MAINE SUPREME JUDICIAL COURT

Reporter of Decisions
Decision No. Mem 11-151
Docket No. Cum-11-4

JP MORGAN CHASE BANK, N.A.

v.

JOHN KENDALL et al.

Argued on September 15, 2011
Decided October 4, 2011

Panel: ALEXANDER J., and LEVY, SILVER, MEAD, GORMAN, and JABAR, JJ.

MEMORANDUM OF DECISION

John Kendall and S. Sherman B. Kendall appeal from two orders of the Superior Court (Cumberland County, *Wheeler, J.*) denying their motion for relief from judgment pursuant to M.R. Civ. P. 60(b) and allowing JP Morgan to proceed with a foreclosure on their property absent full compliance with the notice timing deadline of 14 M.R.S. § 6323(1) (2010). Although we determine that the Kendalls' appeal is timely and not moot, we do not agree with the Kendalls' contention that the court erred in determining that the proper remedy for JP Morgan's failure to comply with section 6323(1) is preclusion from seeking a deficiency judgment. *See Keybank Nat'l Ass'n v. Sargent*, 2000 ME 153, ¶¶ 37, 38, 758 A.2d 528 (when a mortgagor challenges components of a foreclosure sale, the reviewing court should consider "whether it would be equitable to set aside the sale given the procedures that were employed by the mortgagee"); *Cadle Co v. LCM Assocs.*, 2000 ME 73, ¶ 9, 749 A.2d 150 ("We hold that a mortgagee must adhere to the statutory time requirements of section 6323 if it intends to seek a deficiency judgment, absent unusual or exceptional circumstances . . . .").

We do not reach the merits of the Kendalls' arguments that JP Morgan waived the foreclosure and that JP Morgan has not established that there was a

balance due on the note. The Kendalls have not alleged that they made payments to JP Morgan related to the mortgage on their residence, which is the subject property of this foreclosure. The Kendalls' undertaking as guarantor is separate and distinct from the borrower's obligation, *see Casco Bay Northern Bank v. Moore*, 583 A.2d 697, 699 (Me. 1990), and the Kendalls' proper avenue to raise their waiver argument would have been in the foreclosure action on the property for which funds have allegedly been paid. We will not entertain a defense to the foreclosure action first raised in a Rule 60(b) motion when it could have been brought to the trial court's attention prior to entry of the judgment of foreclosure, *see Sargent*, 2000 ME 153, ¶ 15, 758 A.2d 528; *United States v. Harriman*, 2010 U.S. Dist. LEXIS 117236, at *14 (D. Me. Nov. 2, 2010), and we therefore find no abuse of discretion in the court's failure to grant relief on the ground that JP Morgan allegedly failed to establish a balance due on the note.

The entry is:

Judgment affirmed.

On the briefs:

Lee H. Bals, Esq., and Jennie L. Clegg, Esq., Marcus, Clegg & Mistretta, P.A., Portland, for appellants John Kendall and S. Sherman B. Kendall

Leonard M. Gulino, Esq., Wendy J. Paradis, Esq., and Andrew C. Helman, Esq., Bernstien, Shur, Sawyer & Nelson, Portland, for appellee JP Morgan Chase Bank, N.A.

At oral argument:

Lee H. Bals, Esq., for appellants John Kendall and S. Sherman B. Kendall

Leonard M. Gulino, Esq., for appellee JP Morgan Chase Bank, N.A.