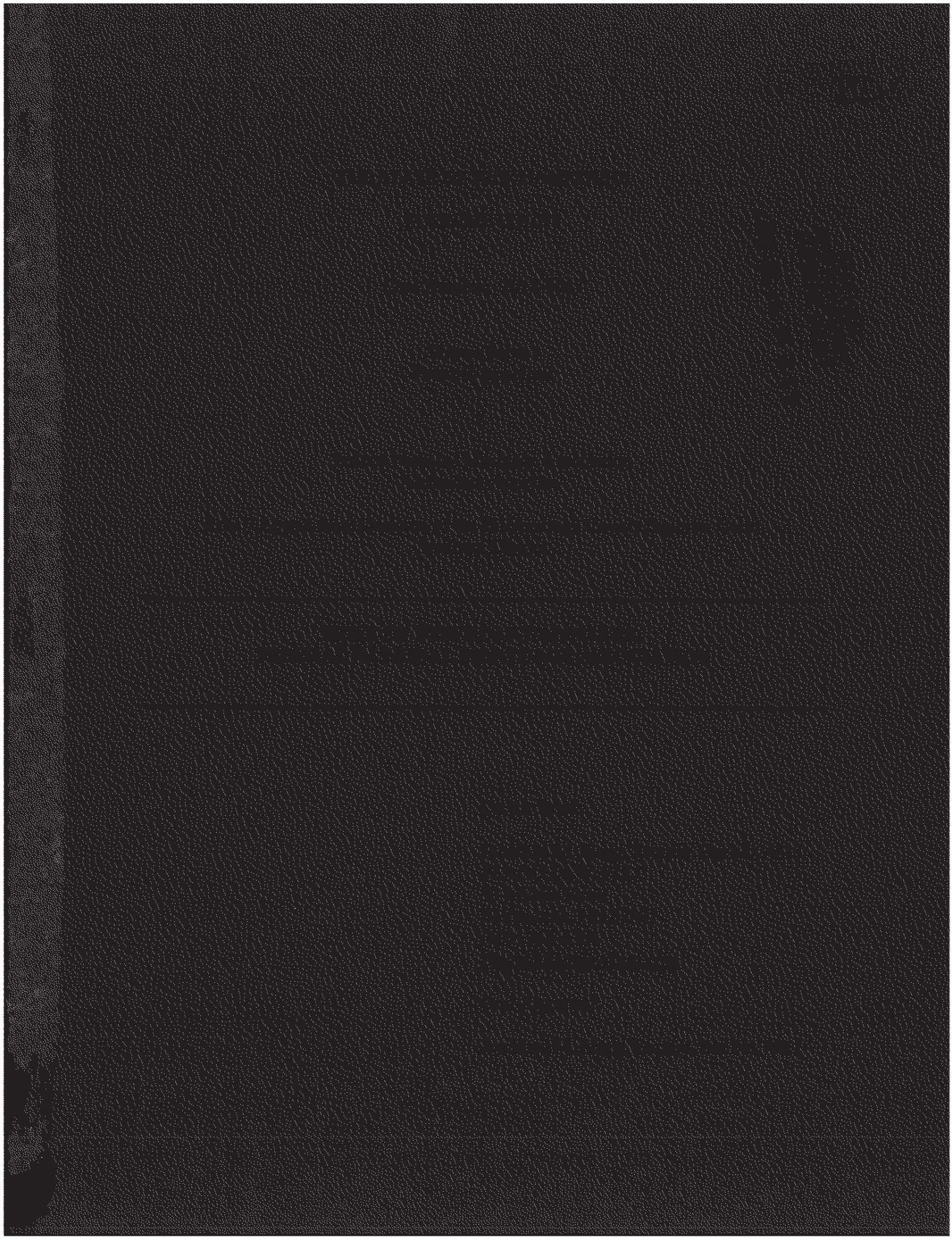

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Summary of Argument

Both parties to this appeal have the same issue with the Lower Court decision, but each think that the Court should have reached completely different results as a matter of law. Plaintiff homeowners believe that the homestead exemption is the entire statutory $120,000.00 because they did not waive it in different mortgage. Defendant believes that the homestead exemption is $0.00 because the homestead was completely waived in the mortgage which is the subject of this appeal and the other mortgage has nothing to do with this matter.

Argument

SABATO APPEAL

The Lower Court correctly ruled that Plaintiff Sabato waived his homestead rights when he signed the second mortgage.

The Lower Court found as a matter of fact that the plaintiff waived his homestead rights.

This case is all about whether the lack of a homestead waiver in the first mortgage could somehow impact the rights of the parties to a completely different contract, namely the second mortgage. It does not, and the lower Court so held: "here, it is undisputed that the plaintiff signed the second mortgage. Under settled New Hampshire law, the plaintiff's signature was sufficient to waive his homestead right relative to the second mortgage", citing Maroun. December 4, 2017 Order, p. 3. The Lower Court continued: "to hold that the plaintiff is entitled to the entire amount of the homestead exemption would render his signature on the second mortgage meaningless…Indeed, even the

plaintiff's counsel conceded at the hearing that the plaintiff signed the second mortgage in order to waive his homestead right. Given the 'surrounding circumstances' at the time the second mortgage deed was signed, it is clear that the plaintiff intended to waive his homestead right related to the second mortgage. Accordingly, the Court does not find that the plaintiff is entitled to the entire amount of the statutory homestead exemption as he claims". December 4, 2017 Order, pp 4-5.

Plaintiff wants the Maroun case to work one way but not the other.

The Plaintiff has argued, and the Defendant absolutely agrees, that "each mortgage waiver was to be interpreted separately and could not be a blanket waiver that acted upon other mortgages". Sabato Brief, page 10. This is because, the Plaintiff argues, "mortgage waivers cannot be interpreted to act upon any other conveyance or encumbrance". *Maroun v. Deutsche Bank National Trust Company*, 167 N.H. 220, 227 (2014). Sabato Brief, page 10. Likewise, the absence of a mortgage waiver in one mortgage "cannot be interpreted to act upon any other conveyance or encumbrance". The Plaintiff would like the *Maroun* case to work in his favor but does not want it to be applied against him. Unfortunately for the Plaintiff, the *Maroun* case proves the Defendant's position.

The absence of a waiver in one contract has no impact on the presence of a waiver in another contract, just as the presence of a waiver in one contract does not impact the absence of a waiver in another contract. *Maroun*. That is because they are two separate contracts. If the first mortgage holder wanted to foreclose, it could not piggyback on the waiver of homestead in the second mortgage. The first is not foreclosing. The second has foreclosed and has utilized the unlimited homestead waiver. If the first should someday

try to foreclose, the first will have to deal with the homestead. The second, fortunately, does not have to deal with homestead. In *Maroun*, an affidavit waiving homestead was unlimited and therefore applied to a mortgage that had no release of homestead. The same is true here: the unlimited homestead waiver in the second mortgage waives the homestead PERIOD. This has nothing to do with the first mortgage! It is as simple as that.

Even if it were not that simple, if the Defendant discharged the first mortgage, there would be no case before this Court because the first mortgage would cease to exist. It is axiomatic that something that no longer exists cannot impact anything. The Court should take judicial notice of that reality.

FANNIE MAE CROSS-APPEAL

Trial Court erred as a matter of law when it held that a foreclosing mortgagee must pay the mortgagor the difference between the amount of the mortgage foreclosed on, and the homestead exemption dollar amount, even though the Court found as a matter of fact and law that the mortgagor has waived the homestead exemption.

The Lower Court correctly noted (December 4, 2017 Order, p. 4) in its final decision (and noted that even the plaintiff agrees), that "plaintiff signed the second mortgage in order to waive his homestead right". However, the Court then, at the bottom of page 5 of the December 4, 2017 Order, concluded that it "must determine the effect and the extent of the plaintiff's waiver". The Court then correctly "concludes that the plaintiff waved his homestead right only to the extent necessary to enforce the second

mortgage", and that is correct because Fannie Mae concedes that the waiver does not extend to enforcement of the first mortgage. December 4, 2017 Order, p. 6. The Court is also correct in the December 4, 2017 Order, p. 6, when it observed that "the waiver in the second mortgage only extends as far as necessary to enforce the mortgage covenants", because the way the second mortgagee enforces the second mortgage is to foreclose in accordance with New Hampshire law at a public auction and once the hammer comes down, the highest bidder must own the property free and clear of anyone else's interest.

Where the Lower Court erred as a matter of law is in its interpretation of "enforcement of mortgages" found in RSA 480:4, III. The Court concluded that because the high bid at the foreclosure of the second mortgage was $64,872.01, and because there is a $120,000.00 statutory exemption, "it appears that some portion of the plaintiff's homestead exemption still exists and must be set – off before FNMA owns the property free and clear". The Court suggests that Fannie Mae could either pay the difference to the plaintiff or could partition the property to accomplish the same thing. See December 4, 2017 Order, p. 7.

The foreclosure of the second mortgage was done, as every other foreclosure in New Hampshire is done, by a public auction. Appendix, pp 127-130. Anyone who wants to protect their equity in the property may attend the auction and bid, whether they are junior mortgagees, attaching creditors, or, like Mrs. Sabato, the holder of some equity position (Mr. Sabato, not being an owner and having waived his homestead, is not the holder of any equity, but he too could have appeared to protect whatever he thought he had). Never has any Court in New Hampshire required the successful bidder at auction to then meet with the former owners, or anyone having any interest in the property, and

compensate them for their interest, unless there is a bid in excess of the total debt of the mortgage foreclosed on (which is not the case before this Court). There is no statutory or case law in New Hampshire in which someone with the homestead interest, who had waived that interest by signing the mortgage, was then compensated for the difference between the bid amount and the homestead dollar amount. That is probably the case because the onus is on the party with the interest, whether that is a junior mortgage or a waived homestead right, to come to the auction and protect their interest.

It is probably also the case because it would make foreclosures impossible to conduct. Jane Doe, buying at a foreclosure, would have no idea what she would have to pay the former owner, and therefore would not bid at the auction. This case is no different. If Jane Doe had purchased the subject property at a foreclosure auction, instead of the foreclosing bank purchasing, would she really then have to bring a partition action against the former owner? Would a prospective bidder have to examine title before going to a foreclosure to determine if there is a spouse, and if so, what he or she is going to have to pay that spouse to get the property free and clear? Is a prospective bidder expected to understand the partition process and take the risk of a partition action? Would a prospective purchaser have to obtain an appraisal of the property before the auction to know what would likely happen in a partition action and therefore how much they would have to pay the former owner? If these questions were answered in the affirmative, no one would lend in New Hampshire because they would not be able to liquidate at a foreclosure auction.

The Lower Court's decision raises even more questions. Is there any difference between Mrs. Sabato executing the mortgage and releasing her interest in the property,

and Mr. Sabato executing the mortgage and releasing his homestead interest? Does a prospective purchaser have to pay Mrs. Sabato the difference between the mortgage amount and the value of the property? How is any subsequent buyer to know, from the record at the registry, what the buyer at foreclosure did or did not do with respect to the homestead interest? The logic of the Lower Court's decision is that there is no difference between Mr. Sabato and Mrs. Sabato. Both, according to the logic of this decision, have mortgaged their property only to the extent of the value of the loan, and should be compensated any difference between the value of the loan and the fair market value of the property (or is it the homestead dollar amount and not the fair value of the property?). Both Mr. and Mrs. Sabato should, under this Court's decision, be entitled to a partition action. The whole purpose of a mortgage or a release of homestead is to make the whole property subject to a workable foreclosure process that requires those with an interest in the property to step forward and protect that interest or be forever barred. Their failure to protect their interest is at their own peril.

NH RSA 479 sets forth the foreclosure process in New Hampshire. The statute has no such elaborate process post-foreclosure as the Lower Court has mandated for the parties to the instant foreclosure. The statutory process laid out in 479 is a simple process: publish a notice of foreclosure for 3 weeks and send like notices to lienholders and then sell at auction free and clear of any interests except those with a priority. If there is a bid in excess of the total debt of the foreclosing lender, those excess proceeds must be filed with the Court and junior lien holders made parties, so they can make claim to the proceeds. That is it. That is all the legislature has mandated. The statute requires no other

procedure and the Lower Court has no authority to mandate anything beyond the mandates of the statute.

When Plaintiff signed the second mortgage, he in fact DEEDED his interest in the property to the defendant's predecessor with warranty covenants. See RSA 477:29 (I). He did not hold anything back. Whatever interest he had, he conveyed. That is simply New Hampshire law. For the Defendant to argue that he somehow retained some homestead interest he had relative to some other contract with some other lender at some other time, defies the terms of his conveyance itself in the words of the second mortgage, the statutory law of New Hampshire, the intent of the parties set forth in the second mortgage, and common sense. Indeed, because the Plaintiff executed a warranty deed to the Defendant's predecessor, he must now warrant and defend the title that Defendant holds, even to the extent of discharging any claim to title to the property, be it homestead or otherwise. Under RSA 477:27 (specifically cited in RSA 477:29), Plaintiff has warranted that his conveyance shall:

> ...have the force and effect of a
> deed in fee simple to the grantee, heirs, successors and assigns, to their own use, with covenant on the part of the grantor, for himself or herself, heirs, executors and administrators, that, at the time of the delivery of such deed, the grantor was lawfully seized in fee simple of the granted premises, that the said premises were free from all incumbrances, except as stated, that the grantor had good right to sell and convey the same to the grantee, heirs, successors and assigns, and that the grantor will, and the heirs, executors, and administrators shall, warrant and defend the same to the grantee and heirs, successors and assigns, against the lawful claims and demands of all persons. RSA 477:27.

As such, this Court should reverse the Lower Court's December 4, 2017 Order and release the property to the current owner, defendant, free of any interest by Mr. or Mrs. Sabato.

Conclusion

The plaintiff continues to focus on the irrelevant first mortgage, as though that contract somehow can impact the contract which is the subject of this matter (the second mortgage). This is a red herring. It is a distraction. This case is simple: Mr. Sabato waved his homestead in the second mortgage so that the second mortgage holder could foreclose and sell to the highest bidder. For this reason, the Lower Court was correct. Plaintiff has no homestead because he waived it. Plaintiff did not waive his homestead a little bit as the Lower Court held. There is no support for that conclusion in the record, and the Lower Court's decision that the homestead was waived just enough to cover the second mortgage should be reversed.

Copy of the Decision Being Appealed

A copy of the decisions below that are being appealed or reviewed are appended to this brief.

Certificate of Service

I hereby certify that two (2) copies of the within Appellee Brief has been mailed this 6th day of July, 2018 to Robert M. Shepard, attorney for the Plaintiff/Appellant.

Jonathan M. Flagg – NH Bar #4811

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT

Hillsborough Superior Court Southern District
30 Spring Street
Nashua NH 03060

Telephone: 1-855-212-1234
TTY/TDD Relay: (800) 735-2964
http://www.courts.state.nh.us

NOTICE OF FINAL DECISION

FILE COPY

Case Name: **Wayne Sabato v Federal National Mortgage Association**
Case Number: **226-2017-CV-00149**

Enclosed please find a copy of the court's order of December 04, 2017 relative to:

ORDER ON MOTIONS FOR RECONSIDERATION

Unless a post-disposition motion or appeal is submitted, final judgment shall be entered 31 days from the date of this notice of decision. After the order becomes final and judgment entered, a Certificate of Judgment, Writ of Execution, or certified copy of the Final Order may be obtained upon request.

NOTE: Case has been REMOVED from the 1/12/18 Trial Mgmt Conf and 1/22/18 Bench Trial lists.

December 05, 2017

Marshall A. Buttrick
Clerk of Court

(564)

C: Robert M. Shepard, ESQ; Jonathan M. Flagg, ESQ

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
SOUTHERN DISTRICT

SUPERIOR COURT
No. 2017-CV-00149

Wayne Sabato

v.

Federal National Mortgage Association

ORDER ON MOTIONS FOR RECONSIDERATION

The plaintiff, Wayne Sabato, brought this complaint "to establish homestead right" against the defendant, Federal National Mortgage Association ("FNMA"). The parties then each moved for summary judgment. In an order dated August 15, 2017, the Court denied the motions for summary judgment, finding that the summary judgment record was insufficient and that it could not properly decide the issues in the case as a matter of law. The parties have since filed motions for reconsideration accompanied by additional evidence. The Court held a hearing regarding the motions on November 1, 2017. After considering the record, the arguments, and the applicable law, the Court finds and rules as follows.

Standard of Review

"A motion for reconsideration allows a party to present points of law or fact that a court has overlooked or misapprehended." Broom v. Cont'l Cas. Co., 152 N.H. 749, 752 (2005) (citation omitted); see Super. Ct. Civ. R. 12(e). In addition, the trial court may, in its discretion, "receive further evidence on a motion for reconsideration." Lillie-Putz Tr. v. Downeast Energy Corp., 160 N.H. 716, 726 (2010) (citation omitted). The Court's decision on such a motion will be upheld "absent an unsustainable exercise of discretion." Town of Bartlett v. Furlong, 168 N.H. 171, 177 (2015).

Analysis[1]

I. Purchase Money Mortgage

In its original order, the Court determined that the plaintiff was not entitled to the homestead exemption as a matter of law because it was possible that the first mortgage on the property, which was part of a "refinancing" transaction, qualified as a "purchase money mortgage." (Aug. 15, 2017 Court Order at 8.) In particular, the Court noted that:

> The plaintiff has not appended any of the relevant documents to his motion for summary judgment, such as the note(s) or mortgages. There is no information regarding: (1) the purpose of the refinancing transaction just four months after the original mortgage; (2) if it involved the same or a different lender; (3) if a new deed was recorded; (4) if a new note was signed; or (5) if the amount secured by the original mortgage increased when the refinancing transaction occurred. Without knowing this information, the Court cannot decide whether the first mortgage, which is labeled as a "refinance" of the original mortgage, should fall under the exception for purchase money mortgages in RSA 480:5-a.

(Id. at 7–8 (emphasis in original).) The plaintiff has moved for reconsideration on this issue, and has provided several documents regarding the refinancing transaction. More importantly, FNMA conceded at the hearing that the first mortgage is not a purchase money mortgage. Given this concession and the new evidence, the Court concludes that the first mortgage is not a purchase money mortgage under RSA 480:5-a. The Court's original summary judgment order is therefore modified to that effect.

II. The Effect of the Second Mortgage on the Homestead Exemption

Generally speaking, to establish a homestead right, one must meet occupancy and ownership requirements. See Mason v. Wells Fargo Bank, N.A., No. 14-CV-77-JL, 2014 WL 2737601, at n. 3 (D.N.H. June 17, 2014). FNMA does not dispute that the plaintiff occupied the property and is married to its owner. See Maroun v. Deutsche

[1] The reader is referred to the Court's original summary judgment order for a rendition of the relevant facts. The Court notes that neither party asked the Court to reconsider any fact from that order.

Bank Nat'l Tr. Co., 167 N.H. 220, 226 (2014) (both spouses have homestead rights "even when only one spouse legally owns the homestead"). As such, the Court concludes that, prior to the execution of the second mortgage, the plaintiff had an unencumbered homestead right. See RSA 480:1 (2005).

However, the right to the homestead exemption is not absolute. RSA 480:4 lists five exceptions to the operation of the homestead right, including "the enforcement of mortgages which are made a charge thereon according to law." RSA 480:4, III. "[F]or a mortgage to be a 'charge' on the homestead right 'according to law,' it must satisfy the requirements of RSA 480:5-a." Walbridge v. Estate of Beaudoin, 163 N.H. 804, 806 (2012) (citation omitted). Pursuant to RSA 480:5-a, "[t]wo types of mortgages are immune from the homestead exemption: (1) a mortgage that is made at the time of purchase to secure payment of the purchase money; and (2) any other mortgage that is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land." Verdolino v. Anderson, 12 F. Supp. 2d 205, 206 (D.N.H. 1998) (quoting RSA 480:5-a). In this case, as discussed above, the first exception does not apply to either the second mortgage or the still-outstanding first mortgage. Rather, only the second exception is implicated.

Here, it is undisputed that the plaintiff signed the second mortgage. Under settled New Hampshire law, the plaintiff's signature was sufficient to waive his homestead right relative to the second mortgage. See Maroun, 167 N.H. at 226 (explaining that "if a deed is signed by both spouses with the requisite formalities, there is no requirement that the text of the deed contain an express waiver of the homestead right"). The main issue presently before the Court is the effect and extent of that waiver.

The resolution of this issue requires the Court to interpret the language of the mortgage deed. "The proper interpretation of a deed is a question of law for this [C]ourt." Sanborn v. 428 Lafayette, LLC, 168 N.H. 582, 587 (2016) (quotation omitted). "In interpreting a deed, [the Court] give[s] it the meaning intended by the parties at the time they wrote it, taking into account the surrounding circumstances at the time." Id. (quotation omitted). "If the language of the deed is clear and unambiguous, [the Court] will interpret the intended meaning from the deed itself without resort to extrinsic evidence." Id. (citation omitted). "If, however, the language of the deed is ambiguous, extrinsic evidence of the parties' intentions and the circumstances surrounding the conveyance may be used to clarify its terms." Id. at 582–83 (quotation omitted).

Here, the plaintiff maintains that his signature on the second mortgage had no effect on his homestead right and therefore he "is entitled to the entire amount of the homestead exemption."[2] (Pl.'s Mot. Recon. ¶ 23.) The Court disagrees. To hold that the plaintiff is entitled to the entire amount of the homestead exemption would render his signature on the second mortgage meaningless. As FNMA correctly notes, "[b]ut for his waiver of the homestead, there is absolutely no point in having his signature, since he was not an owner of the property." (Def.'s Replication ¶ 3.) Indeed, even the plaintiff's counsel conceded at the hearing that the plaintiff signed the second mortgage in order to waive his homestead right. Given the "surrounding circumstances" at the time the second mortgage deed was signed, it is clear that the plaintiff intended to waive

[2] The Court is admittedly confused as to how the plaintiff arrives at this conclusion. To the extent the plaintiff argues that his homestead right was *created* by his lack of waiver in first mortgage, he misunderstands the nature of the homestead right. As stated above, the homestead right is created when there is ownership and occupancy. The fact that the plaintiff did not waive his homestead right when his wife executed the first mortgage simply means that his homestead right was unaffected by that mortgage. It has no bearing on his waiver of that right in the second mortgage, which is the mortgage giving rise to FNMA's ownership.

his homestead right related to the second mortgage. Accordingly, the Court does not find that the plaintiff is entitled to the entire amount of the statutory homestead exemption as he claims.

On the other end of the spectrum, FNMA argues that "the homestead waiver is absolute," and that "when the [p]laintiff signed the second mortgage, . . . [h]e did not hold anything back. Whatever interest he had, he conveyed." (Def.'s Mot. Recon. ¶¶ 3, 4.) In support of its argument, FNMA cites to the homestead waiver paragraph in the second mortgage, which provides: "Except to the extent prohibited by law, Mortgagor waives and releases all rights of homestead and other interests in or relating to the Property." (Second Mortgage ¶ 16 (emphasis added).) However, earlier in the mortgage deed, the "MORTGAGOR" is identified as "**CHERYL A. SABATO Sole Owner**." (Id. ¶ 1 (emphasis in original).) Because the deed unambiguously identifies Ms. Sabato as the only mortgagor, the homestead waiver paragraph cited by FNMA can only fairly be read as applying to her. See Vaillancourt v. Concord Gen. Mut. Ins. Co., 117 N.H. 48, 50 (1977) (where a "contract contains a special definition of [a term], the language of that definition controls"). Thus, the Court does not find that this paragraph has any bearing in the analysis.

Instead, the Court must determine the effect and the extent of the plaintiff's waiver under the common law and the homestead statutory scheme. As the supreme court has noted, "the homestead right [is] a personal privilege, which the homeowner and spouse are entitled to exercise." Maroun, 167 N.H. at 228 (citation omitted); see also Eldridge v. Pierce, 90 Ill. 474, 481 (1878) (noting that homestead exemption "belongs to the [spouse], free from all claims of creditors and others"). When the

plaintiff signed the second mortgage, he chose to partially waive this privilege. However, contrary to FNMA's assertion, the plaintiff only "consent[ed] that the homestead or its proceeds may be applied to the payment of the debt or debts for which the waiver is given." In re Touchet, 28 F.2d 388, 390 (W.D. La. 1928) (emphasis added). In other words, the homestead waiver only extended to the balance due on the note secured by the second mortgage. As put by one court,

> The [plaintiff], in the absence of any expression to the contrary intention, should be presumed to intend no further peril to [his] homestead than necessity demands, while he who receives a mortgage from them should be regarded as obtaining a mere security for his debt, and not the right to employ that security in such a mode as to needlessly imperil the homestead. Hence a mortgage on a homestead and other property may fairly be interpreted as a waiver of the homestead right only so far as may be necessary to secure the debt . . . .

Krueger v. Cent. Lumber Co., 230 N.W. 243, 246 (S.D. 1930) (quotation omitted; emphasis added).

Therefore, the Court concludes that the plaintiff waived his homestead right only to the extent necessary to enforce the second mortgage. It logically follows that the homestead exemption must necessarily be reduced by the amount owed on the second mortgage. See Glenn v. Bresnan, 49 So. 690, 692 (La. 1909) (citations omitted) (explaining that "a mortgage executed by the husband and wife on their homestead in accordance with the statute primes prior mortgages executed by the husband alone"). This reasoning is also supported by the plain language of the homestead statute. In particular, RSA 480:4, III exempts the homestead right only "[i]n the enforcement of mortgages which are made a charge thereon according to law." (Emphasis added). Thus, under RSA 480:4, III the waiver in the second mortgage only extends as far as necessary to enforce the mortgage covenants.

In this case, the second mortgage at issue was a home equity line of credit with a maximum principal balance of $65,000, and the foreclosure auction winner paid $64,872.01 as consideration for the foreclosure deed. Thus, assuming that the $120,000[3] statutory exemption applies, it appears that some portion of the plaintiff's homestead exemption still exists and must be set-off before FNMA owns the property free and clear.[4] In light of the foregoing, the plaintiff's motion for reconsideration is GRANTED IN PART, and FNMA's motion for reconsideration is DENIED. The Court finds that the plaintiff is entitled to $120,000 less the amount owed on the note secured by the second mortgage at the time of the foreclosure sale. In the event FNMA seeks to partition the property instead of paying this amount, FNMA may request a hearing on this issue. In light of this order, the Court does not find that trial is necessary. However, to the extent the parties believe that there are still outstanding issues for trial, they may file appropriate pleadings.

So ordered.

Date: December 4, 2017

Hon. Charles S. Temple,
Presiding Justice

[3] Because FNMA does not contend otherwise, the Court will assume, without deciding, that the current homestead exemption of $120,000 applies.

[4] Because FNMA is also the first mortgage holder, the Court assumes that FNMA would discharge its own mortgage to obtain a clear title.