

January 1989

Maine Debtor-Creditor Law by Dennis M. Patterson

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Recommended Citation

David J. Jones, *Maine Debtor-Creditor Law by Dennis M. Patterson*, 41 Me. L. Rev. 231 (1989).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol41/iss1/11>

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BOOK REVIEW

MAINE DEBTOR-CREDITOR LAW. By Dennis M. Patterson.¹ Stoneham, Mass.: Butterworth Legal Publishers., 1988. Pp. xi, 189. \$40.00.

*Reviewed by David J. Jones*²

Dennis M. Patterson, Esquire, has written a brief, practical guide to selected areas of collection practice entitled *Maine Debtor-Creditor Law*. Two immediate observations come to mind: first, that I plan to keep a copy of the book in my office library for future reference; second, that I am disappointed that the author omitted reference to several challenging issues that confront the attorney having a regular collection or foreclosure practice. This latter observation is both an indication of the usefulness of the book's treatment of the areas covered and a hopeful invitation to the author to expand on his subject matter in future writings.

It is common practice for lawyers to call upon one another for advice or suggestions. I have found this to be as true in regard to foreclosure and collection practice as it was in real estate title practice before the onslaught of title companies. *Maine Debtor-Creditor Law* is an interesting and useful presentation of one lawyer's learning and experience. Between straightforward descriptions of statutory procedures, the author has interspersed practical suggestions for the creditor's counsel along with observations regarding difficulties which may be encountered in the statutory scheme. Although another lawyer might have a different approach to specific problems and might prefer to focus greater attention on issues not treated in this book, by dealing in one volume with a wide range of subjects, the author provides a valuable overview to the student and a handy resource to the regular practitioner.

Unfortunately, the book does appear to contain contradictions or errors in certain instances, which may be a pitfall to the unwary. I will refer specifically in this Review to those misstatements or apparent contradictions that I noticed and which blemish an otherwise handsome treatise.

The author has divided his subject into two parts: (1) obtaining and enforcing a civil judgment and (2) liens and lien foreclosure. Following the text are appendices containing thirty-seven forms commonly used in collection practices, including court forms, sample complaints, motions, affidavits and memoranda. A pocket part to the book contains copies of some of the statutes referred to in the

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text. The selective inclusion of some sections of statutes and omission of others creates a risk, however, in using the statutory supplement.

Chapter One deals with preparations to be undertaken prior to filing of suit, choice of court and pre-judgment attachment. The author has clearly been down the road several times and sets forth a number of practical considerations ranging from information to be gathered from the client to locating the debtor. The chapter includes a thorough discussion of the reasons for or against seeking a pre-judgment attachment, the procedure and formal requirements therefor.

Chapter Two concerns default judgments, interest, costs and foreign judgments. While it may be that many, if not most, collection actions result in a default judgment, it is surprising that the author has made no reference to summary judgment, the specific requirements of Rule 56 of the Maine Rules of Civil Procedure, or the utilization of Requests for Admission to cut through general denials contained in answers in simple debt collection actions.

Effective September 29, 1987, the Maine Legislature enacted a major rewrite of the statutory scheme for collection of money judgments. In Chapter Three, entitled "Post-Judgment Enforcement Remedies," Mr. Patterson addresses the new statutes. In the absence of reported decisions interpreting these statutes, the author's task was merely to report what the statutes provided; thus, in many places he simply paraphrased the statutory language.³ Mr. Patterson's text is well-organized, detailed and thorough. The reader acquires an overview of the various collection remedies available and a better understanding of their interrelationship and procedural context than might be obtained from simply reading the statutes. The author offers several practical considerations for the creditor's counsel, whose interest is to minimize the time and expense involved in the collection process.

Chapter Four, entitled "Liens for Labor and Materials," contains a confusing and, in some instances, erroneous description of the law of mechanic's liens. The author appears to confuse the concepts of perfection of the lien with the requirements for preservation of the lien. This confusion may derive in part from the dual role that the notice requirement⁴ may play in both preserving the lien of a subcontractor as against the owner and perfecting the lien against subsequent purchasers. The terms "perfect" and "preserve" are reversed in some instances, as for example, where the author states,

3. In an article entitled, "The New Disclosure Statutes," District Court Judge Susan Calkins gave a detailed description of the new procedures and contrasted them with the former scheme. See Calkins, *The New Disclosure Statutes*, 2 MAINE B.J. 350 (1987).

4. ME. REV. STAT. ANN. tit. 10, § 3253 (1980).

"the lien is perfected by the filing of an action,"⁵ and "the notice need only be recorded . . . to *preserve* the lien against bona fide purchasers"⁶

A more serious error, however, is the failure to distinguish between one who contracts directly with the owner and one who furnishes labor or materials with only the consent of the owner. The author treats the subcontractor as having contractual privity with the owner on the theory that by hiring the subcontractor "with the consent of" the owner, the general contractor is acting with agency authority that binds the owner. This error leads to the author's assertion that the notice requirement of section 3253⁷ is not required if the labor or materials were furnished with the consent of the owner but applies only where the labor or material is supplied without the consent of the owner.⁸ The author thus concludes that a notice of lien claim is not necessary in situations where, in fact, it is, and that it is applicable to situations where, in fact, the lien would not even arise.

The author makes no mention of what is perhaps the most interesting aspect of mechanic's lien law, the relative priorities of mortgagees and mechanic's lien claimants. Unlike Massachusetts, where a mortgagee has priority for all loan proceeds advanced prior to the filing of a lien, Maine treats a mortgagee as an owner, and subjects the interest of the mortgagee to the lien if the labor or materials were furnished by contract with the consent of the mortgagee. If the mortgagee knows of and consents to the work being performed, but is not advised of expensive change-orders as work progresses, the lien for labor and materials will not obtain priority over the mortgage for the "extras," but will have priority only to the extent of the mortgagee's knowledge and consent.⁹ In a troubled construction project, the ability to claim priority over the mortgage holder may be the lien claimant's only real chance of being paid.

Another important issue from a mortgagee's perspective is the availability of title insurance to protect against the loss of priority to mechanic's lien claimants. Counsel to the mortgagee must be familiar with such title insurance coverage and exercise great caution not to waive or prejudice the mortgagee's rights thereunder.

Chapter Five, entitled "Real Property Mortgage Foreclosure," makes mention that Maine law provides seven methods of foreclos-

5. D. PATTERSON, MAINE DEBTOR-CREDITOR LAW § 4.1, at 41 (1988).

6. *Id.* at 42 (emphasis in original).

7. ME. REV. STAT. ANN. tit. 10, § 3253 (1980).

8. D. PATTERSON, *supra* note 5, § 4.1, at 41-43.

9. *Carey v. Boulette*, 158 Me. 204, 182 A.2d 473 (1962) (holding that a mechanics' lien cannot have priority over the mortgage without knowledge on the part of the mortgagee).

ing non-corporate mortgages,¹⁰ and contains a detailed discussion of "the most common form of foreclosure,"¹¹ civil action foreclosure pursuant to title 14, sections 6321 to 6325 of the Maine Revised Statutes Annotated.¹² It is unfortunate that the author virtually ignores the foreclosure by exercise of power of sale available for mortgages given by corporations. While not as common as civil action foreclosures, the power of sale provides the most efficient method of foreclosure in terms of time and expense, and is the method of choice if the mortgagor is a corporation.

The chapter on foreclosure of real estate mortgages is not carefully written. While containing a useful overview of the foreclosure process, the text includes many overbroad generalizations and inaccuracies. For example, the author cites *American Law of Property*¹³ for the proposition that "the mortgagor retains the right to possession of the property and the right to collect rent from it"¹⁴ while Maine law provides the opposite result unless the parties agree otherwise.¹⁵ In another instance the author states that upon breach of the mortgage, the mortgagee may accelerate the time for payment of the debt, but neglects to note that this is true only if the loan documents so provide and subject to any limitations therein. The author also states that upon expiration of the period of redemption, "the mortgagor's equity of redemption *automatically* passes to the mortgagee"¹⁶ In fact, the equity of redemption terminates. The distinction is important if the mortgagor's interest is further encumbered.

Chapter Five contains a step-by-step guide to the civil action foreclosure process. I found parts of the description confusing and others to be inconsistent with my practice. For example, the author recommends that tenants in possession and lien claimants whose interest are not recorded be joined as parties-in-interest, to make termination of their interest easier and to preclude the need to amend the complaint if a lien claim is filed after commencement of suit. The statute, provides, however, that "[a]ny other party having a claim to the real estate whose claim is not recorded in the registry of deeds as of the time of recording of the copy of the complaint or the clerk's certificate need not be joined in the foreclosure action, and any such party shall have no claim against the real estate after com-

10. *Id.* § 5.1, at 49.

11. *See id.* § 5.1-5.2.

12. ME. REV. STAT. ANN. tit. 14, §§ 6321-6325 (1980 & Supp. 1988-1989), reprinted in D. PATTERSON, *supra* note 5, at 52-55 (Supp. 1988).

13. D. PATTERSON, *supra* note 5, § 5.2, at 57 n.2.

14. *Id.* § 5.1, at 49.

15. *See* Me. Rev. Stat. Ann. tit. 33, § 502 (1988); *American Agric. Chem. Co. v. Walton*, 116 Me. 459, 102 A. 297 (1917).

16. D. PATTERSON, *supra* note 5, at § 5.1, at 50 (emphasis in original).

pletion of the foreclosure sale"¹⁷ It is therefore unnecessary, and perhaps counterproductive, to join parties who may claim unrecorded interests. The author states that the purpose of recording the clerk's certificate is "[t]o put the world on notice of the foreclosure of a mortgage."¹⁸ The real purpose is, however, as noted above, to ensure that the foreclosure will cut off the interests of any party whose claim is recorded after the clerk's certificate.

With regard to recording the clerk's certificate and service of process, the author recommends recording the certificate *after* service of process on all parties.¹⁹ The rationale for this suggestion, that it is simpler to amend the complaint to bring in any intervening lienors before any party has answered, would instead indicate that the certificate should be recorded, the title updated and the complaint amended *before* service of process is effected on any parties.

With regard to possession of the mortgaged property, the author states that "[u]pon expiration of the period of redemption, the mortgagee is entitled to possession of the property [and] . . . the mortgagee has a statutory right to possession."²⁰ The statute, however, provides that "[u]pon expiration of the period of redemption . . . any remaining rights of the mortgagor to possession shall terminate"²¹ The language of the statute should be carefully read, because it recognizes that by law or by agreement the mortgagee may be entitled to possession before the period of redemption expires. To say, however, that the mortgagee has a statutory right to possession overstates the case. If the mortgagee is entitled to possession, such right arises from its legal title, not from the foreclosure statute. Furthermore, the mortgagee might not be entitled to possession if a tenant or other mortgagee has a prior interest.

The author also notes that, if the mortgagor refuses to vacate the property after the expiration of the period of redemption, the mortgagee will have to bring an action for Forcible Entry and Detainer.²² It is common practice, however, to include an order for issuance of a writ of possession as part of the judgment in the foreclosure action. The Law Court has not been called upon to decide whether this practice is authorized by the foreclosure statute, but until it is declared invalid, this practice provides the mortgagee a much more efficient means to obtain possession.

The position of a junior lien holder in the foreclosure proceeding

17. ME. REV. STAT. ANN. tit. 14, § 6321 (Supp. 1988-1989), *reprinted in* D. PATTERSON, *supra* note 5, at 52 (Supp. 1988).

18. D. PATTERSON, *supra* note 5, § 5.2, at 54.

19. *Id.*

20. *Id.* § 5.2, at 55.

21. ME. REV. STAT. ANN. tit., § 6323 (Supp. 1988-1989), *reprinted in* D. PATTERSON, *supra* note 3, at 54 (Supp. 1988).

22. D. PATTERSON, *supra* note 5, § 5.2, at 55.

is not clearly described. The author states that "a junior mortgagee or lien creditor must decide whether or not to bid and 'take out' the senior foreclosing mortgagee, or to refrain from bidding, thereby losing its lien interest in the property." In fact, the junior mortgagee or lienor, if properly joined in the action, loses its lien interest whether or not it bids at the sale. The issue confronted is whether the junior party is willing to outbid the foreclosing mortgagee in order to purchase the property. Of course, if the property value is higher than both mortgages, the junior mortgagee would want to keep the bidding alive until the amount bid is sufficient to satisfy both mortgages.

The author overlooks the rights of junior lien holders when he concludes the chapter by noting that if the foreclosure sale generates a surplus, "the foreclosing mortgagee must remit it to the mortgagor."²³ In a footnote²⁴ and a sample order of foreclosure,²⁵ the author suggests that the surplus must be paid into court for the benefit of junior lienholders only if the mortgagor has failed to appear in the action. Sections 6322 and 6324 of Title 14, however, provide clearly that the judgment shall set forth the order of priority and amounts due junior lienholders, and the foreclosing mortgagee shall disburse the proceeds in accordance with the judgment.²⁶ The correct practice is for the foreclosing mortgagee to distribute any surplus directly to the parties-in-interest.

There are a number of less significant points in Chapter Five that I would quarrel with. Rather than belabor the subject, I feel it is sufficient to say that, while the book provides an informative general description of the civil action foreclosure, it should not be relied upon by bank counsel as a specific practice guide.

Chapter Six is entitled "The Special Problem of Waiver in the Civil Action Real Property Mortgage Foreclosure." This chapter analyzes the decision of the Maine Law Court in *Savings and Loan Association of Bangor v. Tear*,²⁷ in which the court stated that "[a] mortgagee waives its right to foreclose if it accepts tender of a late payment."²⁸ The author persuasively argues that the holding of the case is limited to the situation where the late payment is accepted prior to acceleration and cures all existing defaults for which acceleration could be claimed. The author concludes that the decision in *Tear* does not apply where the payment is made after acceleration

23. *Id.* § 5.2, at 57.

24. *Id.* § 5.2, at 61 n.16.

25. *Id.* app. E-8, at 163-65.

26. ME. REV. STAT. ANN. tit. 14, §§ 6322, 6324 (Supp. 1988-1989), reprinted in D. PATTERSON, *supra* note 5, at 53-55 (Supp. 1988).

27. 435 A.2d 1083 (Me. 1981).

28. *Id.* at 1085.

or where the amount paid is insufficient to cure all defaults.²⁹

The chapter contains an interesting analysis of the effect of the mortgagee's acceptance of a check for a mortgage payment. Based upon section 3-802 of the Uniform Commercial Code, the author demonstrates how the merger rule precludes a mortgagee that has accepted a check for an obligation from attempting to revoke its acceptance of the instrument for the purpose of reinstating the underlying obligation.

Viewed in light of this analysis, the *Tear* decision can be seen as very limited. Rather than constituting a waiver of the right to foreclose, the acceptance of a payment which cures a specific default merely precludes the mortgagee from subsequently invoking the same default to declare an acceleration or to pursue any other remedy. Query: would the court reach the same result if the loan documents expressly provided that acceptance of a late payment would not constitute a waiver of the default?

Chapter Seven is entitled, "Enforcing Security Interests in Personal Property." The author describes and compares the various methods available to the secured party for obtaining possession or control of the collateral. The discussion is detailed and thorough. The author does not attempt to offer a comprehensive treatment of Article 9 of the Uniform Commercial Code. For example, the text does not address the issues of perfection of security interests or competing priorities. The author does, however, provide a pragmatic guide with respect to the secured party's selection of remedies and the statutory provisions ranging from creation of a valid security interest to obtaining and disposing of collateral.

In the introduction to his book, Mr. Patterson indicates that he had three audiences in mind. He intended his book to supplement those law school courses which focus on Bankruptcy Law to the exclusion of basic state debtor/creditor law. He hoped to provide the practicing attorney with a handy reference to the most commonly encountered areas of debtor/creditor practice. Finally, he set out to offer professionals in the financial industry an understandable description of the requirements and limitations of the law regarding enforcement of defaulted obligations. To accomplish these purposes, the author, of necessity, limited the number of subjects covered and the scope of his treatment of each area. In his treatment of mechanic's liens and civil action foreclosure, greater clarity and attention to the statutes would have been desirable. On the whole, however, the author has succeeded admirably in making a wide range of distinct but related subjects accessible in a brief and well written book. By providing a broad overview of various statutory remedies and procedures, comparing the advantages and disadvan-

29. D. PATTERSON, *supra* note 5, § 6.4, at 68-69.

tages of specific remedies and offering practical suggestions, the author has produced a very useful resource.