No. 18-559

In the Supreme Court of the United States

METEKU NEGATU,

Petitioner,

v.

WELLS FARGO BANK, N.A.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Virginia W. Barnhart
Counsel of Record
WOMBLE BOND DICKINSON (US) LLP
100 Light Street, 26th Floor
Baltimore, MD 21202
Phone: (410) 545-5803
Virginia.Barnhart@wbd-us.com

Counsel for Respondent

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

Whether the Petition for Writ of Certiorari should be denied because: (a) it fails to raise any of the considerations required for certiorari review under Part III, Rule 10 of the Rules of this Court; (b) the "Question Presented" by the Petitioner (i.e., whether his due process and equal protection rights were violated by the District of Columbia Court of Appeals in affirming the Superior Court for the District of Columbia's entry of summary judgment in favor of Wells Fargo Bank, N.A.) was neither raised nor preserved by the Petitioner below, and (c) the Petitioner failed to present any evidence in the Superior Court below to demonstrate a dispute of material fact as to Wells Fargo's right to foreclose, even after being provided notice and the opportunity to be heard?

RULE 29.6 CORPORATE DISCLOSURE

Respondent, Wells Fargo Bank, N.A. ("Wells Fargo"), is a subsidiary of Wells Fargo & Company. Wells Fargo & Company is a bank holding company trading under the symbol "WFC" on the New York Stock Exchange. Wells Fargo Bank, N.A., is the successor-in-interest to World Savings Bank, F.S.B.

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STATEMENT OF FACTS

Petitioner, Meteku Negatu ("Mr. Negatu"), obtained a mortgage loan from World Savings Bank, F.S.B., a predecessor in interest to Wells Fargo, on or about April 13, 2007, in the amount of $658,500.00. In connection with that loan, Mr. Negatu executed a promissory note payable to "World Savings Bank, F.S.B., a FEDERAL SAVINGS BANK, ITS SUCCESSORS AND/OR ASSIGNEES" (the "Note"), which was secured by the Property and evidenced by a Deed of Trust that was recorded in the land records of the District of Columbia. Both the Note and Deed of Trust were executed as documents under seal. In the event of default, the Note referred to and incorporated the rights set forth in the Deed of Trust, including the Lender's right to accelerate the loan and sell the property pursuant to Paragraph 28 of the Deed of Trust. Despite his contentions to the contrary (*raised for the first time before the D.C. Court of Appeals)*, the record in the Superior Court was undisputed that Wells Fargo is the successor in interest to the original lender, World Savings Bank F.S.B., and, as such, had the right to enforce the Note and Deed of Trust.

In October 2009, Mr. Negatu admits that he defaulted on the Note by failing to make the required monthly payments. Despite receiving a notice of default and demand letter in November 2009, Mr. Negatu failed to cure the default. On or about April 1, 2015, the Substitute Trustees, Carrie M. Ward, Howard N. Bierman, Jacob Geesing, Jason T. Kutcher, Joshua P. Coleman and Joseph A. Delozier (the "Substitute Trustees"), were appointed and, on June 19, 2015, the underlying Complaint for Judicial

Foreclosure Sale was filed in the Superior Court, Case No. 2015 CA 004574 R(RP) (the "Foreclosure Action").

Throughout his Petition, Mr. Negatu contends that he was denied due process; however, the record from the Foreclosure Action makes clear that Mr. Negatu received notice of the Foreclosure Action *and* actively participated therein. He filed an Answer to the Complaint for Judicial Foreclosure Sale but raised no affirmative or negative defenses therein, nor did he file any counterclaim. The parties engaged in discovery and attended two mediation sessions (notably, mediation in judicial foreclosure actions is not required by the statute). *See Rogers v. Advance Bank*, 111 A.3d 25 (D.C. 2015). On December 21, 2016, the Substitute Trustees filed a Motion for Summary Judgment which Mr. Negatu opposed on January 10, 2017, raising matters that he did not preserve in his Answer. On January 19, 2017, the Substitute Trustees filed a reply memorandum in support of their Motion for Summary Judgment.

On April 4, 2017, the Honorable Michael L. Rankin issued an Order Granting the Substitute Trustees' Motion for Summary Judgment and Decree for Sale of Real Property (the "4/4/17 Order"). App. 7a-8a. In that 4/4/17 Order, Judge Rankin found that there was no genuine dispute of material fact. Specifically, the Court found that:

> (1) [Mr. Negatu] is the record owner of the property; (2) [Wells Fargo] is a beneficiary of the Deed of Trust secured by the property; (3) [Wells Fargo] is the current holder of the note; (4) [Mr. Negatu] defaulted under terms of Note and Deed of Trust [in] October of 2009; (5) [Wells Fargo] mailed a demand letter to [Mr. Negatu's]

> last known address stating the amount needed to cure the default; and (6) [Mr. Negatu] failed to cure the default...[and (7) that Wells Fargo] has attached an affidavit which complies with the Servicemembers Civil Relief Act.

4/4/17 Order, App. 7a-8a. Mr. Negatu appealed the decision of the Superior Court to the District of Columbia Court of Appeals in Appeal No. 17-CV-0412 (the "DC Appeal"). The DC Court of Appeals affirmed the decision of the Superior Court by *per curiam* Memorandum Opinion and Judgment dated July 31, 2018 (the "7/31/18 Opinion"). App. 1a-6a.

Nearly every argument offered by Mr. Negatu in his brief in the Court of Appeals was raised for the first time in that appeal and, thus, were not preserved for review. In addition, those arguments were also wholly unavailing. Mr. Negatu sought reversal of the 4/4/17 Order, arguing that Wells Fargo made false representations in connection with his loan modification review. While this argument had been raised in the Foreclosure Action, Mr. Negatu did not raise it by Counterclaim or in his Answer as an affirmative defense. Instead, as found by the Court of Appeals, he did so "for the first time in his <u>*unsworn*</u> opposition to the motion for summary judgment, [which] was worded in entirely conclusory terms and was not supported by specific evidence that could create a genuine issue of material fact." See 7/31/18 Opinion at App. 3a.

As the remainder of the arguments raised by Mr. Negatu were raised for the first time on appeal, the Court of Appeals properly rejected them, noting that it had no obligation to consider such arguments as they had not been preserved below. See App. 3a-4a.

The Court of Appeals also dispensed with Mr. Negatu's challenge to Wells Fargo's standing to enforce the Note, finding that there was no material dispute of fact as to Wells Fargo's ownership of the Note. The Court of Appeals also recognized that Mr. Negatu had admitted in his Answer that Wells Fargo was the beneficiary of the Deed of Trust secured by the property and that he offered no evidence to refute Wells Fargo's response under oath to an interrogatory that it was the owner of the note.

Similarly, again based on the undisputed summary judgment record below, the Court of Appeals held that Mr. Negatu's argument that the Foreclosure Action was untimely was without merit as both the Note and Deed of Trust were documents executed under seal, finding that the Foreclosure Action thus "was governed by the twelve-year statute of limitations applicable to documents under seal..." App. 4a-5a. Finally, the Court of Appeals rejected Mr. Negatu's assertion that Wells Fargo failed to mitigate damages, noting that Mr. Negatu had filed bankruptcy and received a discharge and that "Mr. Negatu ... failed to explain how, given those circumstances, he could be injured by any failure of Wells Fargo to mitigate damages." App. 5a.

Mr. Negatu now petitions this Court for review of the underlying decisions citing the same arguments that the Court of Appeals properly found were not preserved below and suggesting for the first time in his Petition, that the District of Columbia courts' willingness to grant summary judgment in foreclosures of properties owned by African Americans, like him, somehow violates due process and equal protection. Not only has the District of Columbia foreclosure process already been affirmed

as constitutional, but the record below demonstrates that Mr. Negatu was given the opportunity to bring forth evidence to oppose Wells Fargo's summary judgment motion below and failed to do so.

SUMMARY OF ARGUMENT

This Court should deny the Petition, as Mr. Negatu has waived and abandoned his arguments regarding the timely filing of the Foreclosure Action by the *undisputed* owner of the Note with standing and the right to enforce it, which is central to his appeal herein. Even if the Court were to overlook his waiver and abandonment of defenses, Mr. Negatu has not offered any compelling reason for this Court to grant certiorari in accordance with Supreme Court Rule 10. Nowhere in his Petition does Mr. Negatu identify any decision by a federal Court of Appeals on a matter relevant to his case that is in conflict with a decision by another federal Court of Appeal. Nor has he identified a decision by a federal Court of Appeal on an important federal question relevant to his case that conflicts with a decision by a state court of last resort or a relevant decision of this Court. The Petition also failed to identify any departure from the accepted and usual course of judicial proceedings by the lower courts in this case. Thus, the established criteria for granting further review in this Court have not and cannot be met. While couched in due process terms, the Petition merely consists of a challenge to the factual findings of the Superior Court below and its application of the well settled rule of law concerning summary judgments. Under such circumstances, a "petition for a writ of certiorari is rarely granted." U.S. Sup. Ct. R. 10.

The Court should not be swayed by Mr. Negatu's unsubstantiated conjecture that unnamed borrowers of certain racial and ethnic backgrounds are deprived of due process under the *judicial* foreclosure process set forth in the District of Columbia Code, as there is no evidence in the record to support his position. Instead, the record shows that prior to the entry of summary judgment below, Mr. Negatu was given notice and the opportunity to present evidence of a dispute of material fact below and failed to do so. As such, Mr. Negatu's assertions are not proper for this Court's review, as they are merely "a challenge to the factual findings of the court and/or a misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10.

REASONS FOR DENYING THE PETITION

The principal purpose for certiorari review "is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991) (citing Supreme Court Rule 10.1). Here no such conflict exists, nor has one been properly preserved.

I. Mr. Negatu's Constitutional Arguments Were Not Raised or Preserved Below

Nowhere in his Petition or in the record below is there any evidence which supports Mr. Negatu's conclusory assertion in his petition that he (and other unnamed borrowers) were denied due process or equal protection under the District of Columbia's judicial foreclosure process. Instead, Mr. Negatu spends six pages of argument in his Petition setting forth overgeneralizations and unsupported suppositions in an effort to persuade this Court to grant review. Petition pp. 4-11.

New arguments cannot be raised for the first time in a Petition for Certiorari. *See United States v. Jones*, 565 U.S. 400, 412 (2012) (stating that an argument raised for the first time in the Supreme Court may be forfeited); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 194 (2007) ("[T]he lower court did not consider the claims, and we decline to reach them in the first instance."). Accordingly, the Court should not consider Mr. Negatu's due process or equal protection arguments. Even if the Court elects to consider such arguments, they would fail as the record demonstrates that Mr. Negatu has had sufficient notice and opportunity to be heard and present evidence prior to the entry of summary judgment below.

"The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted). In an attempt to generate a federal question for this Court's review, Mr. Negatu argues for the first time on Pages 24-25 of his Petition, that the Superior Court's single paragraph of factual findings in the 4/4/17 Order violated his right to due process. In support of this newly advanced position that the judicial foreclosure process violates a borrower's due process rights, Mr. Negatu relies on *Connecticut v. Doehr*, 501 U.S. 1 (1991). *Doehr* is plainly distinguishable from this case because it concerned an *ex parte* prejudgment attachment remedy which, unlike the summary judgment process below, did not provide for prior notice or hearing. *Id.* at 24.

The instant case and the foreclosure process in the District Columbia Code are completely distinguishable from the *ex parte* prejudgment attachment remedy at issue in *Doehr*. Here, the

record below makes clear that not only did Mr. Negatu have ample notice and opportunity to be heard, he participated in the Foreclosure Action. First representing himself and subsequently with the assistance of counsel, Mr. Negatu filed an Answer (admitting Wells Fargo's rights as note holder), engaged in discovery, attended mediations, and opposed the motion for entry of summary judgment (albeit without offering evidence). That his arguments in opposition to the motion for summary judgment were not accepted by the Superior Court does not constitute a deprivation of due process nor did the Superior Court's brief recitation of factual findings in support of its summary judgment order.

Thus, Mr. Negatu's effort to generate a federal question in his Petition by asserting for the first time therein, constitutional arguments that were not raised or preserved below, and which are not supported by the record below, falls far short of meeting the standards for certiorari review by this Court.

II. Summary Judgment Was Properly Entered Below

Summary judgment is properly entered where there is no genuine dispute of material fact, and the moving party is entitled to judgment as a matter of law. D.C. Super. Ct. R. 56. Here, the Superior Court properly found that, pursuant to Section 42-816 of the D.C. Code, the undisputed record reflected that Mr. Negatu executed the Note and Deed of Trust, that he defaulted on the Note, that the default was not cured, and that, as the acknowledged owner of the Note, Wells Fargo was entitled to enforce the Note and Deed of Trust. See 4/4/17 Order, App.7a, n.1. Thus, the

Superior Court properly "order[ed] and decree[d] that said property be sold and the proceeds be brought into court to be applied to the payment of the debt secured by said mortgage." D.C. Code Ann. § 42-816. Mr. Negatu never offered any evidence to dispute any of these facts which entitled Wells Fargo to judgment. *Bruno v. Western Union Fin. Servs., Inc.*, 973 A.2d 713, 717 (D.C. 2009). As such, summary judgment was properly entered by the Superior Court and properly affirmed by the Court of Appeals.

Because the record is void of evidence sufficient to generate a dispute of the material fact, Mr. Negatu instead attempted to challenge well-settled law by asserting several arguments for the first time in the Court of Appeals and by attempting to assert a constitutional challenge for the first time in his Petition (which fails for the reasons stated in Section I above). As <u>none</u> of these arguments were preserved in the Superior Court, they should not be considered in support of the Petition. However, to the extent this Court elects to entertain Mr. Negatu's arguments, they nevertheless fail.

A. Petitioner Admitted Below That Wells Fargo Had Standing to Foreclose

In Section IV of his Petition, Mr. Negatu questions Wells Fargo's standing to enforce the Note and Deed of Trust because it has not been "proven factually ... at the Trial level." Petition 22-23. Mr. Negatu then offers a summary of commercial law and negotiable instruments. Notably, in the Foreclosure Action, Mr. Negatu did not plead a defense of lack of standing in his Answer, nor did he ever attempt to amend that Answer. In fact, he admitted that Wells Fargo was the beneficiary under the Deed of Trust with the right

to enforce, and never offered any evidence to refute Wells Fargo's discovery responses under oath that it was the Noteholder and successor in interest to the originating lender. Under the summary judgment standard, the non-moving party must "show the existence of an issue of material fact ... at least enough evidence to make out a prima facie case in support of [his] position." *Bruno v. Western Union Fin. Servs., Inc.*, 973 A.2d 713, 717 (D.C. 2009). There is nothing in the record below that would give rise to a factual dispute as to Wells Fargo's status as the beneficiary of the Deed of Trust and current holder of the Note. As such, by his own admissions, Mr. Negatu's contention that Wells Fargo's standing had to be determined at the "trial level" fails.

B. Petitioner's Defenses Were Waived and Abandoned By His Failure to Preserve

In his Petition and in his brief in Court of Appeals, Mr. Negatu asserted that the Superior Court erred in failing to address the following questions – *which were not presented, raised or preserved in the Superior Court* – before ruling on summary judgment: (1) whether the statute of limitations applied to bar the foreclosure, (2) whether the equitable doctrine of laches applied to bar the foreclosure, (3) whether Wells Fargo was the "holder" of the note and beneficiary of the Deed of Trust (*despite the fact that Mr. Negatu admitted the same in his Answer, in his Requests for Admissions, and did not challenge the same below)*, (4) whether Wells Fargo had standing to bring the foreclosure action, and (5) whether there was an obligation to mitigate damages.

As these issues were not properly preserved below, they should not be considered as grounds for

certiorari review. "For good reason, appellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance. That restraint is all the more appropriate when the appellate court itself spots an issue the parties did not air below, and therefore, would not have anticipated in developing their arguments on appeal." *Wood v. Milyard*, 566 U.S. 463, 473 (2012). Here, while the Court of Appeals ultimately considered the arguments, it found them ineffective (*for the reasons stated herein)* and affirmed the Superior Court's ruling, the defenses were never raised and should be deemed waived. Further, none of these arguments merit certiorari review, as they do not give rise to a question of federal law or an inconsistency between courts.

1. The Foreclosure Action Was Timely Filed

"Ordinarily in civil litigation, a statutory time limitation is forfeited if not raised in a defendant's answer or in an amendment thereto. An affirmative defense, once forfeited is excluded from the case, and, as a rule cannot be asserted on appeal." *Wood*, 566 U.S. at 470 (2012) (citations omitted) (considering whether a court of appeal can *sua sponte* raise a question regarding the timeliness of a habeas petition). The record below reflects that Mr. Negatu did not raise an affirmative defense of statute of limitations or an equitable defense of laches in his Answer, his opposition to the motion for summary judgment, or at any time in the trial court proceedings. As such, it must be excluded from the case.

To the extent this Court considers the arguments set forth in the Petition at pages 16-22, Mr. Negatu's position that the Foreclosure Action was untimely filed is a red herring. The Court of Appeals correctly found that both the Note and Deed of Trust were documents under seal given that both contained the word "(SEAL)" at the end of the signature line on which Mr. Negatu signed. Thus, the documents are subject to the twelve-year limitations period. D.C. Code Ann. § 12-301(6). As he did in the Court of Appeals, Mr. Negatu argues herein that the word "Seal" on the Deed of Trust was not sufficient to create a sealed instrument in the promissory note and cites *Huntley v. Bortolussi*, 667 A.2d 1362 (D.C. 1995) in support. Yet Mr. Negatu's reliance on *Huntley* remains misplaced and his argument ignores that his signature on *both* the Deed of Trust *and* the Note were followed by the word "Seal".

Unlike the Note at issue herein, in *Huntley,* the subject promissory note did not include the word "seal" next to the borrower's name while the deed of trust did. As such, in *Huntley*, the Court of Appeals concluded that because the deed of trust did not independently contain a promise to pay (like the promissory note did), an action to seek a *personal judgment* on the basis of the *promissory note* was subject to the three-year limitations period, as distinguished for an action for foreclosure. *Huntley*, 667 A.2d at 1364. Where, as here, the undisputed record shows that both the Note and Deed of Trust were signed under seal, the Petitioner's reliance on *Huntley* is erroneous.

Mr. Negatu's citation to Maryland and Virginia law also ignores the clear pronouncement from the DC Court of Appeals that:

> When the instrument is made by an individual, the word "seal" next to the signature is **"standing alone, sufficient to create a sealed instrument entitled to the twelve-year statute of limitations**." *Burgess [v. Square 3324 Hampshire Gardens Apartments, Inc.*, 691 A.2d 1153, 1156–57 (D.C. 1997]. *See also Phillips v. A & C Adjusters, Inc.,* 213 A.2d 586, 586–87 (D.C.1965). To that end, we have said that the presence of the word "seal," in parentheses, and opposite the signature " 'undoubtedly evinces an intention to make the instrument a sealed instrument [.]' " *Burgess, supra,* 691 A.2d at 1156 (quoting *Harrod v. Kelly Adjustment Co.,* 179 A.2d 431, 432 (D.C.1962)).

Murray v. Wells Fargo Home Mortg., 953 A.2d 308, 318 (D.C. 2008) (emphasis added).

As noted by the Petition, in *Murray,* the Court of Appeals was asked to consider whether a settlement agreement was subject to the three-year general statute of limitations or the twelve-year limitations period for documents under seal. In that case, the settlement agreement at issue did not contain the word "seal" and, thus, was subject to the three-year limitations period. Unlike the *Murray* settlement agreement and the note in the *Huntley* case, the Note *and* Deed of Trust in this case both contained the word "(SEAL)" after the signature of Mr. Negatu. Accordingly, both documents are subject to the twelve-year statute of limitations applicable to sealed instruments under D.C. law and, thus, the Court of Appeals correctly found that the Foreclosure Action was timely.

2. The Equitable Doctrine Of Laches Does Not Apply

Mr. Negatu also argues that the Foreclosure Action should be barred by laches, another defense which was not preserved in his Answer or his Opposition to the Motion for Summary Judgment below, but rather was raised for the first time in his brief in the Court of Appeals. The Court of Appeals properly held that the defense of laches had not been preserved and did not apply. In his Petition, Mr. Negatu merely recites the standard for the defense of laches, but points to no evidence in the record to support such a defense or how the application of the undisputed facts herein to the well-settled law, constitutes a compelling reason for certiorari review.

The record is void of any evidence of prejudice to Mr. Negatu as a result of an alleged unreasonable delay. *Bannum Inc. v. District of Columbia Bd. Of Zoning Adjustment*, 894 A.2d 423, 431 (D.C. 2006). Instead, the delay in foreclosing was in part due to the Saving D.C. Homes From Foreclosure Act of 2010 (legislation passed in an attempt to remedy, in part, the due process questions that arose from non-judicial foreclosure sales) and, thus, was not unreasonable. Moreover, Mr. Negatu has not (and could not) offer evidence of prejudice *in any way* as he continued to enjoy the benefits of residing in or owning a property for which he did not pay for more than nine years.

To the extent Mr. Negatu contends that he has somehow been prejudiced because Wells Fargo failed to "mitigate its damages" (see Petition 23-24), this assertion also fails. Mr. Negatu filed for bankruptcy in December 2008 and received a discharge in April 2009. App. 5a. Accordingly, the Court of Appeals properly

found that because Mr. Negatu had been discharged from any personal liability he could not be pursued for any deficiency over and above the sale price of the Property at foreclosure and, therefore, any increase in costs or interest resultant from the "delay" in filing the Foreclosure Action caused him no harm. *Id*. Thus, Mr. Negatu's belated and unpreserved argument that this foreclosure action is barred by laches, like his other arguments, lacked merit and fails to meet the standard for further review by this Court.

CONCLUSION

For the foregoing reasons, the Petitioner has not offered any compelling reason in support of certiorari review. As such, Wells Fargo respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully Submitted,

/s/ Virginia W. Barnhart
Virginia W. Barnhart
Counsel of Record
WOMBLE BOND
DICKINSON (US) LLP
100 Light Street, 26th Floor
Baltimore, MD 21202
Phone: (410) 545-5803
Virginia.Barnhart@wbd-us.com