NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 16-046

Bankruptcy Case No. 10-11716-MSH
Adversary Proceeding No. 13-01064-MSH

KIMMY R. JACKSON,
a/k/a Kimmy R. Jackson-Lupoli,
a/k/a Kimmy R. Lupoli,
Debtor.

KIMMY RENE JACKSON,
Plaintiff-Appellant,

v.

ING BANK, FSB, CAPITAL ONE, N.A.,
BANK OF AMERICA, N.A., HARMON LAW OFFICES, P.C., and
PORTNOY & GREENE, P.C.,
Defendants-Appellees.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Melvin S. Hoffman, U.S. Bankruptcy Judge)

Before Deasy, Cary, and Fagone,
United States Bankruptcy Appellate Panel Judges.

David G. Baker, Esq., on brief for Plaintiff-Appellant.
David Himelfarb, Esq., on brief for Defendants-Appellees, Capital One, N.A. and ING Bank, FSB.
Cody J. Cocanig, Esq., on brief for Defendant-Appellee, Bank of America, N.A.
Robert M. Mendillo, Esq., and Andrea V. Lasker, Esq., on brief for Defendant-Appellee, Harmon Law Offices, P.C.
Darren J. Rillovick, Esq., on brief for Defendant-Appellee, Portnoy & Greene, P.C.

August 23, 2017

Fagone, U.S. Bankruptcy Appellate Panel Judge.

With a single notice of appeal, Kimmy Rene Jackson ("Jackson") attempts to appeal from at least thirteen orders of the bankruptcy court, a "transcript," and unspecified "adverse ruling[s]." All stem from an adversary proceeding Jackson commenced in 2013 with a multi-count complaint against five defendants. The underlying dispute involves a note and mortgage that have changed hands multiple times. The crux of Jackson's complaint, in its original iteration and as amended, is that certain attempts to foreclose the mortgage were wrongful.

After winnowing the issues on appeal to a significant extent, we find no error or abuse of discretion in any of the bankruptcy court's orders on the remaining issues. As a result, we **AFFIRM**.

BACKGROUND[1]

I. Pre-Petition Events

In February 2004, Jackson executed a note (the "Note") in favor of America's Wholesale Lender.[2] To secure the amounts due under the Note, Jackson granted a mortgage (the "Mortgage") on her condominium unit (the "Condo") to Mortgage Electronic Registration Systems, Inc. ("MERS"), as mortgagee and as nominee for America's Wholesale Lender.[3]

[1] The factual background is extracted largely from the bankruptcy court's February 1, 2016 memorandum of decision (the "February 2016 Decision") and from the bankruptcy court's December 31, 2013 memorandum of decision (the "December 2013 Decision") regarding Jackson's objection to the claim of Capital One, N.A. ("Capital One"), whose factual findings the parties adopted in the above-referenced adversary proceeding.

[2] America's Wholesale Lender was a "fictitious business name" of Countrywide Home Loans, Inc.

[3] MERS subsequently assigned its interest in the Mortgage to Countrywide Home Loans, Inc., for the benefit of ING Bank, FSB ("ING"), via an assignment dated January 20, 2009. On February 22, 2012, Countrywide assigned its interest in the Mortgage to ING. ING merged into Capital One effective November 1, 2012. Capital One is the current holder of the Note.

Jackson defaulted under the terms of the Note and Mortgage. In December 2008, Countrywide Home Loans, Inc., for the benefit of ING, entered the Condo in order to foreclose, and later recorded a foreclosure deed in the land records (the "2008 foreclosure").

In January 2009, Jackson entered into a "Move Out Agreement" with Countrywide Home Loans Servicing, L.P.[4] Under this agreement, Jackson accepted a cash settlement of $3,500.00, vacated the Condo, and gave broad releases of her claims against Countrywide and others, including those claims related to the 2008 foreclosure.

II. Post-Petition Developments

A. The First Bankruptcy Filing

More than one year after entering into the Move Out Agreement, Jackson filed a voluntary petition for chapter 7 relief in the United States Bankruptcy Court for the District of Massachusetts. She did not list the Condo as an asset on her schedules. Jackson received her chapter 7 discharge in May 2010, and her case was closed in January 2011.

Months later, Jackson received a letter from ING informing her of the monthly payments due on the Note. She later received two more letters—one in November 2011 and the other in January 2012—each from a Portnoy and Greene, P.C. ("P & G") attorney, Suzanne Brunelle ("Brunelle"), demanding payment of the Note on behalf of ING. In the second letter, Brunelle identified ING as "the present holder" of the Mortgage and stated that Jackson was in default of her obligation to make payments due under the Note.

Surprised by the letters, Jackson interpreted them to mean that there had been no foreclosure after all and that she was still the owner of the Condo. Therefore, in June 2012, she moved back in, resuming full possession and occupancy of the premises. Shortly thereafter,

[4] We use the term "Countrywide" to refer to all of the various Countrywide entities.

Jackson received another notice from Brunelle, stating that ING had scheduled a foreclosure sale of the Condo for July 18, 2012 (the "re-foreclosure").[5]

B. The Second Bankruptcy Filing and Reopening of the First

Five days before the scheduled re-foreclosure, Jackson filed a voluntary petition for chapter 13 relief. After the bankruptcy court dismissed that case due to Jackson's failure to file required documents, she filed a motion to reopen her original chapter 7 case, which the bankruptcy court granted on December 21, 2012. Jackson immediately converted her case to chapter 13, and on January 23, 2013, the automatic stay under § 362 was re-imposed.[6] Jackson then amended Schedule A to list the Condo as an asset and amended Schedule D to list "Capital One NA, f/k/a ING" as a secured creditor holding a disputed claim in the amount of $209,000.00.

C. Capital One's Proofs of Claim and Jackson's Objections

On May 30, 2013, Capital One filed a proof of claim in the approximate amount of $219,000.00. Jackson filed an objection to the claim, and later amended that objection. Among other things, Jackson asserted that: (1) the proof of claim included no accounting; (2) the 2008 foreclosure was void; and (3) Capital One's actions were unfair and deceptive within the meaning of Mass. Gen. Laws ch. 93A. Jackson requested an order requiring Capital One to "establish the accuracy of the amount claimed to be due" and "its right to enforce the Note and Mortgage."

---

[5] In order to stop P & G from foreclosing, Jackson commenced a state court action for injunctive relief (the "State Court Action"). The state court denied her motion for a preliminary injunction and she subsequently dismissed the State Court Action.

[6] Unless expressly stated otherwise, all references to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq. All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure, and all references to "Rule" are to the Federal Rules of Civil Procedure.

In its response, Capital One argued, *inter alia*, that Jackson did "not overcome the presumption of validity" of its claim. After some briefing, Capital One filed an amended proof of claim (the "Amended Proof of Claim"). This time, Capital One asserted an increased claim in the approximate amount of $295,000.00, plus attorneys' fees, and approximately $104,000.00 in arrears, secured by the Condo. Jackson filed an objection to Capital One's Amended Proof of Claim (the "Objection to Amended Proof of Claim"), arguing, *inter alia*, that she should not be responsible for any portion of the claim relating to the period of time when she was forced to vacate the Condo.

On December 31, 2013, the bankruptcy court issued an order (the "December 2013 Order") together with the December 2013 Decision, overruling the Objection to Amended Proof of Claim, "except as to whether and in what amount [the claim] should be reduced to reflect the fact that . . . Jackson did not reside in the [Condo] for a period of time." The court consolidated the Objection to Amended Proof of Claim on this surviving ground with Jackson's adversary proceeding.

In October 2014, Capital One filed a second amended proof of claim, reducing its claim to $246,242.22. The intent of this amendment was to resolve Jackson's sole remaining objection by omitting the sums that accrued during the period of time when Jackson did not reside in the Condo. Jackson objected to Capital One's attempted amendment, on the grounds that it was unauthorized and did not take into account all of her damages. The court sustained her objection, striking Capital One's second amended proof of claim so that the disputed amount could be determined in the adversary proceeding.

III. The Adversary Proceeding

A. The Complaint

On February 19, 2013, Jackson commenced an adversary proceeding with a six-count complaint (the "Complaint") against P & G, ING, Capital One, Bank of America, N.A. ("BOA"), and Harmon Law Offices, P.C. ("Harmon"). The crux of the Complaint was that the 2008 foreclosure and the attempted 2012 re-foreclosure were improper.

In Count I, aimed at all defendants except P & G, Jackson sought declaratory relief voiding the 2008 foreclosure on the grounds that Countrywide was not the mortgagee at the time of the sale, as MERS (the original mortgagee) had never assigned the Mortgage.

Jackson captioned Count II, "Fair Debt Collection Practices Act," and alleged in that count that all defendants except P & G "violated the Massachusetts and Federal Fair Debt Collection Practices Acts" by "asserting a right to collect a debt that was not owed to them." Accordingly, she sought money damages.

Jackson captioned Count III, "Deceit and Misrepresentation," and directed it against all defendants except P & G. She alleged that the Count III defendants "deceived [her] by misrepresenting their legal rights and hers." Accordingly, she claimed she was entitled to money damages.

In Count IV, Jackson asserted a cause of action for negligence against all defendants except P & G, alleging that they breached their "fiduciary duty to act fairly and in good faith."

Jackson directed Count V against P & G only, and captioned that count, "Deceit, Misrepresentation, FDCPA, and Violation of the Discharge Injunction." At the heart of this count were communications received by Jackson from Brunelle, "who admitted knowing that Jackson had filed a bankruptcy case and received a discharge." Additionally, Jackson

complained that the January 2012 letter from Brunelle was "false," insofar as it erroneously indicated that ING was the "present holder" of the Mortgage. She alleged in Count V that P & G "admitted that its actions [we]re subject to the Fair Debt Collection Practices Act" (the "FDCPA").

In Count VI, Jackson presented a claim against all defendants for "[b]reach of [c]ontract" and "[w]rongful [f]oreclosure," alleging that in connection with the "2008 foreclosure and the 2012 attempt to re-foreclose," they had failed to send Jackson the notices of default required under the terms of the Note, Mortgage, and "applicable Massachusetts statutes." In her prayer for relief, Jackson asked the bankruptcy court to: (1) enjoin the defendants from "complet[ing] or reinitiat[ing] the wrongful foreclosure sale"; (2) set aside the foreclosure sale and/or declare any foreclosure deed to be a nullity; (3) order the defendants to provide her with an accounting and an opportunity to cure any default pursuant to the provisions of chapter 13; (4) award damages for violation of the discharge injunction; (5) award damages and attorneys' fees; and (6) award "such other relief as to the court seem[ed] . . . just."

B. Responses to the Complaint

BOA promptly moved to dismiss the Complaint. Capital One and ING jointly filed a Partial Motion to Dismiss, seeking the dismissal of Counts II, III, IV, and a portion of Count VI. Jackson objected to both motions.

P & G filed an answer to the Complaint, asserting multiple affirmative defenses. Jackson moved to strike all of them.

Harmon filed an answer on March 21, 2013, in which it asserted eleven affirmative defenses. Jackson moved to strike several of them. On March 28, 2013, Harmon also moved for judgment on the pleadings under Rule 12(c). In its accompanying memorandum of law, Harmon

argued that Jackson was precluded by the terms of the Move Out Agreement from bringing any claim against Harmon arising out of the 2008 foreclosure.

C. May 2, 2013 Hearing and Resulting Orders

After conducting a hearing on May 2, 2013, the bankruptcy court entered multiple orders regarding the pending motions. With respect to BOA's motion to dismiss, the bankruptcy court ordered:

> *For the reasons set forth on the record of today's hearing*, the motion is allowed as to Count II [(the deceit and misrepresentation count)] with respect to the Federal FDCPA only, and as to Count III.
>
> Plaintiff is ordered to file an amended complaint by May 20, 2013, providing more details as to allegations of violations of the Massachusetts FDCPA in Count II, as to bre[a]ch of contract claims in Count IV, and as to bre[a]ch of contract claims in Count VI.
>
> Defendant shall answer the amended complaint by June 3, 2013.

(emphasis added). With respect to ING and Capital One's partial motion to dismiss, the bankruptcy court entered an identical order. The bankruptcy court entered two additional orders, partially granting Jackson's motion to strike Harmon's affirmative defenses and her motion to strike all affirmative defenses asserted by P & G.

D. The Amended Complaint

Jackson filed an amended complaint (the "Amended Complaint") in May 2013. In the Amended Complaint, she: (i) amplified Count II, the Massachusetts FDCPA claim (the federal aspect of that claim having been dismissed); (ii) indicated Count III had been dismissed; (iii) amended Count IV, her negligence count, to include a breach of contract claim, and to allege that the "defendants were negligent in failing to ensure that they actually had the legal right to foreclose"; and (iv) amended Count VI, her breach of contract count, to specifically identify the

Massachusetts statutes she was invoking and the specific requirements of those statutes. Now, in Count VI, she alleged:

> Under the unambiguous terms of the [ ] Note and Mortgage as well as applicable Massachusetts statutes, in particular Chapter 244 § 35A, the mortgagee/lender was required to send Jackson notices of default prior to the 2012 attempt to re-foreclose, affording her the opportunity to cure the default and reinstate the [M]ortgage.
>
> [ ] The statute requires, among other things, that notice be provided that a mortgagee must inform the mortgagor of the mortgagor's right to cure a default or obtain assistance in dealing with the default, and further requires that the right to accelerate be suspended for 150 days.
>
> [ ] At no time did any defendant send Jackson the required notices . . . .

E. Responses to the Amended Complaint

P & G filed an answer on May 31, 2013, in which it asserted four affirmative defenses. BOA moved to dismiss the Amended Complaint in its entirety, relying largely upon Pilalas v. Cadle Co., 695 F.3d 12, 16–17 (1st Cir. 2012), which upheld a broad release of all claims contained in a settlement agreement. Capital One and ING jointly moved to dismiss the adversary proceeding; Harmon likewise filed a motion to dismiss the adversary proceeding. Jackson separately opposed all three motions to dismiss.

F. July 11, 2013 Hearing

On July 11, 2013, the bankruptcy court held hearings regarding the various motions to dismiss the Amended Complaint. Following the hearing, the bankruptcy court entered an order regarding BOA's motion to dismiss the Amended Complaint which provided:

> *For the reasons set forth in the record of today's hearing*, Counts II, IV and VI of the First Amended Complaint are dismissed as to Bank of America.
>
> Count I is also dismissed except insofar as it seeks a declaratory judgment that the 2008 foreclosure sale is void.

> Bank of America shall answer the First Amended Complaint or file such other appropriate pleading by August 12, 2013.

(emphasis added). With respect to Capital One and ING's joint motion to dismiss the Amended Complaint, the bankruptcy court ruled:

> *For the reasons set forth in the record of today's hearing*, Counts II and IV of the first amended complaint are dismissed as to Capital One, N.A. and ING Bank, FSB.
>
> Count I is also dismissed except insofar as it seeks a declaratory judgment that the 2008 foreclosure sale is void.
>
> Capital One, N.A. and ING Bank, FSB shall file their answers to the First Amended Complaint by August 12, 2013.

(emphasis added). As to Harmon's motion to dismiss the Amended Complaint, the bankruptcy court ruled: "*For the reasons set forth in the record of today's hearing*, Counts I, II, IV and VI of the First Amended Complaint are dismissed as to Harmon Law Offices, P.C." (emphasis added).

G. Capital One and ING's Answer to Amended Complaint

In due course, Capital One, ING, and BOA answered the Amended Complaint. Jackson responded by filing a motion for summary judgment on Count I (seeking a declaration that the 2008 foreclosure was void) as to those three defendants. Eventually, the defendants filed statements indicating they did not oppose the entry of summary judgment, and the bankruptcy court vacated its initial denial of Jackson's motion and declared the 2008 foreclosure void.

H. Capital One and ING's Summary Judgment Motion Regarding Count VI, and Jackson's Objection and Cross-Motion

Capital One and ING then filed a joint motion to dismiss and/or for summary judgment on Count VI of the Amended Complaint, arguing:

> Count VI of Jackson's First Amended Complaint alleges wrongful foreclosure and breach of contract based entirely on Capital One's failure to provide Jackson

> a right to cure letter pursuant to Mass. [Gen. Laws ch.] 244, § 35A, in connection with Jackson's 2012 foreclosure, which was commenced, but not completed.
>
> As this foreclosure did not result in any sale, however, Jackson has no legally recoverable damages—an essential element of a wrongful foreclosure claim. Moreover, Jackson had no[ ] legal entitlement to receive a right to cure letter pursuant to Mass. [Gen. Laws ch.] 244, § 35A, because: (a) that statute was not in effect at the time of Jackson's original default; and (b) Jackson received a right to cure letter in 2008, and the law in effect at the time only required that a right to cure letter be sent every five years.

Additionally, they argued: (1) Jackson failed to plead the required elements of her cause of action with specificity; (2) the alleged failure to receive a cure letter did not give rise to a wrongful foreclosure claim, pursuant to U.S. Bank Nat'l Ass'n v. Schumacher, 5 N.E.3d 882 (Mass. 2014); and (3) because the Note was discharged, it was not a valid and binding agreement.

Jackson objected to Capital One and ING's motion for summary judgment. She maintained that she satisfied the specificity requirement established in Ashcroft v. Iqbal, 556 U.S. 662 (2009), by alleging that Capital One and ING "were required by both the contract and by statute to send certain notices in connection with foreclosure, but failed to do so, thus breaching the contract and violating the statute." She then pointed to specific language in both the Note and Mortgage, requiring the lender to give the borrower notice of acceleration. With respect to the alleged "statutory violation," she argued: "[E]ven though the requirements of § 35A are not part of the exercise of the statutory power of sale, giving the proper notice required by § 35A is a mandatory condition precedent to that exercise." Absent proper notices, she argued, the subsequent commencement of foreclosure was both a statutory violation and a tortious wrongful foreclosure. She contended it was immaterial that the foreclosure was not completed. Accordingly, she asked for the entry of summary judgment in her favor.

Capital One and ING jointly objected to Jackson's cross-motion for summary judgment, arguing that Jackson was "mistaken about the law," and even more importantly, failed to produce evidence that the alleged omission of a proper right to cure letter caused her any damages. They elaborated:

> Jackson . . . attempts to muddle the issue by alleging that clearly she must have incurred damages because "she was forced to move from her home," and because she has had to pay attorneys' fees. . . . As Jackson well knows, however, her moving costs relate to her 2008 foreclosure, and the Court has already found that Jackson *is not entitled to any damages relating to the 2008 foreclosure because of the "Move Out Agreement" she entered into, which included a broad release in favor of Capital One.*

I. June 19, 2014 Judgment

After a hearing, the bankruptcy court entered summary judgment on June 19, 2014, in favor of ING and Capital One on Count VI of the Amended Complaint. In its accompanying Bench Ruling (the "Bench Ruling"), the bankruptcy court stated, in pertinent part:

> Even if Capital One did violate the terms of the [N]ote and [M]ortgage or Mass. Gen. Laws ch. 244[,] § 35A, Capital One points out that Ms. Jackson has failed to demonstrate that as a result she is entitled to money damages or any other form of legal or equitable relief at this juncture and thus Ms. Jackson has failed to allege or provide evidence to support a specific claim for relief due to Capital One's alleged failure to send the required notice.
>
> Ms. Jackson responds that the fact that she suffered damages is "manifest on the record" . . . .
>
> Capital One retorts that any damages flowing from the void 2008 foreclosure sale are not recoverable by Ms. Jackson due to the Move Out Agreement she signed in early 2009 in which she released Capital One from all claims, that Ms. Jackson has not pled a basis for or come forward with evidence to support an award of attorneys' fees and that bifurcating the issues of liability and damages would be inappropriate because damages, as an essential element of her claim, must be examined at the summary judgment stage.
>
> Strengthening Capital One's position, at least as to the statutory notice requirements, is the Massachusetts Supreme Judicial Court's recent decision in U.S. Bank Nat'l Ass'n v. Schumacher, 5 N.E.3d 882 (Mass. 2014). In Schumacher, the SJC held that § 35A "is not one of the statutes 'relating to the

> foreclosure of mortgages by the exercise of a power of sale.'" . . . Chief . . . Justice[ ] Gants outlined two avenues of redress, one pre and one post foreclosure, available to mortgagors who did not receive notice in compliance with § 35A. . . . Prior to the foreclosure sale, ". . . the homeowner may file an equitable action in Superior Court seeking to enjoin the foreclosure" . . . . Post foreclosure . . . "she may assert a defense or counterclaim in Housing Court."
> . . . .
> Since a second foreclosure sale never occurred, under Schumacher if Capital One had in fact violated § 35A in connection with the events leading up to the attempted second foreclosure in 2012 Ms. Jackson, at best, would have been entitled to an injunction and issuance of a compliant § 35A notice and a new cure period. Ms. Jackson has her injunction by virtue of the automatic stay imposed on Capital One as a result of her bankruptcy filing. I agree with Capital One that Ms. Jackson has not pled a sufficient basis or come forward with evidence to support an award of attorneys' fees as to Count VI. The other elements of a damages claim enumerated by Ms. Jackson, wrongful foreclosure in 2008, being forced to move from her home, and moving back in, have nothing to do with Count VI which alleges that Capital One failed to give Ms. Jackson notice as required by statute and her loan documents in connection with the attempted 2012 foreclosure.
>
> Because of the automatic stay, the issue of whether Ms. Jackson is entitled to a new § 35A notice and cure period is not ripe for adjudication.
> . . . .
> The inescapable conclusion is that Ms. Jackson has not alleged in her complaint or come forward with sufficient evidence to show that she is entitled to a remedy in Count VI. Put another way, Ms. Jackson has not alleged or come forward with sufficient evidence to demonstrate that her claim of entitlement to a new § 35A notice and cure period is ripe for adjudication.
> . . . .
> I am not insensitive to the fact that Ms. Jackson has suffered some hardship as a result of the void 2008 foreclosure sale. But whether Ms. Jackson is entitled to redress as a result is best dealt with in the context of what is left of this adversary proceeding, Ms. Jackson's claim objection.
>
> In sum Ms. Jackson has failed to demonstrate the existence of any trial[-]worthy issue with respect to Count VI of her First Amended Complaint.

Jackson v. ING Bank, FSB (In re Jackson), Adv. Pro. No. 13-01064-MSH (Bankr. D. Mass. June 19, 2014) (citation omitted) (internal quotation omitted). In a separate order, the bankruptcy court denied Jackson's cross-motion.

J. The Trial

The bankruptcy court conducted a trial on July 22, 2015. The only issues at trial were: (1) the amount of reduction of Capital One's proof of claim; and (2) P & G's liability. Jackson was the sole witness to testify on her behalf. P & G called Brunelle to the stand.

Jackson testified that she moved out of the Condo in January 2009. After moving out, she lived for a time with her boyfriend, to whom she paid monthly rent in the amount of $500.00. She further testified that in January 2012, she received a letter from P & G "calling the entire balance due on [the M]ortgage." Then, in February 2012, she received a letter from ING. She further testified that she moved back into her Condo around July 2012, explaining that her return to the Condo was the product of "a combination of the correspondence from ING and then a letter following that [from] [P & G]." Thereafter, she communicated with Brunelle, who said "the only way to cure" the Mortgage default was "to pay it in full." Jackson elaborated regarding her discussion with Brunelle: "I said, 'I had filed bankruptcy.' She said she knew that I filed bankruptcy. I said, 'Well, if you know I filed bankruptcy, why are you asking me for money?' She said 'cause she could' . . . ."

Brunelle testified that "numerous communications" had been sent to Jackson, including notices of pending and postponed foreclosure auctions. "[W]e did send [notices] each time that the auctions were postponed," she stated. She also testified that P & G's "standard practice was to always run a PACER check before" beginning a foreclosure. P & G offered a letter dated November 25, 2011, in which Brunelle notified Jackson of her default under the Mortgage, the balance due under the Note, and the opportunity to cure the default. In that letter, Brunelle "stated that P & G was a debt collector under the FDCPA and was attempting to collect a debt."

The letter also contained the following disclaimer:

> Be advised that if your debt[ ] to the foreclosing lender has been discharged in bankruptcy and said discharge has not been vacated or otherwise modified any time in the future, then this notice is void and of no legal effect whatsoever and does not serve in any way to assert or revive any claim that the lender may have had against you . . . .

During the course of the trial, counsel for Jackson invoked Pinti v. Emigrant Mortg. Co., 33 N.E.3d 1213 (Mass. 2015), in an effort to support the theory that Jackson did not receive proper notice of the re-foreclosure; however, the court rejected any Pinti argument, noting that the decision was only days old and prospective in its application.

At the conclusion of the trial, Jackson's attorney waived closing argument and agreed to the concurrent submission of post-trial briefs on October 5, 2015.

K. Post-Trial Events

1. Jackson's Motion for Extension of Time to File Post-Trial Brief

P & G, Capital One, and ING timely filed their post-trial briefs. Jackson did not. Instead, on the date the briefs were due, Jackson's attorney moved for an extension of time, representing he had been hospitalized since September 23, 2015, and that he expected to be discharged on October 7, 2015. P & G, Capital One, and ING objected. Capital One and ING noted that simultaneous briefing was intended to prevent any party from having an advantage.

On October 7, 2015, the bankruptcy court entered an order, denying, without explanation, the motion for extension of time. Undaunted, on October 27, 2015, Jackson submitted two post-trial briefs—one regarding Capital One and ING, and another regarding P & G. She simultaneously filed a Motion for Leave to File Brief *Nunc Pro Tunc* (the "Motion for Leave"), seeking permission to file the briefs, arguing "[i]llness and hospitalization generally are

considered 'excusable neglect.'" In support, she cited In re LaClair, 360 B.R. 388 (Bankr. D. Mass. 2006).

2. Jackson's Motion to Strike Attachments to Capital One's Post-Trial Brief

On October 27, 2015, Jackson also moved to strike the two attachments to Capital One and ING's joint post-trial brief, namely, a chart summarizing Jackson's escrow payments during the period she vacated the Condo and a LIBOR rate history. She argued: (1) counsel for Capital One did not call any witnesses or cross-examine Jackson; (2) Capital One never requested that the court take judicial notice of the interest rate information; and (3) the chart regarding escrow payments had not been authenticated.

On November 2, 2015, the bankruptcy court entered an order denying, without explanation, Jackson's Motion for Leave. The court also entered an order denying Jackson's request that the court strike the attachments to Capital One and ING's joint post-trial brief, stating:

> The chart attached to the defendants' post-trial brief summarizes the relevant information contained in the exhibit to Capit[a]l One's proof of claim which was admitted as evidence at trial and may well have been admissible as a chart under FRE 1006 if requested. I take judicial notice of LIBOR rate history under FRE 201.

L. The February 2016 Decision

In its February 2016 Decision, the bankruptcy court addressed the remainder of Jackson's adversary proceeding, namely, her claims against P & G and the Objection to Amended Proof of Claim.

1. The Claims Against P & G

With respect to Jackson's § 524(a)(2) claims against P & G set forth in Count V, the court ruled that P & G committed a violation of the discharge injunction when Brunelle sent

Jackson the November 2011 letter and the January 2012 letter. With respect to Jackson's FDCPA claims, the court found that P & G engaged in acts or omissions prohibited under the FDCPA. With respect to the deceit and misrepresentation claim, the court ruled that Jackson failed to show, as required by Massachusetts law, that she relied to her detriment upon any misrepresentation by P & G.

As for the wrongful foreclosure and breach of contract claims, the court ruled, in pertinent part:

> Ms. Jackson cannot prevail on her wrongful foreclosure and breach of contract claims against P & G in connection with the attempted re[-]foreclosure sale for the same reasons that I ruled against her on those same claims asserted against defendants ING and Capital One. . . . There can be no wrongful foreclosure claim because there was never a foreclosure sale. See Nash v. GMAC Mortg., LLC, No. 10-492, 2011 U.S. Dist. LEXIS 142081, at *38 (D.R.I. May 18, 2011). And because there was never a foreclosure sale, Ms. Jackson's breach of contract claim based on Mass. Gen. Laws c[h]. 244, § 35A is not ripe for adjudication.
> . . .
> Having ruled that there is no wrongful foreclosure claim, it is not necessary to address P & G's added defense that Ms. Jackson was not entitled to a § 35A notice because the [Condo] was not her principal residence.
>
> Additionally Ms. Jackson cannot prevail on a breach of contract claim against P & G because she has failed to establish that she was in privity with P & G. There is no privity of contract between a mortgagor and a law firm retained by a mortgagee to conduct a statutory foreclosure. Quinn v. Ocwen Fed. Bank, FSB, 470 F.3d 1240, 1247 (8th Cir. 2006).

2. The Amended Proof of Claim

The bankruptcy court then shifted to the Amended Proof of Claim, and, in particular, the validity of the amounts Capital One claimed for the period when Jackson did not reside in the Condo. After acknowledging that Jackson had initially carried her burden of challenging the prima facie validity of these amounts, the court noted that Capital One had agreed to reduce its claim by $48,822.00, to exclude charges for interest, escrow payments, and late fees for this so-called vacancy period. The court further observed that Jackson offered "no meaningful

alternative to calculating an appropriate reduction." Persuaded that Capital One's accounting supported a $48,822.00 credit, the court approved a reduction in that amount.

The court concluded its memorandum by summarizing its rulings as follows:

> Judgment will enter . . . in favor of P & G on Ms. Jackson's claims alleging wrongful foreclosure, breach of contract, deceit and misrepresentation. Judgment will enter in Ms. Jackson's favor against P & G for violation of the bankruptcy discharge injunction and § 1692e(2)(A) of the FDCPA. Further proceedings for the assessment of damages will be scheduled.
>
> A separate order will enter in the main case allowing Capital One's proof of claim in the amount of $246,242.22.

The bankruptcy court entered a Judgment in the adversary proceeding (the "February 2016 Judgment") in accordance with the terms of the February 2016 Decision. The bankruptcy court issued an order in the main case, allowing Capital One's proof of claim in the amount of $246,242.22. Jackson appealed the February 2016 Judgment, and the Panel dismissed that appeal as interlocutory.

M. July 7, 2016 Damages Hearing

The bankruptcy court conducted an evidentiary hearing on July 7, 2016 regarding the appropriate amount of damages to assess against P & G. While there is no transcript of this hearing in the record, the record does contain the bankruptcy court's July 29, 2016 Memorandum of Decision and Order Assessing Damages Against [P & G] (the "July 2016 Decision"), wherein it found P & G liable to Jackson in the amount of $17,994.00. This figure consisted of $649.00 in actual damages, statutory damages under the FDCPA of $1,000.00, and attorneys' fees of $16,345.00. The court declined to impose any punitive damages. In support of its award, the bankruptcy court invoked: (1) § 105, which authorizes bankruptcy courts to enforce the discharge injunction and order damages; and (2) the FDCPA, which provides in § 1692k(b) for the imposition of a maximum of $1,000.00 against those who have violated the statute.

Although the bankruptcy court found the $350.00 hourly fee of Jackson's attorney reasonable, the court concluded it would be inappropriate to hold P & G liable for the cost of litigating claims unrelated to the adversary proceeding. Moreover, the court relied on P & G's analysis of the fee application of Jackson's attorney in discounting his fee request by $18,410.00.

This appeal followed.[7]

DISCUSSION

I. Scope of the Appeal

We begin with the necessary process of winnowing to determine what is properly before us. As a preliminary matter, we must take stock of the defects in Jackson's notice of appeal, Jackson's omissions from the record, the omissions in her brief, and the tardiness of her brief, and assess the cumulative effect of those defects on the scope of this appeal. Indeed, all appellees (except P & G) point to the inadequacies of the record and Jackson's brief and seek to hold her accountable. In addition, Capital One and ING argue that Jackson's tardiness in filing her appellate brief warrants dismissal of the appeal.

[7] Jackson identifies with specificity the following matters on appeal: (1) the February 2016 Decision; (2) the July 2016 Decision; (3) the May 3, 2013 order, partially granting the motion to dismiss of BOA; (4) the May 3, 2013 order, partially granting the motion to dismiss filed by Capital One and ING; (5) the July 11, 2013 order, partially granting BOA's motion to dismiss certain counts of the Amended Complaint; (6) the July 11, 2013 order, partially granting Capital One and ING's motion to dismiss; (7) the July 11, 2013 order, dismissing Counts I, II, IV, and VI of the First Amended Complaint as to Harmon; (8) the Bench Ruling; (9) the June 19, 2014 order, denying Jackson's cross-motion for summary judgment as to ING and Capital One on Count VI of the Amended Complaint and the Judgment entered thereon; (10) the December 2013 Order; (11) the October 7, 2015 order, denying Jackson's request for an extension of time to file a post-trial brief; (12) the November 2, 2015 order, denying Jackson's Motion for Leave; and (13) the November 2, 2015 order, denying Jackson's motion to strike exhibits to ING and Capital One's post-trial brief.

Of the host of items appealed, we reach the merits of only the following: (1) the Bench Ruling; (2) the February 2016 Decision; (3) the July 2016 Decision; (4) the October 7, 2015 order, denying Jackson's request for an extension of time to file a post-trial brief; (5) the November 2, 2015 order, denying Jackson's Motion for Leave; and (6) the November 2, 2015 order, denying Jackson's motion to strike exhibits to Capital One's post-trial brief.

A. Notice of Appeal Defects

Among the myriad of items identified in her notice of appeal, Jackson lists the "transcript" of the July 22, 2015 trial. The Panel has jurisdiction over appeals from certain orders, judgments, or decrees of the bankruptcy court. See 28 U.S.C. § 158; Fed. R. Bankr. P. 8003(a)(1). Because the transcript does not qualify as "a judgment, order, or decree," it is not properly the subject of a notice of appeal.[8] Therefore, the notice of appeal is ineffective as to the transcript and Jackson's appeal of the transcript is **DISMISSED** for lack of jurisdiction.

Additionally, Jackson attempts to appeal "from every adverse ruling" of the bankruptcy court, leaving the Panel to guess precisely what other rulings she intends to appeal. A party may not appeal from unspecified rulings. "A notice of appeal must 'designate the judgment, order, or part thereof being appealed,' Fed. R. App. P. 3(c)(1)(B), before it confers jurisdiction on a court of appeals to hear a case." Constructora Andrade Gutiérrez, S.A. v. Am. Int'l Ins. Co. of P.R., 467 F.3d 38, 43 (1st Cir. 2006) (citing Nieves-Márquez v. Puerto Rico, 353 F.3d 108, 122 (1st Cir. 2003)). "It is an elementary principle that a notice of appeal cannot be filed in a desultory fashion but, rather, must specify a particular order or judgment . . . ." Gray v. Evercore Restructuring, L.L.C. (In re High Voltage Eng'g Corp.), 544 F.3d 315, 318 (1st Cir. 2008) (citations omitted). Moreover, noncompliance with Fed. R. App. P. 3 "is fatal to an appeal." Smith v. Barry, 502 U.S. 244, 248 (1992). Therefore, to the extent Jackson's appeal is from "every adverse ruling," it is **DISMISSED**.

[8] Indeed, Jackson was so warned in her earlier appeal taken in the above-referenced adversary proceeding, BAP No. MB 16-013, when the Panel dismissed an identical attempt to appeal the same transcript.

B. The Consequence of Omissions in the Record and Late Filing of Brief

The scope of this appeal is further narrowed by inadequacies of the record. Jackson seeks to appeal from two orders entered on May 3, 2013: (1) the order partially granting BOA's motion to dismiss; and (2) the order partially granting ING and Capital One's motion to dismiss. Each order indicates that it was entered "for the reasons set forth on the record of today's hearing." The record on appeal, though somewhat voluminous, does not contain the transcript of the May 2, 2013 hearing. Similarly, Jackson seeks to appeal from three orders entered on July 11, 2013: (1) the order granting BOA's motion to dismiss certain counts of the Amended Complaint; (2) the order granting Capital One and ING's motion to dismiss certain counts of the Amended Complaint; and (3) the order granting Harmon's motion to dismiss certain counts of the Amended Complaint. Again, these orders state that they were entered "for the reasons set forth on the record of today's hearing . . . ." And, again, Jackson has not included the transcript of that hearing in the record on appeal.[9] Without the transcripts of the May 2, 2013 and July 11, 2013 hearings, we cannot ascertain why the court entered the orders.

"Parties seeking appellate review must furnish the court with the raw materials necessary to the due performance of the appellate task." Campos-Orrego v. Rivera, 175 F.3d 89, 93 (1st Cir. 1999) (citations omitted). "Applicable procedural rules recognize this division of labor and place the burden squarely on the appealing party to supply so much of the record of the

[9] Two weeks after oral argument, however, Jackson did submit a transcript of the July 11, 2013 hearing, together with a request for leave to supplement the record, which the Panel denied. Timely compliance with the rules governing appeals is not optional. When an appeal has been briefed, argued, and taken under advisement, allowing an appellant to supplement the record with critical transcripts—transcripts that were available when items were designated for inclusion in the record—would be unfairly prejudicial to the appellee(s) and would reward the appellant for its failure to comply with the applicable rules.

proceedings below as is necessary to enable the appellate court to conduct informed review." Id. (citing Fed. R. App. P. 10(b); Jardines Bacata, Ltd. v. Diaz-Marquez, 878 F.2d 1555, 1559 n.5 (1st Cir. 1989); Real v. Hogan, 828 F.2d 58, 60 (1st Cir. 1987)); see also Fed. R. Bankr. P. 8009.[10]

Responsibility for voids in the appellate record resides "with the party whose claim of error depends for its support upon any portion of the record of the proceedings below which was omitted from the designation of the record on appeal." In re Abijoe Realty Corp., 943 F.2d 121, 123 n.1 (1st Cir. 1991) (citations omitted). The responsibility to furnish an adequate record includes supplying the reviewing court with "all transcripts necessary to address the issues raised on appeal." Torres Martinez v. Rivera Arce (In re Torres Martinez), 397 B.R. 158, 166 (B.A.P. 1st Cir. 2008) (citing Sanabria v. Int'l Longshoremen's Ass'n, 597 F.2d 312, 313 (1st Cir. 1979); In re Abijoe Realty Corp., 943 F.2d at 123 n.1).[11] "Where the bankruptcy court's findings or conclusions of law were set forth on the record at a hearing, the appellant is required to provide a transcript of the hearing as part of the record on appeal." Kristan v. Patriot Growth Fund, L.P., No. EP 05-049, 2006 WL 53800, at *4 (B.A.P. 1st Cir. Jan. 11, 2006) (stating that debtor-appellant's failure to provide a transcript of the claim objection hearing was "fatal to his appeal"

[10] Bankruptcy Rule 8009 governs the record on appeal. See Fed. R. Bankr. P. 8009. It provides the record must include, among other things, "any opinion, findings of fact, and conclusions of law relating to the issues on appeal . . . ." Fed. R. Bankr. P. 8009(a)(4).

[11] We are mindful that subdivision (e) of Bankruptcy Rule 8009, modeled on Fed. R. App. P. 10(e), now "provides a procedure for correcting the record on appeal if an item is improperly designated, omitted, or misstated." Fed. R. Bankr. P. 8009, cmts. That rule now provides, in pertinent part, that "[i]f anything material to either party is omitted from . . . the record by error or accident, the omission . . . may be corrected . . . by the court where the appeal is pending." Fed. R. Bankr. P. 8009(e)(2)(C). The amendment to Bankruptcy Rule 8009 does "not appear to have altered th[is] general rule" that it is the appellant's burden to furnish an adequate record. In re Cupit, 541 B.R. 739, 746 n.6 (D. Colo. 2015) (citing Wildhaber v. Burchard (In re Wildhaber), BAP No. NC-14-1352-PaJuKl, 2015 WL 4550128, at *5 (B.A.P. 9th Cir. July 28, 2015)). Moreover, the First Circuit BAP Local Rules make clear that "[t]he BAP need not remedy any failure by a party to designate an adequate record." 1st Cir. BAP L.R. 8009-1.

of the order denying his motion for reconsideration of the denial of his objection to the proof of claim). The First Circuit has repeatedly held that an appellate court will not review a claim of error if the appellant has failed to provide a transcript of the pertinent proceedings in the record on appeal. See, e.g., Muniz Ramirez v. P.R. Fire Servs., 757 F.2d 1357, 1358 (1st Cir. 1985) (citations omitted).

Jackson's argument that Harmon should have or could have produced the missing transcript flouts an entire body of law placing the burden of furnishing an adequate record squarely on the appellant. Her argument that the Panel has at its disposal 1,600 pages of documents from which it "could easily discern" the basis of the court's ruling also lacks merit. It is not the reviewing court's burden to comb the record to find support for the appellant's argument. It is the appellant's burden to "facilitate" the court's review, rather than make it more difficult by requiring the court to find needles in the haystack of the appellate record.

Where, as here, an appellant "shirks [its] responsibility" to supply so much of the record of the proceedings below as is necessary to enable an "informed" review, the appellate court in its discretion either may review so much of the appeal as the record permits or dismiss the appeal in its entirety. See Campos-Orrego, 175 F.3d at 93–94 (citation omitted). While Jackson's omissions from the record are far from her only procedural shortcomings—she also failed to file her brief in a timely manner notwithstanding two extensions—we are mindful that there is a strong public policy favoring resolution of disputes on their merits. Additionally, the appellees did not timely move to dismiss the appeal on the basis of these shortcomings. Thus, in this instance, rather than dismiss this appeal outright, we exercise our discretion to decline to review the May 3, 2013 and the July 11, 2013 orders; accordingly, those orders are **AFFIRMED**.

II. Examining What Remains After Narrowing the Scope of the Appeal

After whittling the scope of the appeal, we are still left with numerous orders. We group the remaining orders into three categories: (1) orders relating to Jackson's claims against Capital One and ING and to her objection to Capital One's claim; (2) orders relating to Jackson's claims against P & G; and (3) orders relating to the parties' post-trial briefs.

A. Jurisdiction

The Panel has jurisdiction to hear appeals from final judgments, orders, and decrees of the bankruptcy court. 28 U.S.C. § 158(a)(1), (b)(1). A final order "generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945) (citation omitted).

A bankruptcy court's order assessing damages following a judgment as to liability is a final, appealable order. See Liberty Mut. Ins. Co. v. Wetzel, 424 U.S. 737, 744 (1976); Cent. Pension Fund of Intern. Union of Oper. Eng'rs & Participating Emp'rs v. Ray Haluch Gravel Co., 695 F.3d 1, 7 (1st Cir. 2012) (citation omitted), rev. on other grounds, 134 S. Ct. 773 (2014). Thus, the bankruptcy court's July 2016 Decision (assessing damages against P & G) is a final order. That adjudication was the bankruptcy court's final act in the matter, thereby ending the litigation as all other claims had been resolved.

In addition, "[u]nder the 'merger rule,' prior interlocutory orders merge with the final judgment in a case, and . . . may be reviewed on appeal from the final order." In re Westinghouse Sec. Litig., 90 F.3d 696, 706 (3d Cir. 1996); see also Diaz-Santos v. Dep't of Educ. of Commonwealth of P.R., 108 F. App'x 638, 641 (1st Cir. 2004); Brandt v. Wand Partners, 242 F.3d 6, 14 (1st Cir. 2001). Thus, upon entry of the order assessing damages against P & G, all of the bankruptcy court's prior interlocutory orders became final and subject to review

on appeal. These include the orders relating to: (1) Jackson's claims against Capital One and ING and to her objection to Capital One's claim; and (2) the parties' post-trial briefs.

B. Standard of Review

We review the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Jeffrey P. White & Assocs., P.C. v. Fessenden (In re Wheaton), 547 B.R. 490, 496 (B.A.P. 1st Cir. 2016) (citation omitted). The standard of review on appeal from a grant of summary judgment is de novo. Prime Healthcare Servs.-Landmark LLC v. United Nurses & Allied Prof'ls, Local 5067, 848 F.3d 41, 45 (1st Cir. 2017).

The Panel reviews the allowance or disallowance of a claim, the grant or denial of a request to extend time, and the grant or denial of a motion to strike under the abuse of discretion standard. See, e.g., RNPM, LLC v. Mercado Alvarez (In re Mercado Alvarez), 473 B.R. 853, 859 (B.A.P. 1st Cir. 2012) (allowance or disallowance of a claim); Rivera-Siaca v. DCC Operating, Inc., 416 B.R. 9, 14 (D.P.R. 2009) (citing Pérez-Cordero v. Wal-Mart P.R., 440 F.3d 531, 534 (1st Cir. 2006)) (request for extension of time); Wiscovitch-Rentas v. Villa Blanca VB Plaza LLC (In re PMC Mktg. Corp.), 543 B.R. 345, 354 (B.A.P. 1st Cir. 2016) (motion to strike). "An abuse of discretion occurs when the court ignored a material factor deserving significant weight, relied upon an improper factor, or made a serious mistake in weighing proper factors." In re Mercado Alvarez, 473 B.R. at 859 (citation omitted) (internal quotations omitted). An error of law is also an abuse of discretion. Picciotto v. Cont'l Cas. Co., 512 F.3d 9, 15 (1st Cir. 2008).

III. Orders Regarding Capital One and ING

A. Order on Jackson's Objection to Claim of Capital One

By its December 2013 Order, the bankruptcy court overruled the Objection to Amended Proof of Claim, except as to whether and in what amount that claim should be reduced to reflect the fact that Jackson did not reside in the Condo for a period of time. The court explained its reasoning in the December 2013 Decision, a detailed 18-page memorandum.

In her appellate brief, Jackson does not specify what error of law the bankruptcy court committed by partially allowing Capital One's claim in this manner. She never even suggests the claim should have been disallowed. There is not a single reference in Jackson's appellate brief to the bankruptcy court's memorandum or to any of the law or reasoning articulated therein. Although Jackson argues the bankruptcy court "incorrectly shifted the burden of proof" to her regarding the allowance of Capital One's claim, she does not argue this purported burden shifting led to an improper result.

"The appellant carries the burden of showing an abuse of discretion—and the burden is a heavy one." Thibeault v. Square D Co., 960 F.2d 239, 242 (1st Cir. 1992) (citations omitted). Jackson has failed to shoulder this burden in connection with her appeal of the December 2013 Order regarding the Amended Proof of Claim. That order is, therefore, **AFFIRMED**.

B. The June 19, 2014 Judgment and the Bench Ruling

To recapitulate**,** by their motion dated March 24, 2014, ING and Capital One sought dismissal or summary judgment on Count VI of the Amended Complaint. That count, as stated above, was entitled "Breach of Contract; Wrongful Foreclosure" and alleged Capital One's failure to send certain notices prior to attempting to re-foreclose on the Condo in 2012 as required by Mass. Gen. Laws ch. 244, § 35A. It stated simply that Capital One never "sen[t]

Jackson the required notices or otherwise compl[ied] with the statutory requirements in attempting to re[-]foreclose, thus breaching the contract and applicable Massachusetts statutes." Count VI was silent regarding the 2008 foreclosure. Capital One mounted the following challenges to Count VI: (1) any damages stemming from the void 2008 foreclosure were not recoverable due to the release contained in the Move Out Agreement; and (2) Jackson failed to plead a basis for or produce evidence to support an award of attorneys' fees.

In ruling in Capital One's favor, the bankruptcy court explained in the Bench Ruling that it "agree[d] with Capital One that Ms. Jackson ha[d] not pled a sufficient basis or come forward with evidence to support an award of attorneys' fees as to Count VI." Additionally, the bankruptcy court stated Capital One's position was "strengthen[ed]" by Schumacher, *supra*, where the Massachusetts Supreme Judicial Court "outlined two avenues" of redress—one pre- and one post-foreclosure—available to "mortgagors who did not receive a notice in compliance with § 35A." The court concluded that the automatic stay was the functional equivalent of the type of relief that Jackson could be entitled to, pre-foreclosure, under Schumacher, i.e., an injunction preventing the foreclosure. "Because of the automatic stay, the issue of whether . . . Jackson [wa]s entitled to a new § 35A notice and cure period [wa]s not ripe for adjudication," the court concluded. Moreover, the court ruled Jackson failed to demonstrate the existence of a trial-worthy issue in connection with the attempted re-foreclosure. In a separate order, the court denied Jackson's cross-motion for summary judgment.

1. The Summary Judgment Standard

Under Rule 56, made applicable to bankruptcy proceedings pursuant to Bankruptcy Rule 7056, "'[i]t is apodictic that summary judgment should be bestowed only when no genuine issue of material fact exists and the movant has successfully demonstrated an entitlement to judgment

as a matter of law.'" Frykberg v. JPMorgan Chase Bank, N.A. (In re Frykberg), 490 B.R. 652, 657 (B.A.P. 1st Cir. 2013) (citation omitted) (internal quotations omitted). "[T]he 'mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986)).

2. The Summary Judgment Standard Applied

In her appellate brief, Jackson says virtually nothing of the bankruptcy court's Schumacher analysis. Instead, again citing Pinti (as she had at trial with no success), she argues that the Mortgage's notice requirements were mandatory. Yet, she simultaneously acknowledges that Pinti, which post-dated the June 2014 Judgment and the Bench Ruling, is prospective in application, only. She has failed to demonstrate any error in the bankruptcy court's Schumacher analysis, and our independent scrutiny reveals no error in that analysis.

Additionally, Jackson suggests that the bankruptcy court erred in concluding she was not entitled to damages because of the Move Out Agreement, as that agreement was based on mutual mistake. This argument fails for two reasons. First, Jackson misapprehends the basis for the bankruptcy court's ruling. While the bankruptcy court acknowledged Capital One's Move Out Agreement argument, the court neither endorsed nor rejected that argument in its Bench Ruling. Second, we cannot say that the mutual mistake doctrine was pled or sufficiently developed, either below or on appeal. Therefore, that argument is waived on appeal. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (stating "issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived").

Based on the Supreme Court's admonition in Liberty Lobby, *supra*, that a *genuine* issue of material fact is required to defeat a motion for summary judgment, the bankruptcy court did not err in concluding that she did not meet her burden; nor does it appear that the bankruptcy court erred in determining that she had not demonstrated an entitlement to judgment as a matter of law. Accordingly, the Panel **AFFIRMS** the June 2014 Judgment and Bench Ruling.

IV. The February 2016 Decision

The bankruptcy court conducted a bench trial on July 22, 2015 regarding, *inter alia*, the Objection to Amended Proof of Claim, particularly as that objection related to amounts claimed for the vacancy period. That trial resulted in the issuance of February 2016 Decision.

A. The February 2016 Decision as to Capital One's Claim

The court accepted Capital One's accountings and calculations and adopted Capital One's voluntary reduction of its own claim. Capital One's math supported a claim of $246,242.22, after a credit of $48,822.00. The reduction reflected the exclusion of interest, escrow payments, and late fees charged during the vacancy period.

At no point in the proceedings below, either in her written submissions or during trial, did Jackson present a "meaningful alternative to calculating an appropriate reduction." In her objection to Jackson's claim, there is no such alternative. She waived closing argument at trial, thereby choosing to remain silent about the reduction of Capital One's claim. She then failed to timely file her post-trial brief, thereby missing another opportunity to present an alternative calculation. By her own choices and omissions, Jackson failed to preserve the amount of Capital One's claim as an issue for appeal purposes. For the first time, Jackson now suggests on appeal that the correct principal balance owed to Capital One was $219,066.07 (based on a 1099-A form from Capital One), not the $219,973.00 balance reflected in the accounting attached to Capital

One's disallowed amended proof of claim. She argues that the court erred in finding a higher balance due. In short, this argument comes too late.

Instead of coherently pointing to the bankruptcy court's alleged abuse of discretion in reducing Capital One's proof of claim in the stated amount, Jackson again complains in her appellate brief about various evidentiary rulings made during the trial. Those complaints deserve short shrift. First, they were forfeited by Jackson's failure to raise them at trial. Second, she fails to explain how these rulings would have resulted in a different outcome. Again, Jackson has failed to sustain her formidable burden of demonstrating that the bankruptcy court abused its discretion by reducing Capital One's claim by $48,822.00. Therefore, the bankruptcy court's February 2016 Decision is **AFFIRMED** to the extent it determined the amount of Capital One's proof of claim.

B. The February 2016 Decision as to P & G Claims

With respect to P & G, the court ruled Jackson sustained her burden (in Count V) of establishing P & G violated the discharge injunction and the FDCPA, but not her burden of establishing the elements of deceit and misrepresentation. The court further ruled that Jackson could not prevail on her claim of wrongful foreclosure and breach of contract.

On appeal, Jackson claims only a single error in the February 2016 Decision relating to the P & G claims, arguing that the bankruptcy court erred "in finding that P & G did not engage in deceit or misrepresentation." We discern no error in the bankruptcy court's ruling that Jackson failed to carry her burden to establish reasonable or justifiable reliance on the allegedly injurious representation.

In the title of Count V (but not in the body, as the bankruptcy court noted) Jackson claimed that P & G engaged in deceit and misrepresentation. The bankruptcy court presumed,

with good reason, that Jackson was referring to the January 2012 letter wherein P & G stated ING was foreclosing on the Condo when, at the time, the Mortgage was held by Countrywide. Notwithstanding the title of Count V, Jackson failed to allege the existence of the justifiable reliance elements, and a review of the trial transcript reveals that this omission persisted during trial. Jackson never testified regarding any justifiable reliance or resulting damage. As Jackson's attorney waived closing argument and failed to submit a timely post-trial brief, there was no argument made on her behalf that the presence of the reliance element should be inferred from her testimony.

Now, for the first time on appeal, Jackson argues in her appellate brief:

> The detrimental reliance on Jackson's part is that in the June, 2012 [State] Court [A]ction, she named ING . . . as a defendant but did not name Countrywide. While the S[tate] Court complaint originally was filed *pro se*, she eventually retained a lawyer and incurred his fees, aside from the cost of copying [and] filing the complaint and exhibits, and having it served by a constable or sheriff. . . . Lastly, she had to reopen this bankruptcy case, convert it to chapter 13 . . . and thereafter commence the litigation underlying this appeal.

As all of these purported forms of justifiable reliance are raised for the first time on appeal, it goes without saying that Jackson's reliance argument is waived. See Abdallah v. Bain Capital, LLC, 752 F.3d 114, 120 (1st Cir. 2014).

In her appellate brief, Jackson argues alternatively that detrimental reliance "is not always required" and the bankruptcy court therefore erred in requiring this element. In support, she cites Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 142 F.3d 26, 41 (1st Cir. 1998), for the proposition that, under Massachusetts law, "a party still may be held liable . . . for [the] misrepresentation of information negligently supplied for the guidance of others." That Jackson's alternative argument is made for the first time on appeal is the least of its problems.

More egregious is that she has misrepresented the law regarding the exception to the justifiable reliance requirement by only selectively quoting from Massachusetts School of Law. Significantly, in that case the First Circuit went on to observe:

> [I]f a defendant "in the course of his business . . . supplies false information for the guidance of others in their business transactions," he "is subject to liability for pecuniary loss caused to [*third persons*] by [*the recipient's*] justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information".

Id. (emphasis added but alterations in the original) (quoting Fox v. F & J Gattozzi Corp., 672 N.E.2d 547, 551 (Mass. App. Ct. 1996)). The Massachusetts School of Law exception has no application here—there is nothing in this record to support a claim that there was justifiable reliance by third persons. And the bankruptcy court made no error of law when it held that without the necessary element of justifiable reliance, there can be no recovery for negligent misrepresentation under Massachusetts law. See id. (citation omitted).

Accordingly, the bankruptcy court's conclusion that Jackson failed to carry her burden to establish the elements of reasonable or justifiable reliance is **AFFIRMED**.

V. The July 2016 Decision

The bankruptcy court conducted an evidentiary hearing on July 7, 2016, to determine appropriate damages to assess against P & G for its violation of the discharge injunction and the FDCPA. In the July 2016 Decision which followed, the bankruptcy court acknowledged that Jackson claimed damages of $62,882.50, but awarded her only $17,994.00. The court explicitly stated it made this reduction after considering Jackson's testimony, documentary evidence, and arguments of counsel. The court was influenced, *inter alia*, by its review of Jackson's complaint filed in the State Court Action (the "State Court Complaint"), which revealed that only a fraction of the claims asserted in that complaint (and for which she sought compensation in the

bankruptcy proceedings) actually related to P & G. Thus, the court refused to award attorneys' fees incurred in connection with that complaint. Jackson disagrees, contending she should recover for all counts.

On appeal, Jackson has not furnished the transcript of the July 7, 2016 hearing, the State Court Complaint, or the other "documentary evidence" considered by the bankruptcy court. Thus, we cannot evaluate her claims of error regarding the assessment of damages against P & G in an informed manner. See Discussion, *supra*, at I(B). Accordingly, the July 2016 Decision assessing damages is **AFFIRMED**.

VI. The Orders Regarding Post-Trial Briefs

A. The October 7, 2015 Order Denying Jackson's Motion for Extension of Time

Although Jackson had agreed to the simultaneous filing of post-trial briefs, she waited until the last day for filing, after the other parties had filed their briefs, to ask the court for an extension of time. In the motion, Jackson's attorney represented he had been hospitalized. Other than In re LaClair, he cited no legal authority for the requested extension. The court denied his request, without explanation. On appeal, Jackson argues:

> Jackson's counsel suffers from neurological conditions that are chronic and occasionally require hospitalization. This happened after the trial. Because of that hospitalization, the deadline to file a post-trial brief was missed. . . . The hospitalization constituted "excusable neglect" within the meaning of Pioneer [Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993)]
> . . . .

Jackson also continues to rely on In re LaClair in support of her claim that the bankruptcy court abused its discretion in refusing to grant her an extension.

Bankruptcy Rule 9006(b)(1) provides that a bankruptcy court has discretion to grant a request to enlarge the time for taking an action which is required to be performed within a specific period of time. Fed. R. Bankr. P. 9006(b)(1). This includes the discretion to enlarge the

court's own deadlines. See Fed. R. Bankr. P. 9006(b)(1). Additionally, bankruptcy courts are vested with the authority to control and manage their own dockets, see In re Colón Martinez, 472 B.R. 137, 147 (B.A.P. 1st Cir. 2012), and to set the pace of the litigation. See Pérez-Cordero, 440 F.3d at 533 (stating trial courts have "significant discretionary authority to set and enforce filing deadlines . . . , even when those deadlines are difficult for lawyers to meet"); Macaulay v. Anas, 321 F.3d 45, 49 (1st Cir. 2003) (stating "[c]ourts simply cannot afford to let lawyers' schedules dominate the management of their dockets"); Mendez v. Banco Popular de P.R., 900 F.2d 4, 7 (1st Cir. 1990) (stating a "judge must often be firm in managing crowded dockets and demanding adherence to announced deadlines").

Even the illness and hospitalization of Jackson's attorney did not give him carte blanche to file a late brief. Nothing in In re LaClair suggests that illness of an attorney automatically excuses late briefs. In fact, Jackson's reliance on In re LaClair is misplaced. The LaClair court's recognition of the tendency to grant extensions of time on account of an attorney's illness came with the following caveat: "[L]ike so many things in life, *context is paramount*." 360 B.R. at 390 (emphasis added). The court elaborated:

> [W]here illness become[s] a daily or weekly excuse for repeated errors made over an extended period of time and which threaten to sacrifice a client's economic well-being, courtesy is no longer a factor. *An attorney may simply not permit his or her client to suffer legal harm, even where the excuse is the attorney's long term illness. Many attorneys suffer from long-term or chronic illnesses and manage quite well to represent their clients without sacrificing the rights of those clients. An attorney suffering from such an illness must obtain appropriate assistance or supports to avoid risks of harm to clients, and failing that, withdraw from ongoing representations and decline to take on new cases.*

Id. at 397–98 (emphasis added) (quoting In re LaFrance, 311 B.R. 1, 24 (Bankr. D. Mass. 2004)).

A review of the bankruptcy court's docket, beginning with the commencement of the adversary proceeding, reveals a long history of delays by Jackson and a pattern of seeking of extensions.[12] There is no basis to suggest, nor does Jackson argue, that her attorney was surprised by the briefing deadline; nor was the deadline unfair, as Jackson's attorney had agreed to it in open court. See Perez-Cordero, 440 F.3d at 534 (indicating surprise or unfairness justify extension). Thus, we discern no abuse of discretion in the October 7, 2015 refusal to grant Jackson an extension of time to file her post-trial brief and that order is therefore **AFFIRMED**.

B. The November 2, 2015 Order Denying the Motion for Leave

Although the court refused to grant Jackson an extension of time to file her brief, she filed it anyway, together with the Motion for Leave. In the Motion for Leave, Jackson's attorney reiterated that he was hospitalized from September 23 to October 7, 2015, and unable to draft a brief and discuss it with his client during that time. Citing In re LaClair, Jackson's attorney argued that his illness constituted "excusable neglect." He made no reference to Bankruptcy Rule 9006(b)(1), which provides for the filings of a motion for extension of time after the deadline has expired, or to Pioneer, the seminal case articulating the "excusable neglect" standard for application of that rule. It is only on appeal that Jackson mentions Pioneer (and at that, only cursorily). Therefore, that argument is waived on appeal. Moreover, we discern no abuse of discretion in the November 2, 2015 order denying the Motion for Leave and therefore **AFFIRM** that order.

[12] See, e.g., A.P. Docket No. 53 (Jackson's Emergency Motion to Continue Hearings); A.P. Docket No. 84 (Jackson's Motion to Extend Time to Object to All Pending Motions to Dismiss); A.P. Docket No. 86 (Jackson's Renewed Motion for Extension of Time to Object to Pending Motions, Nunc Pro Tunc); A.P. Docket No. 140 (Joint Motion for Extension of Existing Deadlines); A.P. Docket No. 151 (Order to Show Cause, directing Jackson and her counsel to appear and show cause why Jackson's pretrial memorandum should not be stricken and why her counsel should not be sanctioned for his acts and omissions in connection with that memorandum).

C. November 2, 2015 Order Denying Jackson's Motion to Strike

On appeal, Jackson maintains that the bankruptcy court should have stricken the exhibits to Capital One's post-trial brief, which included a LIBOR rate history and a chart depicting certain escrow payments. In refusing to strike the challenged exhibits, the court explained that the chart summarized relevant information contained in the exhibit to Capital One's proof of claim (which Jackson, herself, had offered as evidence at trial), and that it was entitled to take judicial notice of the LIBOR rate history. Jackson offers no legal support for a conclusion that the court abused its discretion in so ruling. She complains she was not able to cross-examine the chart preparer and that the LIBOR rate history was "not amenable to judicial notice" because the "court did not state the source of information." Yet she fails to explain how she was harmed by the inclusion of the exhibits. Without more, Jackson has failed to sustain her burden of establishing an abuse of discretion in permitting the exhibits to the post-trial brief of Capital One. Accordingly, the November 2, 2015 order denying Jackson's motion to strike is **AFFIRMED**.

CONCLUSION

Jackson's appeal of the transcript of the July 22, 2015 trial and "every adverse ruling" having been **DISMISSED**, we **AFFIRM** each of the remaining orders properly on appeal before the Panel.