

IN THE
SUPREME COURT OF THE UNITED STATES

MELISSA MAY,

Petitioner,

v.

CONTINENTAL TOWERS CONDOMINIUMS ASSOCIATION, ET AL.

Respondents.

On Petition for Writ of Certiorari to the Kentucky Supreme Court

RESPONSE IN OBJECTION TO
PETITION FOR WRIT OF CERTIORARI

RESPECTFULLY SUBMITTED,


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PARTIES TO THE PROCEEDING

Based upon the procedural history involved, the Respondent, Continental Towers Condominium Association, Inc., respectfully submits that it is the only properly named responding party by virtue of Kentucky law governing appellate procedure, as set forth hereinbelow.

In the foreclosure action before the Fayette Circuit Court, Fayette County, Kentucky, the only parties to the case were the Respondent, Continental Towers Condominium Association, Inc., the Petitioner Melissa May, and the other potential lienholders Branch Banking and Trust Co., (“BB&T”), and the Commonwealth of Kentucky for and on behalf of Fayette County (the “Commonwealth”). No additional parties were pled into the case. Before the Kentucky Court of Appeals, the Petitioner identified this Respondent, BB&T, and the Commonwealth as Appellees, along with several new parties, none of which had been part of the trial action¹: Continental Towers Management, consisting of Continental Towers Condominiums, Dwight Bradburn, Southeastern Management Co., and Greg Chase, and Attorney Guy Colson and Judge Kimberly Bunnell. Only this Respondent participated in the appeal.

¹ For Kentucky courts, “an appeal does not ‘lie against one who was not a party to the proceedings in which the judgment was rendered.’” *McBrearty v. Ky. Cnty. & Tech. College Sys.*, 262 S.W.3d 205, 210 n.9 (Ky. Ct. App. 2008) (internal citation omitted).

The Petitioner Melissa May then moved for discretionary review before the Kentucky Supreme Court, and filed motions identifying different parties as respondents. At different points, the Petitioner identified this Respondent and Southeastern Management Co. as respondents. Southeastern Management Co. was not a party to the underlying foreclosure action.² Again, only this Respondent participated before the Kentucky Supreme Court.

The Respondent states that it does not have a parent corporation, and it is privately owned.

² See n. 1, *supra*.

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BASIS FOR JURISDICTION

The Respondent submits that this Honorable Court is without jurisdiction to decide the Petition for Writ of Certiorari on the grounds that the underlying case does not involve a federal question. 28 U.S.C. § 1257.

MAY IT PLEASE THE COURT,

Comes now the Respondent, Continental Towers Condominium Association, Inc., by and through counsel, and for its Response in Opposition to the Petition for Writ of Certiorari filed by the Petitioner, Melissa May, hereby states and argues as follows:

STATEMENT OF THE CASE

The suit underlying Ms. May's Petition began as a foreclosure action brought against Ms. May in January 2013, following her failure to make timely payments for her condominium unit located at Continental Towers in Lexington, Kentucky.³ The trial court entered summary judgment in the Respondent's favor on both the foreclosure complaint and the counterclaim filed by Ms. May, from which Ms. May appealed.⁴ Thereafter, the Kentucky Court of Appeals affirmed the trial court's decisions.⁵

The underlying facts as more fully set forth by the Kentucky Court of Appeals in their Opinion Affirming rendered March 31, 2017, are incorporated herein in their entirety.⁶ Following the March 31, 2017 Opinion Affirming, the Kentucky Supreme Court denied Ms. May's motion seeking discretionary review by Order entered March 14, 2018.⁷

³ March 31, 2017 Opinion Affirming, Kentucky Court of Appeals, Case No. 2014-CA-001702-MR, p. 3.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at pp. 2-3.

⁷ March 14, 2018 Order Denying Discretionary Review, Kentucky Supreme Court, Case No. 2017-SC-000379-D.

ARGUMENT

I. Jurisdictional Challenge

At the outset, the Respondent submits that this Court is without jurisdiction to grant Ms. May's Petition for Writ of Certiorari. Pursuant to 28 U.S.C. § 1257, only final judgments rendered by the highest State court addressing the following issues may be heard: (1) where the validity of a treaty or U.S. statute is drawn into question, or (2) where the validity of a State statute is drawn into question, in either instance 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."⁸ The Respondent submits that none of these conditions is present such that the Petition for Writ of Certiorari should be dismissed for want of jurisdiction.

In the state action below, Ms. May did not ask the Kentucky Court of Appeals to "decid[e] an important federal question" in her appeal; Ms. May only argued state law, albeit unsuccessfully. In the Commonwealth of Kentucky, litigants' arguments on appeal are confined to the issues delineated in their prehearing statement.⁹ Before the Court of Appeals, Ms. May filed ten motions requesting leave to amend and/or supplement her prehearing statement. In August 2015, The Court of Appeals denied

⁸ 28 U.S.C. § 1257(a). See also SUP. CT. R. 13(1); *Gonzalez v. Thaler*, 565 U.S. 134, 154 (2012) (holding judgments of a lower state court are reviewable if the state court of last resort has denied discretionary review).

⁹ KY. R. CIV. P. 76.03(8).

Ms. May's motions, struck her original prehearing statement filed in November 2014, and directed Ms. May to file a new prehearing statement that included all issues she intended to argue on appeal, which Ms. May thereafter did.¹⁰

Despite having had ample opportunity to identify and hone the purported legal wrongs she planned to address on appeal, Ms. May proceeded to argue completely new and unpreserved issues in her appellate brief. Ms. May had not listed any of those issues within her prehearing statement, and none had been presented to the trial court; the Kentucky Court of Appeals was foreclosed from being able to review Ms. May's issues as a matter of Kentucky law.¹¹

The four issues that Ms. May argued before the Kentucky Court of Appeals were as follows:

(1) [Ky. Rev. Stat. §] 381.9111 mandates that [Ms. May's] property be treated the same as other types of property, and that therefore she was improperly prevented from entering it; (2) under [Ky. Rev. Stat. §] 381.9175, the burden was entirely on [Ms. May] to maintain and repair the property; (3) under [Ky. Rev. Stat. §] 381.870, the amount of [Ms. May's] fees should have been abated because the property was uninhabitable; and (4) [Ky. Rev. Stat. §] 514.030 forbids exercising control over another's property with the intent to deprive the true owner thereof.¹²

As can be seen, Ms. May's issues before the Kentucky Court of Appeals involved only application of state law. There was neither a federal question nor

¹⁰ March 31, 2017 Opinion Affirming, Kentucky Court of Appeals, Case No. 2014-CA-001702-MR, p. 5.

¹¹ March 31, 2017 Opinion Affirming, Kentucky Court of Appeals, Case No. 2014-CA-001702-MR, p. 4. (citing Ky. R. Civ. Pr. 76.03(8), limiting issues on appeal to those contained within the prehearing statement; citing *Sallee v. Sallee*, 142 S.W.3d 697, 698 (Ky. Ct. App. 2004) (holding the failure to raise an issue in the prehearing statement precludes review by the Kentucky appellate courts)); *Id.* at p. 5 (citing *Fischer v. Fischer*, 348 S.W.3d 582, 588 (Ky. 2011) (noting “[a]n appellate court ‘is without authority to review issues not raised in or decided by the trial court.’”) (internal citation omitted)).

¹² March 31, 2017 Opinion Affirming, Kentucky Court of Appeals, Case No. 2014-CA-001702-MR, p. 3.

constitutional challenge present. Hence, the Kentucky Court of Appeals' decision could not conflict with another state's decision on an important federal question, or that of a U.S. Court of Appeals, or of this Court. Neither could it decide an important federal question that should be settled instead by this Court.¹³ Likewise, statutory jurisdictional requisites cannot be met.¹⁴ It follows that Ms. May's Petition for Writ of Certiorari should be denied for want of jurisdiction.

II. The Petitioner has Failed to Preserve Her Arguments for Review

The Respondent next submits that this Court should deny Ms. May's Petition for a Writ of Certiorari because Ms. May has failed to properly preserve the issues that she now wishes this Court to review. The preservation of issues for review is a basic facet of our jurisprudence; "It is indeed the general rule that issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts."¹⁵ In order to be preserved for appellate review, a litigant must "only state the action that it wants the court to take or objects to, along with the grounds for the request or objection."¹⁶ Under the lenient standard announced by Federal Civil Rule 46, a litigant may "state" her request or object to the court in a relatively informal manner, "... principle does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue."¹⁷ So long as a trial or intermediate appellate court is put on notice that a

¹³ SUP. CT. R. 10.

¹⁴ 28 U.S.C. § 1257(a).

¹⁵ *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000).

¹⁶ FED. R. CIV. P. 46.

¹⁷ *Nelson v. Adams USA, Inc.*, 529 U.S. at 469.

litigant has a request or objection to an action, then that issue is properly preserved for review. However, in the instant case, Ms. May has failed to clear even this low bar.

This case originated in a dispute between the owner of a condominium unit and the condominium association over the rights and responsibilities contained in the Master Deed. Should this Court grant the Petition, a quick glance at the record from the trial and appellate court would reveal that there is nothing in the record to suggest that Ms. May alleged any discrimination on the part of the Respondent until she filed her Petition for Writ of Certiorari with this Court.

Similarly, Ms. May did not argue any claim of discrimination by the Respondent in front of the Kentucky Court of Appeals. There, she argued only state statutory issues, none of which had been preserved for review as the Kentucky Court of Appeals aptly noted.

Again, while Ms. May did not have to recite any magic words in order to preserve an issue for review, she must have at least given the lower courts enough notice for them to consider it, however briefly. Neither did Ms. May raise any issue of discrimination by the Respondent, nor did either the trial court or the Kentucky Court of Appeals feel the need to “pass upon” the issue in their respective analyses.¹⁸ Quite simply, if a litigant fails to raise an important issue below, and the lower courts

¹⁸ *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

do not consider or “pass upon” the issue in their analysis, then there is simply nothing left to appeal. It follows that the Petition for Writ of Certiorari should be denied.

III. The Petitioner has Likewise Failed to State Compelling Reasons to Grant Writ

The Respondent respectfully proffers that the arguments set forth within the Petition for Writ of Certiorari do not demonstrate compelling reasons to review the Kentucky decisions with which Ms. May disagrees. Supreme Court Rule 10 requires that compelling reasons be present in order for a writ to be granted. This requires the need to resolve “a problem beyond the academic or episodic.”¹⁹ Examples of compelling reasons given in Supreme Court Rule 10 are as follows:

- (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s supervisory power;
- (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
- (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.²⁰

Of note is that each of the aforementioned examples requires that a question of federal law be present. Despite Ms. May’s current arguments, no federal law was at issue at any point of the state proceedings below. In fact, none of issues that Ms.

¹⁹ *Rice v. Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

²⁰ SUP. CT. R. 10.

May desires to argue have been previously brought before the Kentucky courts below. Thus, compelling reasons are lacking and the Petition for Writ of Certiorari should be denied.

IV. Misstatements of Fact

The Respondent would also direct this Court's attention to the fair number of factual misstatements contained within Ms. May's Petition for Writ of Certiorari.²¹ In the event this Honorable Court were to grant certiorari, the following factual misstatements are pertinent.

Within Ms. May's Statement of the Case, Ms. May states that the Kentucky Supreme Court denied her motion seeking discretionary review on procedural grounds and due to her disabling condition.²² This is a misstatement of fact; the Kentucky Supreme Court denied Ms. May's motion without opinion.

Ms. May next states that this Respondent stole the locks from her condominium unit after the police left, in violation of the Fourth Amendment.²³ This is also a misstatement of fact. Instead, the Lexington-Fayette Health Department found Ms. May's unit to be contaminated with methamphetamine, which required professional decontamination before the unit would be deemed safe for occupancy. The Lexington-Fayette Health Department instructed this Respondent to install a deadbolt on the unit's door and to limit public access into the unit until cleared. This

²¹ SUP. CT. R. 15.

²² Petition for Writ of Certiorari, pp. 5, 7-8.

²³ Petition for Writ of Certiorari, pp. 6, 8-9.

Respondent notified Ms. May that a key to the property was being kept at its office.²⁴

Ms. May next states that the state trial judge discriminated against her for not allowing someone to speak for her in court.²⁵ In actuality, the Fayette Circuit Court, Judge Kimberly Bunnell presiding, denied Ms. May's request to have a non-attorney represent her in court. Practice of law without a license in Kentucky is a Class B Misdemeanor.²⁶ In so ruling, the Fayette Circuit Court was upholding the law in Kentucky.

Ms. May next states that all of the Respondent's purported wrongdoing was "totally undisputed".²⁷ The Respondent is unsure of precisely to what Ms. May is referring. The trial and appellate records both will speak for themselves and demonstrate that the Respondent has fervently disputed Ms. May's accusations against it.

Within Ms. May's "Restitution with Certiorari" section, several damages elements have been identified.²⁸ Most of these damages were never sought by Ms. May at the trial level. Moreover, for those that were (lost income and the cost of her graduate school), Ms. May failed to present any definitive evidence supporting the dollar amount sought. Her multiple attempts to do so at the appellate level were disallowed as beyond the record on appeal.

²⁴ March 31, 2017 Opinion Affirming, Kentucky Court of Appeals, Case No. 2014-CA-001702-MR, p. 2.

²⁵ Petition for Writ of Certiorari, pp. 6-7.

²⁶ KY. REV. STAT. 524.130.

²⁷ Petition for Writ of Certiorari, p. 8.

²⁸ Petition for Writ of Certiorari, pp. 10-11.

Within this same section, Ms. May states that the “employee for the HD”, i.e. the Environmental Health Team Leader in the Environmental Health & Protection Division of the Lexington-Fayette County Health Department, did not have authority to tell this Respondent to change the locks on Ms. May’s condominium unit due to the methamphetamine contamination.²⁹ At no point in the underlying litigation did Ms. May challenge the Health Department’s authority to direct this Respondent to secure the unit due to the methamphetamine contamination.

Also within this same section of Ms. May’s Petition for Writ, Ms. May has misidentified several pertinent exhibits as follows:

- Exhibit 4A has been identified as an expensive statement for two tests conducted on Ms. May’s condominium unit. In actuality, Exhibit 4A is Statement from Continental Towers Condominiums from October 31, 2011 to September 1, 2012, showing an outstanding balance of \$7,905.05, due to unpaid monthly condominium assessments and late fees, and testing conducted in June 2011 and June 2012.
- Exhibit 4B has been identified as certified testing ordered by Ms. May. In actuality, Exhibit 4B is a September 28, 2012 Invoice from Bio Meth Management for “pre assessment for the presence of methamphetamine residue”.
- Exhibit 13A has been identified as an arrest report for her tenant. In actuality,

²⁹ Petition for Writ of Certiorari, p. 11.

Exhibit 13A is the first page of the criminal indictment charging Ms. May's tenant with First Degree Possession of a Controlled Substance, Possession of Drug Paraphernalia, and Persistent Felony Offender First Degree.

Finally, within the "Reasons for Granting this Petition" section of Ms. May's Petition, Ms. May states that this Respondent prevented her from supplementing her Social Security benefits, and that in so doing, this Respondent intentionally took advantage of Ms. May.³⁰ This Respondent adamantly denies this, and affirmatively states that nowhere in the record is there any evidence showing that the Respondent intentionally took advantage of Ms. May or had any part in affirmatively preventing Ms. May from supplementing her Social Security benefits.

V. Misstatements of Law

The Petition for Writ of Certiorari also contains several misstatements of law with which this Respondent takes issue.³¹

Ms. May first cites to KY. REV. STAT. 521.060 for Criminal Trespass in the First Degree. This particular statute actually corresponds with "Offer or Acceptance of Donations to Sheriff's Office – Exemption from Charges of Bribery". The correct statute for Criminal Trespass in the First Degree is KY. REV. STAT. 511.060.

Ms. May next cites to KY. REV. STAT. 533.244.01-410, which she states concerns disclosure of contamination to a lessee, tenant or buyer. The Kentucky Revised Statutes do not have a statute enumerated as 533.244.01-410. The Respondent has

³⁰ Petition for Writ of Certiorari, p. 13.

³¹ SUP. CT. R. 15.

tried to discern precisely to which statute Ms. May refers, and believes it may be possible that this is in reference to KY. REV. STAT. 224.1-410, "Legislative findings regarding methamphetamine contamination ... Written notice of property contamination to buyer or lessee...".

CONCLUSION

The Respondent Continental Towers Condominium Association, Inc., respectfully submits that jurisdiction is lacking such that the Petition for Writ of Certiorari should be denied. The issues delineated by the Petitioner have not been preserved; neither has the Petitioner stated any compelling reasons to grant writ.

WHEREFORE, the Respondent Continental Towers Condominium Association, Inc., respectfully requests that this Honorable Court DENY the Petition for Writ of Certiorari filed by Melissa May.

RESPECTFULLY SUBMITTED,



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