true. Thus, he has failed to "show affirmatively that the affiant is competent to testify to the matters stated . . . " by him, as required by Rule 56(e). Such statements are not admissible. See M.R.Ev. 602 stating, "(a) witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

Contrast this with the testimony of the bank officer in *Northeast Bank v. Soley*, 481 A.2d 1123 (Me. 1984), where the Law Court stated that it was the bank officer's being "'intimately involved in the daily operation' of the bank" that made him "competent to testify as to the essential elements of the business records exception." *Id* at 1126 citing *E.N. Nason, Inc. v. Land-Ho Development Corp.*, 403 A.2d 1173, 1178 (Me. 1979), 1 A.L.R. 4th 306. Here, Stephan has failed to show that he has any involvement in the operation of GMAC other than his role as a "Limited Signing Officer"--he simply signs papers. He does not have, and does not assert, any basis to have personal knowledge about anything contained in his affidavit.

Stephan Aff. ¶ 7 asserts that Defendant is in default for failing to make monthly payments. The only person who could make that statement as a matter of "personal knowledge" would be the employee at GMAC or FNMA charged with receiving Defendant's mortgage payments and applying them to the mortgage account. The testimony of any other

person to that fact is inadmissible hearsay under M.R.Ev. 802 and is prohibited by M.R.Ev. 602. Stephan does not assert or show that he is the one who collects the mortgage payments on this account (and it is doubtful that a "Limited Signing Officer" would have such duties.) The assertion by Stephan that the Defendant is in default is inadmissible hearsay, and Plaintiff has made no effort to prove that assertion by offering records under the business records exception [M.R.Ev. 803(6)] to the hearsay prohibition of M.R.Ev. 802. Stephan's statement on this alleged fact cannot be accepted by the court. *Washinton Mutual v. Morin, supra*. See also *Countrywide v. D'Amico*, BID-RE-07-204 (Bidd. Dist. Ct., 12/3/08) stating "(w)ithout the proper foundation for business records, and the records themselves (as to the existence of a default), this court cannot accept these statements in Ms. Selman's Affidavit."

Stephan A.. ¶ 8 asserts that a notice of default was sent to the Defendant on November 7, 2008. The purported default notice is attached to Stephan's affidavit as Exhibit D. An inspection of that letter does not reveal who, if anyone, signed it, and Stephan's name appears nowhere upon it. There is nothing in Stephan's affidavit that reveals who prepared the letter, on whose behalf it was sent, or containing any evidence (such as a certificate of mailing) that it was in fact sent. Thus the Stephan affidavit is devoid of any evidence required by M.R.Ev. 602, and by M.R.Civ.P 56(e) that would "show affirmatively that (Stephan) is competent to testify to . . . " the assertion that a default notice was ever sent to the defendant.

Stephan Aff. ¶ 9 states the amount due on the mortgage loan at issue, stating the amount of principal due, the amount of interest due, an amount of late fees due, an amount of "escrow advances" due, property inspection fees due, and a credit due for a "suspense balance". Yet again, his affidavit is devoid of any information as to how he could possibly have personal knowledge of all, or even any, of those facts. His statements as to those sums claimed to be due is simply hearsay and are prohibited by M.R.Civ.P. 56(e) and M.R.Ev. 602 & 802, *Streeter v. Caparetto*, 2008 Me. Super. LEXIS 61 (Cumb., Delahanty, J.)

Because the Stephan Affidavit in its entirety, and in its specific allegations, is based upon inadmissible hearsay, Rule 56(e) requires the rejection of its statements. This leaves the Plaintiff with no factual support for its already insufficient statement of material facts, and mandates that the motion for summary judgment be denied. *Levine v. RBK Caly Corp., Id* at

¶6, "A party who moves for summary judgment must properly put the motion, and most importantly, the material facts before the court or the motion will not be granted . . . "

C. BUSINESS RECORDS REFERRED TO AND RELIED UPON IN THE PLAINTIFF'S AFFIDAVIT ARE NOT ATTACHED AS REQUIRED BY M.R.Civ.P. 56(e).

In the second sentence of Paragraph 1 of his affidavit, Stephen asserts that GMAC is the servicing agent for FNMA. That relationship between GMAC and FNMA cannot arise except by virtue of a contract between those two entities. Stephan is referring to that contract in making his assertion, yet he has failed to meet the requirement of Rule 56(e) to attach a sworn copy of that contract to his affidavit. It is necessary for that contract to be presented to the court so that the fact finder may determine for itself what responsibilities GMAC has for servicing this mortgage and for keeping the records that form the basis for this motion for summary judgment. It is not appropriate for the court to accept or consider the proffered testimony of Stephan as to the content of that contract. *Town of Orient v. Dwyer, supra*.

As noted in Section III B above, Stephan has failed to offer the business records upon which he must be relying as to the assertions in Paragraphs 7,8 and 9 of his affidavit claiming the existence of a default, the sending of a notice of default, and the balances due. Because Stephan does not have personal knowledge of those facts, the business records evidencing them are required. Business records as to the amounts due are required. See *Streeter v. Caparetto*, 2008 Me. Super. LEXIS 61, ¶ 8, (Cumb., Delahanty, J.) involving a similar situation, where the court held that " all of the statements contained in the affidavit regarding amounts owed are hearsay, and Streeter should provide the actual business records of the amounts owed for consideration and admission into evidence under M.R.Evid. 803(6)." See also *U.S. Bank National Assoc. v. Jaenish, supra*. A critical reason for requiring these records is that, in paragraph 2 on page 7 of the Mortgage attached to the Stephan affidavit as Exhibit B, there is a specific and intricate method that the mortgage holder must follow in applying a homeowner's payments. Without the business records being presented to the court, there is no way for the court to know whether the homeowner's payments have been properly applied, and thus no way to determine whether the amount claimed to be due by the Plaintiff

is correct. There is nothing in the Plaintiff's summary judgment papers that would allow the court to make that determination.

With the statements in the Stephan affidavit having been established as being inadmissible hearsay in Section III B above, it is now also established that the Stephan affidavit fails to overcome the hearsay prohibition of M.R.Ev. 802, by failing to bring the proffered facts before the court under the business records exception to the hearsay rule contained in M.R.Ev. 803(6). The motion for summary judgment therefore must be denied. *Levine v. RBK Caly Corp., supra.*

IV. THERE ARE GENUINE ISSUES OF MATERIAL FACT.

Even if the proffered facts of the Stephan Affidavit were properly before the Court, there are genuine issues as to those facts. Those issues of fact are established by the Defendant's Opposing Statement of Material Facts (hereinafter "Opp. S.M.F.") and the supporting affidavit of the Defendant.

Paragraph 3 of the Supp. S.M.F. asserts that the Note "was assigned to FNMA by the endorsement . . . ". That is supported by the same assertion in Stephan Aff. ¶5. However there remains a genuine issue as to whether the purported endorsement is effective. An endorsement is only effective if it appears directly on the Note, or on a document "affixed" to the note. 11 M.R.S.A. §3-1204(1).³ The alleged GMAC endorsement to FNMA is on a sheet of paper separate from the Note. There is no assertion in the Stephan Affidavit that the endorsement is "affixed" to the note. Nor has the Plaintiff produced the Note itself (as opposed to a photocopy) so that the court can determine whether the endorsement meets

³ 11 M.R.S.A. §3-1204 provides as follows:

"Indorsement" means a signature, other than that of a signer as maker, drawer or acceptor, that alone or accompanied by other words is made on an instrument for the purpose of:

- (a). Negotiating the instrument;
- (b). Restricting payment of the instrument;
- (c). Incurring indorser's liability on the instrument

Regardless of the intent of the signer, a signature and its accompanying words is an indorsement unless the accompanying words, terms of the instrument, place of the signature or other circumstances unambiguously indicate that the signature was made for a purpose other than indorsement. For the purpose of determining whether a signature is made on an instrument, a paper affixed to the instrument is a part of the instrument.

the statutory requirements. Thus, there remains a genuine issue of fact as to whether the alleged endorsement is effective.

While production of the original signed Note would allow the court to determine if the endorsement is effective, there are far more compelling reasons to require production of the original Note when the alleged holder seeks to enforce it.

It is only by actually producing the Note (rather than a mere photocopy of it) that the Plaintiff can prove that it is in possession of the Note at the time that judgment is sought. Even if the Supp. S.M.F. had asserted that the FNMA is in possession of the Note, and even if the Stephan Affidavit had backed up that assertion, it is not be possible for the court to know whether FNMA remains in possession of the Note now. The Stephan affidavit is dated August 5, 2009. By the time that this court has an opportunity to rule four or five months later, the note could well have been negotiated to some party not before the court.

In this day of frequent sales and re-sales of mortgage obligations, a re-negotiation of the note is entirely possible. A ruling for FNMA, without the original Note having been presented to the Court by FNMA with its summary judgment motion papers, would leave the Defendant vulnerable to a subsequent suit on the same note. This would leave her exposed to the emotional distress and legal expense, if she could afford to make a defense, of having to undo a judgment in this court or prove a judgment in this case as a defense in a new action by a new holder of the note.

For these reasons, it is settled Maine law that it is the actual "production of the instrument that entitles a holder to recover on it." *Camber v. Bridges*, 520 A.2d 711 (Me. 1987). That rule holds true on summary judgment as well as at trial. *FDIC v. Bandon Associates*, 780 F. Supp. 60, 63 (D. Me. 1991), holding, in a summary judgment decision, that ". . .the party who has brought an action to recover on the promissory note against the maker is entitled to recover *after production and admission of the validly executed note*." (Emphasis added.) The Plaintiff has failed to produce the note, thus leaving a genuine issue of material fact as to whether it is the party entitled to enforce it.

The Defendant, in ¶5 of the Opp. S.M.F., has denied the assertion in ¶ 8 of the Supp. S.M.F. that a demand letter was sent to the Defendant. That denial is supported by ¶3 of her affidavit. The Plaintiff has offered no certificate of mailing of the default notice, which would establish conclusive proof of receipt, under 14 M.R.S.A. §6111(3). Nor has the

Plaintiff has offered any evidence of its business practices regarding the mailing of default notices in order to support its claim that this notice was mailed. These failures, taken together with the denial in ¶ 3 of Defendant's affidavit, leave a fact finder with the burden of choosing between competing versions of the truth as to whether the default notice was sent. By definition, this is a "genuine issue of material fact". *Inkel v. Livingston*, 2005 ME 42, ¶ 4, 869 A. 2d 745, 747. The existence of this genuine issue of material fact mandates that summary judgment be denied. M.R.Civ.P. 56(c), *Platz Associates v. Finley*, 2009 ME 55, ¶ 10, 973 A.2d 473.

The Defendant, in ¶7 of the Opp. S.M.F., denies that the amounts claimed to be due in ¶7 of the Supp. S.M.F. are in fact due. The Stephan Affidavit itself show sthat there are errors in the Plaintiff's calculations of the amounts due for principal, interest, and late fees. The Plaintiff's failure to attach to the Stephan Affidavit the required business records showing credits for payments made and debits for charges to the loan account leaves the Court with no ability to determine the amounts due on this mortgage. Clearly this too leaves a genuine issue of fact, which mandates denial of the motion for summary judgment under Rule 56(c) and *Platz Associates v. Finley, supra*.

V. SUMMARY JUDGMENT SHOULD BE GRANTED TO DEFENDANT PURSUANT TO M.R.Civ.P 56(c).

Rule 56(c) provides that "(s)ummary judgment, when appropriate may be rendered against the moving party." This is a classic situation where such a ruling would be "appropriate". Even if the Supp. S.M.F. was sufficient, even if the Stephan affidavit was sufficient to establish the facts asserted, and even if there were no issues with respect to the facts asserted by Plaintiff, the Court is still left with the fact that the alleged default notice, a copy of which is attached to the Stephan Affidavit as Exhibit D, is legally insufficient.

For the Plaintiff to have the right to bring this foreclosure action, it must establish that it has complied with the provisions of Paragraph 22 on pages 18 and 19 of the Mortgage, a copy of which is attached to the Stephan Affidavit as Exhibit B. This is the instrument chosen by GMAC to evidence this mortgage loan. It requires that, if the Plaintiff claims that the Defendant has defaulted, before the Plaintiff "may bring a lawsuit to take away all of (the

Borrowers) remaining rights in the property and have the property sold" the following must happen:

The Lender (defined on page 2 to include "any Person who takes ownership of the Note and this Security Instrument", and this including the Plaintiff here) must send to the Defendant a notice that states:

1. The promise that the Defendant has failed to keep under the Note or Mortgage
2. The action that the defendant must take to correct the default;
3. The date by which the Defendant must correct the default;
4. That if the Defendant does not cure the default, the Plaintiff may require immediate payment in full.
5. That, if the Defendant pays all sums needed to cure a default, she will have the right to have the loan reinstated as if there had been no acceleration;
6. That the Defendant will have the right in any foreclosure action to contest the claim of there being a default and to present defenses.

The so-called default notice in this case fundamentally fails to meet these requirements.

First, one cannot even determine on whose behalf the notice is sent. The mortgage document clearly provides that the Plaintiff (as the successor owner of the Mortgage) must send the notice. There is no mention anywhere in the notice of the name Federal National Mortgage Association, nor of FNMA, nor of GMAC as servicer for FNMA. Even if the Defendant had received this notice, there is no way that she could have known whether it was a notice authorized by the Plaintiff.

Second, the so-called default letter does not include the statement mandated by ¶22(b)(5) of the Mortgage that, if the Defendant were to pay past due amounts, she would be entitled to "have the Lender's enforcement of this Security Instrument discontinued and to have the Note and this Security Instrument remain fully effective as if immediate payment in full had never been required." The second to last paragraph of the purported default letter seems to be an attempt at such notice, but it fails to comply with the terms chosen by the Lender to evidence this mortgage loan and fails to convey the necessary information to the

Defendant. Where a lender chooses to use a plain language statement⁴ in a mortgage of the terms required for a default notice, that party should be held to strict compliance in the use of that language in the default letter. *In re Colony Square*, 843 F.2d 479, 481 (11 Cir. 1988) ("Contracts which set forth the manner in which a party must exercise a remedy in the event of a default must be strictly adhered to If a party does not comply with the requirements of the contract's default clause, it forfeits its rights under the clause.") If the Court feels that there is any ambiguity left in ¶22 of the Mortgage as to what language must be used in the default letter, then any such ambiguity must be construed against the Plaintiff as successor to the drafter of the document. *Barratt v. McDonald Investments*, 2005 ME 43, ¶ 15, 870 A.2d 146.

Third, the so-called default letter makes not attempt to include the statement mandated by ¶ 22(b)(6) of the Mortgage, of the right of the Defendant in any foreclosure to argue that she did keep her promises under the Note and Mortgage and to present other defenses.

It is the longstanding and fundamental law in Maine that mandated steps, such as the those addressed above, "must be strictly performed." *Camden National Bank v. Peterson*, 2008 ME 85, ¶21, 948 A.2d 1251, 1257, citing *KeyBank Nat'l Ass'n v. Sargent*, 2000 ME 153, ¶36, 758 A.2d 528, 537, which in turn cites Maine decisions going back to 1902.

These deficiencies in the default notice are not something about which there exists an issue of fact. The facts regarding these deficiencies and their legal impact, if summary judgment is denied, will be the same at trial--they will require a finding that the mandated steps required before this Plaintiff could commence foreclosure have not been met. It is for this reason that it is "appropriate", within the meaning of Rule 56(c), for the court to order summary judgment in favor of the Defendant now.

⁴ On the 7th page of the Mortgage (shown on the bottom as "bk 458 pg 090") the following paragraph appears:

PLAIN LANGUAGE SECURITY INSTRUMENT

This Security Instrument contains promises and agreements that are used in real property security instruments all over the country. It also contains promises and agreements that vary, to a limited extent, in different parts of the country. My promises and other agreements are stated in "plain language."

VII. CONCLUSION

The Supp. S.M.F. does not include a fact essential to proof by the Plaintiff of a right to a judgment of foreclosure--it fails to establish that the Plaintiff has the right to enforce the Note by failing to establish that the Plaintiff has actual possession of the Note. The Stephan Affidavit fails to support any of the critical facts stated in the Supp. S.M.F.--it is inadmissible hearsay in its entirety and makes no effort to overcome the hearsay problem by offering the business records to prove the facts asserted. And, the purported default notice fails to meet the requirements of the Mortgage. For these reasons, Plaintiff's Motion for Summary Judgment should be denied, and the Court should exercise its power to award summary judgment in favor of Defendant.

DATED: December 4, 2009

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