

No.

IN THE
Supreme Court of the United States

ROBERTA GOLDEN AND PETER POULOS, INDIVIDUALLY
AND AS TRUSTEE OF THE SUNSHINE TRUST,
PETITIONERS

v.

GEORGE PETERSON

*PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH OF MASSACHUSETTS
APPEALS COURT*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Were Petitioners denied due process when the state refused to allow Petitioners to have a hearing on the nature of the illegality and instead conflated equitable principles with legal mandates to preclude any hearing. The result is the enforcement of an illegal contract involving a fraudulent mortgage on the subject real property and the pending loss of the property in a foreclosure sale.

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OPINIONS BELOW

The unpublished Middlesex County Superior Court Opinion and Order dated January 23, 2013 issued by Judge Mitchell Kaplan is attached as Appendix C. and is unreported. The unpublished Opinion of the Commonwealth Appeals Court dated March 6, 2018 is attached as Appendix B and reported at 92 Mass.App.Ct. 1131. The unpublished Denial of the Application for Further Appellate Review to the Supreme Judicial Court of Massachusetts is attached as Appendix A and is reported at 480 Mass. 1104.

JURISDICTION

The decision of the Supreme Judicial Court of Massachusetts, the highest State Court in Massachusetts in which a decision could be had, denying the Application for Further Appellate Review and affirming the entry of the Appeals Court of the Commonwealth of Massachusetts judgment in Respondent's favor despite petitioner's due process arguments, decided and filed on June 29, 2018. (App. A). The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Sec. 1257(a).

RELEVANT PROVISIONS INVOLVED**United States Constitution, Amendment XIV, Sec. 1:**

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law nor deny to any

person within its jurisdiction the equal protection of the laws". U.S. Const. amend XIV, Sec. 1.

28 U.S.C. Sec. 1257(a):

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States".

STATEMENT

Peter A. Poulos, ("petitioner" and/or "Poulos"), Roberta A. Golden, ("petitioner" and/or "Golden") and George Peterson ("respondent" and/or "Peterson") entered into a contract designed to facilitate Peterson using his credit to obtain a mortgage on a home owned by Poulos and Golden. Peterson was a friend of Poulos and Golden and according to Golden, was responsible for an unpaid legal bill to Golden on account of legal work she performed for Peterson and another Peterson friend whom he had referred to her. The contract called for Golden and Poulos to transfer title to the property to Peterson temporarily while they recovered financially and then obtained their own reverse

mortgage which would result in paying the loan Peterson obtained from the mortgage lender to assist Poulos and Golden to escape from their financial plight. The parties proceeded with the transaction and Peterson obtained a mortgage loan on the property in his name by misrepresenting to the lender that he resided in the home and failing to disclose the existence of the underlying agreement. He did so to obtain the lower interest rate associated with owner occupied home mortgages.

Years later, Peterson filed suit alleging breach of the agreement and demanding payment. Poulos and Golden defended by claiming that Peterson breached their agreement by secretly obtaining additional second mortgages in the amount of \$234,000.00 and preventing them from obtaining a reverse mortgage to repay Peterson. Neither party realized the agreement might be illegal as a result of the fraudulent mortgage application by Peterson and neither asserted the illegal nature of the contract in their complaint answer of affirmative defenses. The case proceeded to trial before the court. The court found in favor of Peterson on the majority of his claims, but in its Opinion and Order at pages 17-18 and note 21, stated, "**it could be said that the agreement was an illegal contract in its execution**", noting the fraudulent nature of the mortgage application by Peterson.

The court refused to recognize the significance of its own *sua sponte* finding in posttrial motions. The fact that the agreement between the parties was found to be an **illegal contract** and, accordingly, was void and was waived because it had not been specifically plead at trial even though Justice Kaplan stated in the lower court as follows:

THE COURT: I may rue the day that I simply didn't order that the property be placed in the name of Peterson as it is now. I mean, the property - according to the Registry of Deeds, Peterson owns the property. It would have been easy to [say] that Peterson – that I hereby order that Peterson owns the property free and clear of the claims of the defendants. It struck me that Peterson feathered his own bed when he participated in a fraud on Washington Mutual, and that was not the appropriate thing to do, but I certainly made life more difficult for everybody when I did that." (See Add D-EXHIBIT C-July 17, 2013 Transcript, Page 39-40).

The court of appeal affirmed on the basis that the parties did not plead the illegal nature of the contract first identified by the trial court after trial. The Court of Appeals also concluded that the court did not really find that it was illegal by virtue of its comments in footnote 21, Court of Appeals Opinion, at page 4, note 3. Rather, the appeals court found that the trial court only noted that "it could be said" to be illegal, turning a finding into meaningless dictum. The result was the enforcement of an illegal contract and a judgment in favor of Peterson that will result in the foreclosure of the fraudulent mortgage loan Peterson obtained instead of a judgment in his favor against Golden and Poulos without the potential loss of their home.

REASONS FOR GRANTING THE PETITION

Petitioners have a constitutionally protected property interest in their home that is at risk as a result of the court's of the state of Massachusetts precluding them from asserting the mortgage on their home is part of an illegal contract initially discovered and identified by the trial court after trial.

The State of Massachusetts deprived or impaired the Petitioners of a substantial property right, ownership of their home, by refusing to provide them with a minimal opportunity to be heard on the illegal nature of a mortgage contract between the Respondent, Petersen, and his bank. Petitioner's did not recognize the illegal nature of the mortgage until the trial court pointed it out in its Opinion and Order after trial. The court (and the State of Massachusetts in upholding this procedural rejection of an opportunity to be heard) avoided allowing the Petitioners to have well established substantive law that an illegal contract may not be enforced applied to their case because it was not raised in the complaint or answer involving litigation. This resulted in the pending foreclosure of the mortgage between Petersen and his bank that is secured by the Golden Poulos home.

In *Barclay v Florida*, 103 S. Ct. 3418 (1983), in a plurality opinion, this court affirmed the decision of the Florida Supreme Court in the face of a challenge based on due process and the failure to follow Florida state law. In doing so, this court developed three distinct approaches to determining whether a state's refusal to follow its own established law constituted a constitutional due process violation. The "Entitlement"

analysis and the “Rule of Law” analysis recognized by this court both would find the Massachusetts state courts to have violated due process pursuant to the facts and claims in the instant petition.

In *Cleveland Board of Education v Loudermill*, 470 US 532, 105 S. Ct. 1487 (1985), this court refined the analysis for determining whether state law was in violation of procedural due process. In doing so, this court determined that once a constitutional right to property was recognized, that a balancing test would be applied to determine what process was due under the circumstances. At a minimum, the court held that a hearing or opportunity to be heard on the jeopardy to the property right was required. In the instant action, no hearing or review was allowed because the illegal contract was not recognized by the parties and was one solely between Petersen and Countrywide, his lender.

In the instant petition, the Massachusetts courts recognized that the mortgage contract at the heart of the case between Peterson and Washington Mutual was based on fraud and illegal but enforced it despite its illegality in the face of well established state law prohibiting its enforcement. The result is an imminent foreclosure on the property, the residence of Golden and Poulos. The state courts did so based on the procedural principle that the contract’s illegality had not been raised by either party in the pleadings. Just so as the “illegality” was not identified until after the trial by the trial judge, *sua sponte*, in his Opinion and Order, well after either party could have recognized and raised the issue. The state refused to allow Petitioners to have a hearing on the nature of the illegality and instead conflated equitable principles with legal mandates to preclude any hearing. The result is the enforcement of an illegal contract involving a fraudulent mortgage on

the subject real property and the pending loss of the property in a foreclosure sale.

Is it a violation of due process to refuse to apply and enforce well established (and universally recognized) law that an illegal contract [a mortgage contract between Petersen and Washington Mutual, his lender] may not be enforced because it was not raised in the complaint or answer involving litigation exclusively between Petersen and Golden/Poulos, especially when the trial judge first recognizes the illegality after the trial?

The parties agreed to a contract they thought was legal that would assist Poulos and Golden to retain their home by virtue of a temporary transfer of title to their home to allow Petersen to use his credit to obtain a loan on the home. To obtain the best rate on the loan, Petersen represented to the mortgage lender that he resided in the home when in fact he did not. Poulos and Golden resided in the home. In addition, Petersen did not disclose that he was only a temporary owner or placeholder who would return the home to Golden and Poulos as soon as they could qualify for a reverse mortgage (Poulos and Golden are now 84 and 82). According to the trial court, "it could be said" that Petersen's fraud made the entire contract illegal in its execution.

Golden and Poulos maintain a constitutionally protected right in property concerning the ownership of their Framingham home. See *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 222-23, 106 S.Ct. 507, 511-12, 88 L.Ed.2d 523 (1985); *Brady v. Town of Colchester*, 863 F.2d 205 (2d Cir.1988). They endeavored to protect it by entering into the contract with Peterson and allow him to obtain a mortgage they could not otherwise qualify for. In doing so, Peterson

committed a fraud on the lender by representing he was the resident of the home. While Golden and Poulos owe Petersen funds he advanced to pay the mortgage for them, they should not be subject to the consequences of foreclosure due to an illegal mortgage that Peterson obtained through fraud.

Golden and Poulos were unable to assert the illegal nature of the mortgage contract between Peterson and his lender and believed it to be valid until the trial court said “it could be” illegal and unenforceable

A contract, including a mortgage, obtained through fraud, is illegal. It is unenforceable as a matter of law as a result of the illegality. The result is that a court of law shall leave the parties to an illegal contract in the position the court would find them absent such a contract. *Arcidi v National Ass'n of Government Employees, Inc.*, 447Mass 616 (2006). Whether a fraudulent contract, including a mortgage, will be enforced to any extent is subject to a detailed analysis of the circumstances after a hearing to determine:

“whether recovery may be had upon the illegal contract in the light of all relevant circumstances, including: the nature of the subject matter of the contract ... the extent of the illegal behavior ... [whether] that behavior [was] a material or only an incidental part of the performance of the contract ... the strength of the public policy underlying the prohibition; how far ... effectuation of the policy [would] be defeated by denial of an added sanction; how serious or deserved would be the forfeiture

suffered by the plaintiff, how gross or undeserved the defendant's windfall".

Town Planning & Engineering Assoc. v. Amesbury Specialty Co., 369 Mass. 737, 745, 342 N.E.2d 706 (1976).

In the underlying action, the trial court made the specific findings concerning enforcement of the Golden/Poulos and Peterson contract without allowing Golden and Poulos to have a hearing on the issue of the actual mortgage application that the court found to be fraudulent. Since the mortgage contract was between Petersen and Washington Mutual, Golden and Poulos could not simply allege it was illegal in a complaint, answer or affirmative defense at the outset of the case. Until the trial was concluded and the court noted the mortgage was illegal, Poulos/Golden were not on notice the mortgage was obtained by fraud and was or could be illegal. They had no privity or standing to directly attack the validity of the mortgage. Thus, state procedural law insulated the illegal nature of the mortgage from review and prevented Golden/Poulos from a meaningful hearing on their property right, the ownership of their home and the risk of foreclosure.

Whether or not the trial court would have found the mortgage enforceable as part of the overall agreement or contract should have been the subject of a hearing on the issue noted in *Town Planning & Engineering Assoc.*, *supra*. While the trial court made several findings related to this issue, **it did so without having a hearing on the issues as the trial**, by the trial court's admission, did not encompass these issues as they were not specifically pled. Indeed, they could not have been as Poulos/Golden had no reason or ability to attack the validity of the mortgage between Peterson and Washington Mutual.

CONCLUSION

This case presents an excellent and appropriate vehicle to address issues related to mortgage fraud and its effect on third parties. It also presents the court with the ability to address the fundamental property right of home ownership and that state law must protect that right by providing a meaningful right to be heard before the loss of that home by foreclosure can proceed as a result of a fraudulent lien obtained by a third party.

Respectfully submitted,
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