

In the
Supreme Court of the United States

◆

RENEE L. McCRAY,
Petitioner,
v.

JOHN E. DRISCOLL, III, *et al.*,
Respondents.

On Petition for Writ of Certiorari from
the Court of Appeals of Maryland

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Maryland Court of Appeals erred in denying discretionary review to the Petitioner after she lost her appeal in that State's intermediate appellate court?

LIST OF PARTIES

The Petitioner is Renee L. McCray. The Respondents are John Driscoll, III, Robert E. Frazier, Jana M. Gantt, Laura D. Harris, Kimberly Lane and Deena L. Reynolds, who acted as Substitute Trustees for the Note Holder and Mortgage Loan Servicer in docketing and prosecuting a foreclosure action against the Petitioner's real property.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
I. Petitioner’s Claim of Erroneous Application and Interpretation of the FDCPA by the Maryland Courts Below is Not Properly Before This Court.....	4
II. The Maryland Court of Special Appeals Affirmed the Circuit Court’s Denial of Ms. McCray’s Motions on the Basis of Procedural Rules, Not Any Federal Question	6
A. The Motion for Injunctive Relief Was Untimely and Failed to Comply With Maryland Rule 14-211	6
B. The Motion to Vacate Was Untimely and Failed to Comply with Maryland Rule 2-535	10
III. Ms. McCray Has Been Afforded Due Process.....	10
CONCLUSION	12

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bates v. Cohn</i> , 9 A.3d 846 (Md. 2010)	6
<i>Bd. of Regents v. Roth</i> , 408 U.S. 564 (1972)	11
<i>Braxton v. United States</i> , 500 U.S. 344 (1991)	4
<i>Buckingham v. Fisher</i> , 115 A.3d 248 (Md. 2015)	6
<i>Currie v. Wells Fargo Bank</i> , 950 F. Supp. 2d 788 (D. Md. 2013)	8
<i>Derisme v. Hunter Leibert Jacobson, P.C.</i> , 880 F. Supp. 2d 311 (D. Conn. 2012)	5
<i>Elliott v. Kupferman</i> , 473 A.2d 960 (Md. Ct. Spec. App. 1984)	11
<i>Green v. Ford Motor Credit</i> , 828 A.2d 821 (Md. Ct. Spec. App. 2003)	5
<i>Griffin v. Bierman</i> , 941 A.2d 475 (Md. 2008)	11
<i>Hicks v. Gilbert</i> , 762 A.2d 986 (Md. Ct. Spec. App. 2000)	9
<i>Hlista v. Altevogt</i> , 210 A.2d 153 (Md. 1965)	9
<i>Marchese v. JPMorgan Chase Bank, N.A.</i> , 917 F. Supp. 2d 452 (D. Md. 2013)	8
<i>McCray v. Federal Home Loan Mortgage Corp.</i> , 839 F.3d 354 (4th Cir. 2016)	2

<i>McCray v. Samuel I. White P.C.</i> , 2019 WL 935236 (D. Md. Feb. 26, 2019)	2
<i>Mostofi v. Midland Funding, LLC</i> , 117 A.3d 639 (Md. Ct. Spec. App. 2015)	5
<i>Mullane v. Cent. Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950)	11
<i>Pelletier v. Burson</i> , 73 A.3d 1180 (Md. Ct. Spec. App. 2013)	12
<i>Thacker v. Hale</i> , 806 A.2d 751 (Md. Ct. Spec. App. 2002)	10
<i>Wells Fargo Home Mortgage, Inc. v. Neal</i> , 922 A.2d 538 (Md. 2007)	9
Statutes	
15 U.S.C. §§ 1692, <i>et seq.</i>	<i>passim</i>
Md. Code Ann., Real Prop. Art. §§ 7-105, <i>et seq.</i>	4
Constitutional Provisions	
U.S. Const. amend. art. VI, Cl. 2	4
Rules	
Md. Rule 2-311	12
Md. Rule 2-535	10, 12
Md. Rule 14-211	6, 7, 8, 11

STATEMENT OF THE CASE

Renee McCray (“Ms. McCray” or “Petitioner”) executed a promissory note (the “Note”) and deed of trust on October 7, 2005, in regard to a home mortgage loan she obtained to finance her acquisition of real property in Baltimore, Maryland. That Note ultimately was assigned to the Federal Home Loan Mortgage Corporation (“Freddie Mac”) and serviced by Wells Fargo Bank, N.A. (“Wells Fargo”).

On May 2, 2012, the Petitioner defaulted on the repayment provisions of her loan. The Substitute Trustees then initiated a foreclosure action on February 12, 2013, by filing an Order to Docket in the Circuit Court of Maryland for Baltimore City, Case No. 24-O-13-000528 (the “Foreclosure Action”).

Over the intervening years since the foreclosure was docketed, the Petitioner has filed over a dozen unsuccessful dilatory motions in the Foreclosure Action. She also filed three separate petitions in bankruptcy and multiple cases in the U.S. District Court for the District of Maryland; she improperly attempted to remove the Foreclosure Action to federal court, after which it was summarily remanded; and she filed three separate notices of appeal in the Foreclosure Action, the first two of which were dismissed by the Maryland Court of Special Appeals. The third notice of appeal resulted in a full briefing of the issues presented and the rendering of an unreported decision by the Court of Special Appeals, a copy of which is attached as Appendix A to Ms. McCray’s Petition for Writ of Certiorari to this Court. It is this decision that formed the basis for Ms. McCray’s Petition for Writ of Certiorari to the Maryland Court of Appeals. On December 14, 2018,

the Maryland Court of Appeals denied that Petition. See Appendix D to the Petition herein. She now seeks Certiorari in this Court.

In 2013, after the foreclosure was initiated, Ms. McCray filed her first suit in the U.S. District Court for the District of Maryland against the Substitute Trustees (and their employer law firm, Samuel I. White, P.C.), Wells Fargo Bank, and Freddie Mac. See *McCray v. Samuel I. White, P.C., et al.*, Case No. 13-cv-1518 (D.Md.). There, Ms. McCray alleged violations of various consumer protection laws, including the federal Fair Debt Collections Practices Act, 15 U.S.C. §§ 1692, *et seq.* (“FDCPA”). The U.S. District Court dismissed the claims against all Defendants and McCray appealed this dismissal.

In an opinion filed on October 7, 2016, the U.S. Court of Appeals for the Fourth Circuit affirmed the dismissal of all claims against Wells Fargo and Freddie Mac, but held that the District Court had prematurely dismissed the FDCPA claim against the Substitute Trustees, having erred in concluding that they were not acting as “debt collectors.” *McCray v. Federal Home Loan Mortgage Corp.*, 839 F.3d 354, 361 (4th Cir. 2016). However, the Fourth Circuit made clear that the decision “is not to be construed to indicate, one way or the other, whether they, as debt collectors, violated the FDCPA.” *Id.* at 363. Thereafter, on February 26, 2019, this open question on FDCPA liability was resolved when the U.S. District Court granted summary judgment *in favor of* the Substitute Trustees and against Ms. McCray with respect to those claims. *McCray v. Samuel I. White P.C.*, 2019 WL 935236 (D. Md. Feb. 26, 2019). She has

appealed that decision to the U.S. Court of Appeals for the Fourth Circuit.¹

As set forth more fully below, the Court of Special Appeals was entirely correct in affirming the Maryland Circuit Court's denial of two motions in the Foreclosure Action which were filed by Petitioner on August 14, 2017: (1) her "Emergency Motion for Injunctive Relief and Requested Hearing" (hereinafter "Motion for Injunctive Relief") and (2) her "Demand to Vacate Order Dated March 31, 2017, and All Orders Denying Defendant's Motions to Dismiss Foreclosure Action Because the Court Lacks Jurisdiction Over the Subject Matter and Request for Hearing" (hereinafter "Motion to Vacate"). Not only was each of these two Motions filed well outside of time limits specified by the Maryland Rules, they were also without substantive merit.²

The Petitioner failed to elicit further discretionary review of her foreclosure appeal in the Maryland Court of Appeals. In now seeking this Court's review of that denial, however, the Petitioner has not identified any decisions by the U.S. Courts of Appeals or state courts of last resort that conflict with one

¹ Ms. McCray's FDCPA claims that she relies upon in her Petition are now pending in the U.S. Court of Appeals. Importantly, for purposes of the present Petition, no federal question (including the alleged mistaken interpretation and application of the FDCPA in this case) was considered in the Maryland appellate decisions for which Ms. McCray now seeks this Court's review. *See* Argument § II, *infra*.

² The Court of Special Appeals affirmed the dismissal of the two Motions by the Circuit Court on the basis of untimely filing and absence of fraud, mistake or irregularity. In so ruling, it did not reach the substance of the claims presented. *See* Appendix A to Petition at pp. 3-4.

another. Nor has she articulated any public interest or important federal question of law that is implicated which requires this Court's attention. *See* Supreme Court Rule 10. 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). Having thus failed to implicate any of the elements of Supreme Court Rule 10, the Petition for Writ of Certiorari should be denied.

ARGUMENT

I. Petitioner's Claim of Erroneous Application and Interpretation of the FDCPA by the Maryland Courts Below is Not Properly Before This Court

In an attempt to obtain review by this Court, Ms. McCray baldly contends that Maryland's application of the FDCPA is contrary to Congressional intent. She also invokes the Supremacy Clause of the U.S. Constitution. *See* Petition at pp. 15-16. She offers no authority in support of either of these assertions.

The gravamen of the Petition is Ms. McCray's misplaced belief that the Respondents lost the right to file what she repeatedly but erroneously refers to as a "state non-judicial foreclosure action"³ because of an alleged violation of the FDCPA. *See* Petition at pp. 4-5, 9-14. In short, she contends that the Circuit Court of Maryland for Baltimore City did not have subject matter jurisdiction over the Foreclosure Action because the Substitute Trustees violated the

³ Residential foreclosure actions in Maryland are *judicial* in nature. *See* Md. Code Ann., Real Prop. Art. §§ 7-105, *et seq.*

FDCPA in allegedly failing to verify and validate her debt after being requested to do so. *See* Petition at p. 4.

However, that issue was not considered or decided by the Maryland appellate courts below. Rather, her appeal was resolved on the basis of the application of the Maryland Rules of procedure alone. Accordingly, Ms. McCray's FDCPA argument is not presently before this Court.

Even if the interpretation and application of the FDCPA was at issue here, and assuming that the U.S. District Court for the District of Maryland had not already resolved those claims in favor of Respondents, a statutory violation would not have impacted the Maryland courts' subject matter jurisdiction in any event. The "FDCPA bars any false, deceptive, or misleading representation or means in connection with the collection of any debt. It also creates an independent statutory remedy for aggrieved debtors." *Mostofi v. Midland Funding, LLC*, 117 A.3d 639, 647 (Md. Ct. Spec. App. 2015) (internal citations and quotation marks omitted). "That remedy is not limited, nor is it technically tied in any way, to the alleged debt." *Id.* In other words, even if the Substitute Trustees had been found to have violated the FDCPA, the outcome of such a finding would have been the availability of damages and other statutory remedies for the Petitioner; such a liability determination would not have extinguished or otherwise altered the underlying debt itself. *See Green v. Ford Motor Credit*, 828 A.2d 821, 837-38 (Md. Ct. Spec. App. 2003); *Derisme v. Hunter Leibert Jacobson, P.C.*, 880 F. Supp. 2d 311, 329 (D. Conn. 2012) (finding that a violation of the FDCPA is not a defense to a foreclosure action in Connecticut).

Because Ms. McCray's underlying default in repayment of her mortgage debt is not and cannot be disputed, the Circuit Court's jurisdiction to entertain the Foreclosure Action was not affected by any claimed FDCPA violation on the part of the Substitute Trustees. Thus, the jurisdiction of the Circuit Court below over the Foreclosure Action and the subsequent review by the Maryland appellate courts was unaffected by the pendency of Ms. McCray's FDCPA claims at the time.

II. The Maryland Court of Special Appeals Affirmed the Circuit Court's Denial of Ms. McCray's Motions on the Basis of Procedural Rules, Not Any Federal Question

Ms. McCray argued below that "the Circuit Court for Baltimore City abused its discretion in denying both motions, and that the court erred in denying them without a hearing." *See* Appendix A to Petition at p.2. However, the Court of Special Appeals affirmed the Circuit Court's denial of the motions for two reasons: (1) because they were untimely, and (2) they otherwise failed to comply with the applicable rules. *Id.* at pp. 3-4. Each motion will be separately addressed below.

A. The Motion for Injunctive Relief Was Untimely and Failed to Comply With Maryland Rule 14-211

Maryland Rule 14-211 sets forth the content and timing requirements for a motion to stay or dismiss a pending foreclosure action. *Buckingham v. Fisher*, 115 A.3d 248, 250 (Md. 2015); *see also Bates v. Cohn*, 9 A.3d 846, 852-53 (Md. 2010) (quoting Maryland Rule 14-211(a)(3)(B) and holding that a motion made pursuant to Rule 14-211 is the proper method by

which a borrower “may petition the court for injunctive relief, challenging ‘the validity of the lien or . . . the right of the lender to foreclose in the pending action’ ”). That governing Rule also provides that a motion must be filed no later than 15 days after the last to occur of (i) the date the final loss mitigation affidavit is filed, (ii) the date a motion to strike post-file mediation is granted, or (iii) if mediation was requested and the request not stricken, the date the post-file mediation was held. Maryland Rule 14-211(a)(2)(A).

Here, post-file mediation occurred and concluded without agreement on June 26, 2013. *See* Appendix A to Petition at p. 3. Thus, any Rule 14-211 motion should have been filed within fifteen days thereafter. Yet, the subject Motion for Injunctive Relief was not filed until August 14, 2017, nearly four years after the post-file mediation, which was clearly untimely. At no time has Ms. McCray offered any explanation for why this motion to stay or dismiss the foreclosure was not timely filed, nor has she demonstrated good cause that would excuse the late filing.

In such circumstances as these, “the court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion . . . was not timely filed and does not show good cause for excusing noncompliance with [the timing requirements] of this rule.” Maryland Rule 14-211(b)(1) (emphasis added). There is no discretion given to the trial court on this issue; if the motion is untimely, it must be denied. Because Ms. McCray filed her Motion for Injunctive Relief well beyond the time limit prescribed by the Maryland Rules and, in so doing, she failed to explain why the Motion was not timely filed or offer good cause for the noncompliance,

the Court of Special Appeals had no choice but to affirm the Circuit Court's dismissal of this Motion.

Even if her Motion for Injunctive Relief had been deemed timely or had her noncompliance been excused for good cause, the Motion itself still failed to set forth the content required by Maryland Rule 14-211. Rule 14-211(a)(3) provides that any motion to stay or dismiss a foreclosure shall "state with particularity the factual and legal basis of each defense that the moving party has to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action." Md. Rule 14-211(a)(3)(B). Rule 14-211(b) further provides that the trial court "shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion . . . does not on its face state a valid defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action." Md. Rule 14-211(b)(1)(C).

As noted above, the foundation for Ms. McCray's challenge to the subject matter jurisdiction of the Maryland Circuit Court in the Foreclosure Action is her claim (recently disproved) that the Substitute Trustees violated the FDCPA by failing to validate the debt while continuing debt collection activities. As set forth herein above, even if this claim had been resolved in her favor, the pendency of an FDCPA action against the Substitute Trustees does not constitute a defense to the foreclosure. The right to initiate foreclosure proceedings arises upon the borrower's default. *Currie v. Wells Fargo Bank*, 950 F. Supp. 2d 788, 802 (D. Md. 2013) (dismissing claims brought pursuant to the Maryland Consumer Debt Collection Act); *Marchese v. JPMorgan Chase Bank, N.A.*, 917 F. Supp. 2d 452 (D. Md. 2013). Ms.

McCray's claimed FDCPA violation concerned the *method* of collecting the debt and did not arise out of the *transaction* creating the debt. Thus, her alleged FDCPA claims had no effect on whether the debt was owed and in default. In this case there is no dispute that Ms. McCray was in default of her payment obligations under the Note, thereby giving rise to the lender's right to foreclosure under the Deed of Trust. Thus, even if Ms. McCray's Motion had been timely filed, it failed to present a valid defense to the foreclosure.

For similar reasons, Ms. McCray's argument that the doctrine of unclean hands is a defense to the foreclosure is unavailing. As noted by the Maryland Court of Appeals, this doctrine does not mandate that those seeking equitable relief (in this case, the foreclosure) must have exhibited unblemished conduct, but rather that the particular matter for which a litigant seeks equitable relief must not be marred by any fraudulent, illegal, or inequitable conduct. *Wells Fargo Home Mortgage, Inc. v. Neal*, 922 A.2d 538, 552-53 (Md. 2007) (citing *Hlista v. Altevogt*, 210 A.2d 153, 156 (Md. 1965) and *Hicks v. Gilbert*, 762 A.2d 986, 990 (Md. Ct. Spec. App. 2000)). In other words, "[t]here must be a nexus between the misconduct and the transaction, because what is material is not that the plaintiff's hands are dirty, but that he dirties them in acquiring the right he now asserts." *Hicks*, 762 A.2d at 990 (internal citations and quotations marks omitted). Here, there has been no assertion that the *right* to foreclose was acquired through unclean hands. Accordingly, even if this doctrine had been properly and timely pled, it has no relevance or application here.

B. The Motion to Vacate Was Untimely and Failed to Comply with Maryland Rule 2-535

As with her Motion for Injunctive Relief, Ms. McCray's Motion to Vacate also was untimely and failed to contain the content prescribed by the governing Maryland Rule. This Motion sought to vacate all prior Circuit Court orders which were entered in denying her serial motions to dismiss, spanning several years in time. Because none of the prior orders had been entered within 30 days of the filing date of the Motion to Vacate on August 14, 2017,⁴ that Motion was untimely and the Petitioner's only other revisory remedy available was where fraud, mistake, or irregularity could be established. See Maryland Rule 2-535(b). However, there was nothing presented in the Petitioner's Motion to Vacate which remotely resembled an allegation of fraud, mistake or irregularity as those terms have been defined by the Maryland courts. See Appendix A to Petition at p. 3 (citing *Thacker v. Hale*, 806 A.2d 751, 759 (Md. Ct. Spec. App. 2002)). Accordingly, the Court of Special Appeals was correct in affirming the denial of the Motion to Vacate on the basis of untimeliness and noncompliance with the applicable Maryland Rule.

III. Ms. McCray Has Been Afforded Due Process

In her Petition and in her briefs in the Maryland courts below, Ms. McCray argues that her due process rights were violated because she was denied a hearing

⁴ Maryland Rule 2-535(a) grants power to a Circuit Court to alter or amend a judgment, provided that an appropriate motion is filed within 30 days of entry of that judgment. The Petitioner here failed to file such a motion in time.

on both her Motion for Injunctive Relief and her Motion to Vacate. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise [sic] interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Griffin v. Bierman*, 941 A.2d 475, 481 (Md. 2008) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The scope of real property rights formed and the process that is due to protect them is “created and [its] dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Elliott v. Kupferman*, 473 A.2d 960, 966 (Md. Ct. Spec. App. 1984) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

The Maryland Circuit Court acted within the authority granted to it by Rule 14-211 in denying Ms. McCray’s request for a hearing. Ms. McCray received notice of the foreclosure proceeding and had more than sufficient opportunity to present to the court in her pleadings, the grounds on which she believed she was entitled to have the foreclosure stayed and dismissed. It was not a violation of her right to due process when, after airing all of her grievances in writing, the court did not also schedule a hearing.

The Maryland Court of Special Appeals fully considered Ms. McCray’s due process claim in rendering its decision:

McCray received notice of the foreclosure proceedings and had a sufficient opportunity to

make known to the court, in her motions, the grounds on which she maintained that she was entitled to have the proceeding stayed or dismissed. It was not a violation of her due process right to be heard when, after being heard in writing, the court did not give her an opportunity for an oral hearing when she did not file her fifth motion to stay in a timely manner and her motion to vacate failed to allege a sufficient basis for the court to reconsider its prior orders under Maryland Rule 2-535.

See Appendix A to Petition at p. 4. The Court of Special Appeals further noted that the Motion to Vacate was not a dispositive motion and, as such, the Circuit Court was not required to hold a hearing, even where one had been requested. *Id.*; see also Maryland Rules 2-311 and 2-535; *Pelletier v. Burson*, 73 A.3d 1180, 1185-86 (Md. Ct. Spec. App. 2013). Accordingly, Ms. McCray was not denied due process simply because the Circuit Court exercised its discretion in deciding not to hold a hearing on her two motions.

CONCLUSION

The Petitioner contends that her garden variety foreclosure is of “national importance,” presenting a question of “whether a State should be allowed to disregard the prerequisites of the FDCPA imposed by Congress, in order to permit a debt collector to illegally file a state non-judicial foreclosure action.” Petition at p. 19. However, the subject state court appeal was resolved against her on the basis of the application of procedural rules, and not on any misinterpretation or misapplication of the FDCPA.

Nothing in the Petition implicates any of the considerations which give foundation to a grant of certiorari as set forth in Supreme Court Rule 10. This case simply does not present a conflict between courts or pressing federal issue worthy of this Court's review. Accordingly, the Petition for Writ of Certiorari should be denied.

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