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THE STATE OF NEW HAMPSHIRE  
SUPREME COURT

Case Number: 2018-0047

Wayne Sabato  
Plaintiff-Appellant

v.

Federal National Mortgage Association  
Defendant-Appellee

Rule 7 Appeal from Decision of the Hillsborough County Superior Court  
Southern District

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**BRIEF OF PLAINTIFF/APPELLANT, WAYNE SABATO**

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Oral Argument:

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### **Questions Presented For Review**

- 1) Whether the trial court committed an error of law when it held that the homestead exemption must necessarily be reduced by the amount owed on the second mortgage because any waiver in the Second Mortgage had no impact on the lack of waiver in the First Mortgage, and the second mortgagee took with knowledge of this fact.

Preserved: Hearing on Motions to Reconsider, November 1, 2017, pg. 6, ln. 19 – 25.

**Constitutional Provisions, Statutes, Ordinances, Rules, or Regulations Involved**

RSA 480:1 (2018)

Every person is entitled to \$120,000.00 worth of his or her homestead, or of his or her interest therein, as a homestead. The homestead right created by this chapter shall exist in manufactured housing, as defined by RSA 674:31, which is owned and occupied as a dwelling by the same person but shall not exist in the land upon which the manufactured housing is situated if that land is not also owned by the owner of the manufactured housing.

RSA 480:3-a (2018)

The owner and the husband or wife of the owner are entitled to occupy the homestead right during the owner's lifetime. After the decease of the owner, the surviving wife or husband of the owner is entitled to the homestead right during the lifetime of such survivor.

RSA 480:4 (2018)

The homestead right is exempt from attachment during its continuance from levy or sale on execution, and from liability to be encumbered or taken for the payment of debts, except in the following cases:

- I. In the collection of taxes;
- II. In the enforcement of liens of mechanics and others for debts created in the construction, repair or improvement of the homestead;
- III. In the enforcement of mortgages which are made a charge thereon according to law;
- IV. In the enforcement of liens filed by homeowner associations or by condominium associations under RSA 356-B, for unpaid assessments against the homestead, including collection costs; and
- V. In the levy of executions as provided in this chapter.

RSA 480:5-a (2018)

No deed shall convey or encumber the homestead right, except a mortgage made at the time of purchase to secure payment of the purchase money, unless it is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land.

### Statement of the Facts and the Case

The underlying facts in this case are undisputed. The Plaintiff/Appellant, Wayne Sabato (“Wayne”), lives with his wife, Cheryl A. Sabato (“Cheryl”), and their children at 12 Birch Lane, Pelham, New Hampshire 03076 (“Property”). Appendix (“Appx.”), pg. 31. The family has resided there continuously since late August of 2001. *Id.* at pg. 31. Cheryl took title in her name only to the Property by a Warranty Deed recorded on August 29, 2001 at the Hillsborough County Registry of Deeds at Book 6480, Page 2557. Appx. pg. 90. When she purchased the home, Cheryl obtained a purchase money mortgage (“Original Mortgage”). Appx. pg. 30. The deed clearly stated that Cheryl was a married person. *Id.* The Original Mortgage was not signed by Wayne. *Id.* The Original Mortgage was discharged on May 14, 2002 at Book 6633, Page 467. Appx. pg. 103.

On or about January 25, 2002, Cheryl refinanced the Original Mortgage that encumbered the home. Appx. pg. 30. She executed a mortgage (“First Mortgage”) to HomeVest Mortgage Corporation. *Id.* The First Mortgage is recorded at the Hillsborough County Registry of Deeds at Book 6572, Page 2335, in the amount of \$173,250.00. Appx. pg. 104. At the time of this execution, Cheryl continued to be married to Wayne. Appx. pg. 30. Wayne made no waiver of homestead and did not sign the First Mortgage. Appx. pg. 104-114. The First Mortgage was not a purchase money mortgage, but a refinance. Brief (“Br.”), pg. 16. The First Mortgage was immediately assigned to CitiMortgage, Inc. (“CitiMortgage”) by an Assignment dated January 25, 2002 and recorded at Book 6572, Page 2346. Appx. pg. 115. Thereafter, CitiMortgage assigned the First Mortgage to the Defendant, Federal National Mortgage Association (“FNMA”), by an Assignment dated

March 21, 2011 and recorded at Book 8305, Page 876. Appx. pg. 116. FNMA is also the holder of the Note executed by Cheryl. *Id.*

Cheryl subsequently obtained an equity loan / second mortgage in the amount of \$65,000.00 in favor of National City Bank (“Second Mortgage”) dated November 18, 2005 and recorded at Hillsborough County Registry of Deeds at Book 7589, Page 2423. Appx. pg. 30. The Second Mortgage was signed by Cheryl, and Wayne also signed as “husband of Cheryl A. Sabato.” *Id.* The Second Mortgage was later assigned to Situs Investments, LLC (“Situs”) by an Assignment of Mortgage from PNC Bank National Association, successor by merger to National City Bank, recorded on June 28, 2013 at the Hillsborough County Registry of Deeds at Book 8576, Page 2298. Appx. pg. 31. Situs took title to the property by a Foreclosure Deed recorded at the Hillsborough County Registry of Deeds at Book 8649, Page 1713 on March 31, 2014. Appx. pg. 124. The consideration for the Foreclosure Deed was \$64,872.02. Situs took title subject to the first mortgage to FNMA and subject to Wayne’s homestead right. Situs later sold the property to the Defendant, FNMA, by deed recorded at Book 8841, Page 2867. Appx. pg. 131. In late 2016, Wayne and/or Cheryl received notices from FNMA informing them that they may be evicted from their home.

On April 3, 2017, Wayne filed a complaint to establish his homestead right. In response, FNMA asserted that Wayne’s homestead had been completely extinguished with the Second Mortgage foreclosure auction, and that it thus holds title clear of the homestead interest. In an order dated August 15, 2017, the court (Temple, J.) denied the parties’ cross-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 then filed motions for reconsideration accompanied by additional evidence. The court held a hearing regarding those motions on November 1, 2017. In its December 4, 2017 order on the motions for reconsideration, the court denied the Defendant's motion and partially granted the Plaintiff's motion. The court found that under RSA 480:4 (III), Wayne's signature of the Second Mortgage was sufficient to waive his homestead right to the extent necessary to enforce the Second Mortgage. The court therefore held that Wayne was not entitled to the full statutory homestead exemption of \$120,000, but to that amount less the balance owed on the note secured by the Second Mortgage at the time of the foreclosure sale. Both parties moved for reconsideration, and both motions were denied. This appeal follows.

#### **Summary of Argument**

Wayne has lived continuously, with his wife and children, at the Property for approximately seventeen (17) years. As of November 17, 2005, it is uncontested that Wayne has a homestead right in this Property in the amount of \$120,000.00. The dispute arises on November 18, 2005, when Cheryl obtained the Second Mortgage and Wayne signed as spouse of Cheryl. The Second Mortgage does not reduce or eliminate Wayne's homestead exemption since Wayne did not waive his homestead right in the First Mortgage, which remains in full force and effect. The Second Mortgage is subject to, and subordinate to, the First Mortgage and the outstanding homestead right of Wayne.



## Argument

**I. The trial court committed an error of law when it held that the homestead exemption must necessarily be reduced by the amount owed on the second mortgage because any waiver in the Second Mortgage had no impact on the lack of waiver in the First Mortgage, and the second mortgagee took with knowledge of this fact.**

**A. The purpose of the homestead exemption is to protect the family home, thus the legislature has limited the exceptions to exemption to only five circumstances.**

In New Hampshire, RSA 480:1 establishes the homestead right by providing that “[e]very person is entitled to \$120,000.00 worth of his or her homestead, or of his or her interest therein, as a homestead.” The statutory protection of the homestead right extends to spouses who occupy the homestead but are not title owners of the property. *See* RSA 480:3-a; *Maroun v. Deutsche Bank Nat’l Trust Co.*, 167 N.H. 220, 226 (2014) (citing *Bothell v. Sweet*, 6 A. 646, 648 (1886) (concluding that plaintiff’s homestead right was not affected by three mortgages in which she did not join because she “preserved her homestead right by occupation”). “The homestead right is exempt from attachment during its continuance from levy or sale on execution, and from liability to be encumbered or taken for the payment of debts, except in [five specific] cases.” RSA 480:4.

Pursuant to RSA 480:4, the following are the only five (5) exceptions in which the homestead right would not be exempt from attachment:

- I. In the collection of taxes;
- II. In the enforcement of liens of mechanics and others for debts created in the construction, repair or improvement of the homestead;
- III. In the enforcement of Mortgages which are made a charge thereon according to law;

IV. In the enforcement of liens filed by homeowner associations by condominium associations under RSA 356-B, for unpaid assessments against the homestead, including collection costs; and

V. In the levy of executions as provided in this chapter.

A mortgage must satisfy the express requirements under RSA 480:5-a to constitute a charge on the homestead according to law under RSA 480:4 (III). *Chase v. Ameriquest Mortg. Co.*, 155 N.H. 19, 22-23 (2007). RSA 480:5-a provides that “[n]o deed shall convey or encumber the homestead right, except a mortgage made at the time of purchase to secure payment of the purchase money, unless it is executed by the owner and wife or husband, if any, with the formalities required for the conveyance of land.” In this case, there is no dispute that the First Mortgage was not “a charge on the homestead according to law” as it was not a purchase money mortgage nor was it executed by both spouses. Appx. pg 16. (“[T]he Court concludes that the first mortgage is not a purchase money mortgage under RSA 480:5-a.”).

Finally, the purpose of the homestead interest is “to secure to debtors and their families the shelter of the homestead roof, . . . to protect and preserve inviolate a family home, . . . to protect[] the family from destitution, and protect[] society from the danger of its citizens becoming paupers.” *Maroun, supra* at 225-26 (internal quotation marks omitted). “Statutory homestead protections are remedial in nature, and to effectuate their public policy objectives are universally held to be liberally construed; everything is to be done in advancement of the remedy that can be given consistently with any construction that can be put upon it.” *Deyeso v. Cavadi*, 165 N.H. 76, 80 (2013) (internal quotation marks omitted).

**B. The trial court made an error of law when it held that the Plaintiff was not entitled to the full \$120,000.00 exemption because any waiver of homestead in the Second Mortgage had no impact on the lack of waiver in the First Mortgage.**

Even assuming that the Plaintiff/Appellee waived his homestead right in the Second Mortgage obtained by his wife, that waiver has no effect on his homestead right in the First Mortgage. Yet the trial court found that Wayne's purported waiver of homestead in the Second Mortgage means his homestead in the amount of \$120,000.00 must be reduced by the amount owed on the note secured by the Second Mortgage at the time of the foreclosure sale. Br. at 21. This was an error of law.

There is no support under New Hampshire law for reducing the amount of protection afforded to the holder of the homestead right who did not waive his homestead. Had the legislature intended to allow for a reduction in the homestead exemption, it would have provided a sixth (6<sup>th</sup>) exception in RSA 480:4. This it did not do.

The homestead right endures absent a valid waiver in *each document*. Precedent firmly holds that mortgage waivers are not interpreted to act upon any other conveyance or encumbrance. *Maroun, supra* at 227. In *Maroun*, the Court considered waivers contained in three (3) separate mortgages, as well as a waiver in a separate affidavit. *Id.* The Court held that the two (2) waivers which complied with the RSA 480:5-a requirements had no effect on the later mortgage, which lacked a valid waiver. *Id.* That is to say, each *mortgage* waiver was to be interpreted separately and could not be a blanket waiver that acted upon other mortgages. This holding is consistent with the policy purpose of the homestead exemption, which is to protect the homeowner and place the burden on banks to perform their due diligence and execute documents correctly if

they are to be allowed to attach the homestead. Likewise, the Plaintiff/Appellant's signature on the foreclosed Second Mortgage has no impact on the continuing existence of his homestead right. The Second Mortgage, by definition, is subject to and subordinate to the First Mortgage. The First Mortgage in this case, is subject to and subordinate to the outstanding homestead right.

Moreover, in *Maroun*, the New Hampshire Supreme Court held that "given the protective purpose of the homestead right, we further hold that there is a presumption against such a waiver, and a party may waive the homestead right broadly . . . only by an act which evidences an *unequivocal intention* to do so." *Id.* at 228 (emphasis added). The court stated that compliance with RSA 480-5:a "obviates the need for proof of such an unequivocal intention." *Id.* Combined with its holding that "mortgage waivers cannot be interpreted to act upon any other conveyance or encumbrance," a waiver in one mortgage cannot be an act that evidences unequivocal intention to broadly waive homestead rights.

The statute and case law in New Hampshire are clear that the homestead right is exempt from attachment and liability unless waived validly in the mortgage being enforced or a separate waiver evidences unequivocal intention. Here, there was no separate waiver, and the waiver in the Second Mortgage has no impact on the lack of waiver in the First Mortgage. Thus, the court made an error of law when it said that the Plaintiff/Appellant's waiver in the Second Mortgage could possibly be read to reduce the \$120,000.00 homestead exemption by the amount owing on the Second Mortgage at the time of foreclosure.

**C. The trial court committed an error of law when it held that the homestead exemption must be reduced by the amount owed on the Second Mortgage because the second mortgagee took with knowledge of the lack of homestead waiver on the First Mortgage.**

By holding that Wayne's homestead exemption is reduced by the amount owed on the second mortgage, the trial court has created a sixth (6<sup>th</sup>) exception that is not authorized by statute. *See* RSA 480:4.

A second mortgage is by its very nature subordinate to and subject to the first mortgage. Before granting a second a mortgage, the Mortgagee is presumed to have conducted a title search. In this case, the title search would have revealed a first mortgage by the record owner, Cheryl, to Homevest Mortgage Corporation that was recorded on January 29, 2002 at the Hillsborough County Registry of Deeds at Book 6572, Page 2335. Appx. pg. 104. In examining the mortgage to Homevest Mortgage Corporation, the second Mortgagee would have noted that the mortgage was only signed by Cheryl A. Sabato and there was no waiver of homestead from her husband. Therefore, the second would be subject to the first mortgage and subject to an outstanding homestead right to Wayne.

The Second Mortgage holder cannot argue that it did not know of the failure to waive the homestead right or of the existence of the Plaintiff's homestead right. Therefore, the conveyance of the home by the Second Mortgage holder is subject to the outstanding homestead right. This is the only conclusion that is consistent with the statutory purpose of the homestead right.

**Conclusion**

Since a homestead waiver in one mortgage cannot be interpreted to act upon another mortgage, there is no basis in New Hampshire for allowing the homestead exemption to be reduced by the amount owing on the second mortgage at the time of foreclosure.

**Oral Argument**

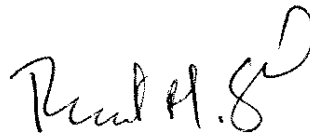
The Plaintiff/Appellant respectfully requests oral argument of not more than 15 minutes.

**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 Appellant Brief and the included Appendix has been mailed this 8<sup>th</sup> day of June, 2018 to Jonathan M. Flagg, attorney for the Defendant/Appellee.



\_\_\_\_\_  
Robert M. Shepard – NH Bar #2326

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

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**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 Gas. 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<sup>1</sup>

### 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

<sup>1</sup> 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 Court. Sarborn v. 428 Lafayette LLC, 168 N.H. 582, 587 (2016) (quotation omitted). "In interpreting a deed, [the Court] gives 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."<sup>2</sup> (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

<sup>2</sup> 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<sup>3</sup> 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.<sup>4</sup> 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

<sup>3</sup> Because FNMA does not contend otherwise, the Court will assume, without deciding, that the current homestead exemption of \$120,000 applies.

<sup>4</sup> Because FNMA is also the first mortgage holder, the Court assumes that FNMA would discharge its own mortgage to obtain a clear title.

**THE STATE OF NEW HAMPSHIRE  
JUDICIAL BRANCH  
SUPERIOR COURT**

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**NOTICE OF DECISION**

**FILE COPY**

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

Please be advised that on December 28, 2017 Judge Temple made the following order relative to:

Plaintiff's Motion for Reconsideration

"MOTION DENIED"

AND

Defendant's Motion for Reconsideration and Objection to Plaintiff's Motion for Reconsideration

"Motion Denied"

December 29, 2017

Marshall A. Buttrick  
Clerk of Court

(574)

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

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