No. _____

In the
Supreme Court of the United States

ROSETTA BULLUCK,
Petitioner,
v.

NEWTEK SMALL BUSINESS FINANCE, INC.,
d.b.a. Newtek Business Services, Inc.,
FEDERAL DEPOSIT INSURANCE CORPORATION, as
receiver for Global Commerce Bank,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether granting summary judgment in favor of Respondents and dismissing Petitioner's case was improper when the District Court deemed that, among other things, Petitioner had no private right of action for Respondents' unlawful acts.

Whether the Court of Appeals erred in failing to examine the District Court's summary judgment findings as it pertains to contract formation and implementation and wrongfully gave complete deference to the District Court.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before this Court are as follows:

Rosetta Bulluck.

NEWTEK SMALL BUSINESS FINANCE, INC., d.b.a. Newtek Business Services, Inc.,

FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Global Commerce Bank.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Rosetta Bulluck has no parent corporations and no publicly held company that owns 10% or more of any entity.

LIST OF PROCEEDINGS

ELEVENTH CIRCUIT COURT OF APPEALS
Case No. 19-10238
ROSETTA BULLUCK v. NEWTEK SMALL BUSINESS FINANCE, INC., d.b.a. Newtek Business Services, Inc., FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Global Commerce Bank
Judgment dated 3/27/2020 per curiam District Court granting Defendant's motion for summary judgment AFFIRMED.
Bulluck v. Newtek Small Bus. Fin., Inc., No. 19-10238, 2020 U.S. App. LEXIS 9509 (11th Cir. Mar. 27, 2020).

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
Civil Action N0. 1-16-CV-04326-SCJ
ROSETTA BULLUCK v. NEWTEK SMALL BUSINESS FINANCE, INC., d.b.a. Newtek Business Services, Inc., FEDERAL DEPOSIT INSURANCE CORPORATION, as receiver for Global Commerce Bank
Order dated 12/21/2018 Defendant's motion for summary judgment GRANTED and Report and Recommendations ADOPTED.
Bulluck v. Newtek Small Bus. Fin., Inc., No. 1:16-CV-4326-SCJ, 2018 U.S. Dist. LEXIS 221477 (N.D. Ga. Dec. 21, 2018).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

RULES

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully requests that a Writ of Certiorari be issued to review United States District Court for the Northern District of Georgia's, and the Eleventh Circuit Court's on appeal, dismissal of her case and the granting of Respondents' motion for summary judgment.

OPINIONS BELOW

The March 27, 2020 decision without a published opinion from the Eleventh Circuit Court of Appeals can be found at *Bulluck v. Newtek Small Bus. Fin., Inc.*, No. 19-10238, 2020 U.S. App. LEXIS 9509 (11th Cir. Mar. 27, 2020). This decision is reproduced in the Appendix ("Pet. App.") at Pet. App. 1a-12a.

The December 21, 2018 decision without a published opinion from the United States District Court for the Northern District of Georgia (DCD. 84) can be found at *Bulluck v. Newtek Small Bus. Fin., Inc.*, No. 1:16-CV-4326-SCJ, 2018 U.S. Dist. LEXIS 221477 (N.D. Ga. Dec. 21, 2018). This decision is reproduced at Pet. App. 13a-28a.

BASIS FOR JURISDICTION IN THIS COURT

The Eleventh Circuit Court of Appeals affirmed the District Court's decision on March 27, 2020. (Pet. App. 1a). This Court has jurisdiction pursuant to statutory provisions 28 U.S.C. § 1254(1) and 28 U.S.C. § 1331 to review on writ of certiorari the decision of the United States Court of Appeals for the Eleventh Circuit. This matter brings questions of law that are unsettled.

In *Grable & Sons Metal Products, Inc. v. Darue Eng'g & Mfg*, 545 U.S. 308 (2005), this Court articulated a standard for federal question jurisdiction. The federal issue must be "actually disputed and substantial," and it must be one that the federal courts can entertain without disturbing the balance between federal and state judicial responsibility. *Id.* at 314. Here, that question is whether the SBA under the Act is subject to a duty of care to its borrowers.

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 56(a)

> Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

12 U.S.C. § 2605

> (Pet. App. 18a-28a)

O.C.G.A. § 44-14-162.2(a)

> Notice of the initiation of proceedings to exercise a power of sale in a mortgage, security deed, or other lien contract shall be given to the debtor by the secured creditor no later than 30 days

> before the date of the proposed foreclosure. Such notice shall be in writing, shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all terms of the mortgage with the debtor, and shall be sent by registered or certified mail or statutory overnight delivery, return receipt requested, to the property address or to such other address as the debtor may designate by written notice to the secured creditor. The notice required by this Code section shall be deemed given on the official postmark day or day on which it is received for delivery by a commercial delivery firm. Nothing in this subsection shall be construed to require a secured creditor to negotiate, amend, or modify the terms of a mortgage instrument.

O.C.G.A. § 23-2-114

> Powers of sale in deeds of trust, mortgages, and other instruments shall be strictly construed and shall be fairly exercised. In the absence of stipulations to the contrary in the instrument, the time, place, and manner of sale shall be that pointed out for public sales. Unless the instrument creating the power specifically provides to the contrary, a personal representative, heir, heirs, legatee, devisee, or successor of the grantee in a mortgage, deed of trust, deed to secure debt, bill of sale to secure debt, or other like instrument, or an assignee thereof, or his personal representative, heir,

> heirs, legatee, devisee, or successor may exercise any power therein contained; and such powers may so be exercised regardless of whether or not the transfer specifically includes the powers or conveys title to the property described. A power of sale not revocable by death of the grantor or donor may be exercised after his death in the same manner and to the same extent as though the grantor or donor were in life; and it shall not be necessary in the exercise of the power to advertise or sell as the property of the estate of the deceased nor to make any mention of or reference to the death.

STATEMENT OF THE CASE

A. Bringing the Claims to Federal Court.

On November 3, 2015, Petitioner filed a state court Complaint in Clayton County Superior Court, Georgia against Respondents alleging multiple causes of action involving violations of SBA Servicing Guidelines, various federal laws, Georgia state law, and the United States and Georgia constitutions. (DCD. 1; DCD. 54.1). Respondent then removed the case to the United Stated District Court for the Northern District of Georgia on November 21, 2106 (DCD. 1).

B. Concise Statement of Facts Pertinent to the Questions Presented.

Petitioner, Rosetta Bulluck, owned and operated her business, Bulluck's Best BarBQ & Catering (hereinafter referred to as "Bulluck's BarBQ"). On April 13, 2000, Petitioner financed the purchase of the subject property, 4592 Hwy. 12, Conley, Georgia, for

$141,000 through Global Commerce Bank. (DCD. 1.2). Upon purchasing the subject property, Global Commerce Bank received a security interest in the property and recorded a Deed to Secure the Debt. (Pet. App. 2a). Notably, Plaintiff and her husband, along with the Small Business Administration ("SBA") guaranteed the loan pursuant to 15 U.S.C. § 631 *et seq*. (Id.).

Unfortunately, after facing financial hardship, Petitioner first filed for Bankruptcy relief in October of 2009. (DCD. 1-2). Petitioner filed for bankruptcy several other times, resulting in dismissal each time. (DCD. 55.1). A few years later, on or about May 23, 2012, the Georgia Department of Banking and Finance closed the Global Commerce Bank. (DCD. 1.2). Subsequently on that same day, the Federal Deposit Insurance Corporation became the Receiver (FDIC-R) for the account, and Newtek Small Business Finance, Inc. became the servicer of the loan. (Id.). Importantly, Newtek issued Petitioner a letter detailing that Newtek was the servicer of the loan. (DCD. 54.3). Neither Newtek nor FDIC-R represent the SBA.

Given the tumultuous events surrounding her loan, Petitioner attempted to reconcile any missed payments and contacted Newtek to seek a loan modification and renegotiate her loan to ensure that she could stay current. (Id.; DCD. 1.2). Newtek never directly replied to Petitioner's request but informed her that she was being evaluated for the possibility of modification. (DCD. 1.2). Nonetheless Petitioner made timely payments equaling $4.729.45 (DCD. 1.2).

Soon thereafter, Petitioner was no longer receiving monthly statements, despite Petitioner continuously asking Newtek for a payoff number so she could plan for modification and getting up to date on payments. (DCD. 1.2).

On June 27, 2014, FDIC-R sent a letter to Petitioner and Bulluck's BBQ, notifying the parties that the loan was in default. (Pet. App. 3a). The letter also informed Petitioner and Bulluck's BBQ that FDIC-R planned to auction the property to service and secure the loan on or about August 4, 2014. (Pet. App. 3a). As such, FDIC-R conducted a foreclosure sale and took title to the property. (Pet. App. 3a). Significantly, Newtek did not own the note at this time.

On or about February 27, 2015, FDIC-R filed a dispossessory action in the Magistrate Court of Clayton County, Georgia. (Pet. App. 3a). On March 23, 2015, the Magistrate Court granted FDIC-R a writ of possession and Petitioner appealed to the Clayton County Superior Court. (Pet. App. 4a). Petitioner's appeal was denied.

On, October 15, 2015, Respondents' attorney appeared without invitation to Appellant's property and invited a locksmith on the premise to change the locks. (Pet. App. 4a). Thereafter, Petitioner arrived at the property and asserted her right to possession and was given a key to the newly installed lock. (Pet. App. 4a).

C. Procedural History

Petitioner filed a Complaint against Respondents on November 3, 2015. (DCD. 1.2). Respondents moved the

case to the United States District Court for the Northern District of Georgia. (DCD. 1). On July 1, 2018, each party moved for Summary Judgment. (DCD. 54; DCD. 55). After multiple replies on responses (DCD. 58, 59, 66, 70, 73) the Magistrate Judge, on August 24, 2018, issued a Report and Recommendation denying Petitioner's Motion for Summary Judgment. (DCD. 77). On August 28, 2018, the Magistrate Judge issued a Report and Recommendation granting Respondent's Motion for Summary Judgment. (DCD. 80). On December 21, 2018, the District Court adopted the Magistrate's Report and Recommendations. (DCD. 84). On January 18, 2019, Petitioner filed a timely notice of appeal. (DCD. 86).

On March 27, 2020, the Eleventh Circuit Court of Appeals affirmed the District Court's findings. (Pet. App. 1a).

This Petition for Writ of Certiorari followed.

REASONS TO GRANT THIS PETITION

I. The District Court And Court Of Appeals Erred In Granting Respondents Summary Judgment And Dismissing Petitioner's Case When They Held That Petitioner, Among Other Things, Had No Private Right Of Action For Respondents' Unlawful Acts.

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The reviewing court must always draw any necessary inferences in the light most favorable to the nonmovant. *Adickes v.*

S.H. Kress & Co., 398 U.S. 144, 158–59 (1970). Thereafter, first, the party moving for summary judgment has the burden to demonstrate to the court the absence of **genuinely disputed material facts**. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986) (emphasis added). Then, the burden shifts to the non-moving party, whose "response must set out specific facts showing a genuine issue for trial." Fed. R. Civ. P. 56(a). Importantly, on a motion for summary judgment, the reviewing court must resolve any inferences in the non-moving party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The District Court erred in adopting the magistrate's recommendation to grant Respondents summary judgment. The Court of Appeals erred in affirming the District Court's findings. The magistrate court failed to review the record in its entirety and did not resolve any inferences whatsoever in Petitioner's, the non-moving party, favor. As shown below, there are genuine issues that require trial.

A. Respondents' Notice of Foreclosure Sale named the wrong entity deeming it void.

In Respondents' Notice of Foreclosure sale, they did not notify Petitioner with the official name of Bulluck's BarBQ.[1] Per O.C.G.A. § 44-14-162.2(a), notice of a foreclosure "shall include the name, address, and telephone number of the individual or entity who shall have full authority to negotiate, amend, and modify all

[1] Respondents' Notice of Foreclosure Sale named "Bulluck's BBQ & Catering, Inc." However, the official legal name of Petitioner's business is "Bulluck's BarBQ & Catering, Inc."

terms of the mortgage with the debtor." Foreclosures and evictions must adhere to O.C.G.A. § 44-7-50. Under Georgia law, the exclusive method whereby a tenant may be evicted is through a properly instituted dispossessory action. *Mwangi v. Federal National Mortgage Association*, 162 F.Supp.3d 1315 (N.D. Ga. 2016). Importantly, if a landlord evicts a tenant without filing a dispossessory action and obtaining a writ of possession, or without following the dispossessory procedures for handling the tenant's personal property, the landlord can be held liable for wrongful eviction and trespass. *Id.* Significantly, in Georgia, foreclosure laws must be strictly construed. *See* O.C.G.A. § 23-2-114.

Seemingly harmless technical errors can result in a wrongful conviction. In *Wells Fargo Bank, N.A. v. Molina-Salas*, 332 Ga. App. 641 (2015), the Georgia Court of Appeals addressed a wrongful foreclosure claim where there was an error in the published foreclosure advertisements. The court deemed the mistake a typographical error in the legal description. *Id*. The trial court denied the lender's motion for summary judgment. *Id.* at 642. Similarly, this case involves a technical error where Respondent erred in identifying the proper legal name of the entity owning the property.[2]

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[2] Respondents, dispossessory action was further improper because an action cannot be brought against a dissolved corporation or its officers. *See* O.C.G.A. § 14-2-1407(comments). The corporation should have been reinstated prior to any action against it or its officers.

Summary judgment was improper because there is a triable issue of whether Respondents' Notice of Foreclosure was adequate under Georgia law. It is worth noting that the existence of a mortgage assignment is no proof that the foreclosing party had the right to enforce the note. In fact, under O.C.G.A. § 44-14-162.2(a), Newtek admitted to not having the requisite authority to service the loan. (DCD. 1.2). Therefore, trial was needed to determine the efficacy of the foreclosure proceedings, generally. Since there is conduct which is contrary to a prescribed statute, the notice is void. As such, the District Court should have denied Respondents' motion for summary judgment and resolved the disputed facts.

B. Petitioner's cause of action arises out of common-law doctrine, not the Small Business Act.

The District Court held that Petitioner could not prevail on her negligence claims because she did not have a "private right of action" under the Small Business Act. (Pet. App. 15a-16a). The District Court and the Court of Appeals incorrectly characterized Petitioner's negligence claim. Petitioner did not seek to enforce a private right of action through the Small Business Act. Rather, Petitioner uses common law negligence as the grounds for her action and uses the Small Business Act enlistment proposed and suggested measures and a baseline for a duty of care and as evidence of such negligence. The inquiry is a simple one – Does the SBA owe its consumers a duty of care that is consistent with the common law doctrine of

negligence, or are they excused from such duty as a matter of law?

Under Georgia common law, the first question that must be answered in a negligence claim is whether there is the existence of a duty. The common law and statutes of Georgia recognize multiple sources for a duty including a valid legislative enactment. 12 U.S.C. § 2605 is a valid legislative enactment. The use of federal statutes and regulations as a source of the element of duty for a negligence claim has been established in Georgia. *McLain v. Mariner Health Care, Inc.*, 279 Ga. App. 410, 412, 631 S.E.2d 435, 437 (2006); *See also West v. Mache of Cochran, Inc.*, 187 Ga.App. 365, 368-369, 370 S.E.2d 169 (1988) (breach of federal Gun Control Act regulations amounted to negligence per se). Importantly, the SBA Guidelines are just that… guidelines. Therefore, the inquiry to whether there is an existence of a duty is broader than simply looking for statutory language.

To succeed in a claim for negligent misrepresentation, Petitioner must prove that: (1) the defendant negligently supplied false information to foreseeable persons, known or unknown; (2) such persons reasonably relied upon that information; and (3) economic injury proximately resulted from that reliance." *MacIntyre & Edwards, Inc. v. Rich*, 267 Ga. App. 78, 82 n.14, 599 S.E.2d 15 (2004) (citing *Hardaway Co. v. Parsons, Brinckerhoff, Quade & Douglas, Inc.*, 267 Ga. 424, 426, 479 S.E.2d 727 (1997)). "The legal duty is the obligation to conform to a standard of conduct under the law for the protection of others against unreasonable risks of harm . . . . The

duty can arise either from a valid legislative enactment, that is, by statute, or be imposed by a common law principle recognized in the case law." *Rasnick v. Krishna Hospitality, Inc.*, 289 Ga. 565, 566, 713 S.E.2d 835 (2011).

The SBA Guidelines detail requirements for lenders and loan servicers. This includes providing a description and justification for changes to loan terms. *See* SBA S.O.P. 50 57: 7(a) Loan Servicing and Liquidation, at ¶¶ 25--26 (Effective Date: 3/1/2013), https://www.sba.gov/sites/default/files/sops/SOP_50_57-7(a)_Loan_Servicing_and_Liquidation_FINAL_1.-pdf. From this a duty of care can be inferred.

Moreover, under 12 U.S.C. § 2605, Respondent was required to inform Petitioner of her loan amount. Given that federal law creates a notice requirement, Respondents were required to give such information. Respondent supplied refused to inform Petitioner on how much she owed on the loan. This deprived Petitioner the ability to (1) devise a realistic payment plan and (2) seek outside relief. By failing to do so, they breached an established duty of care to their borrower. *See Ames v. JP Morgan Chase Bank, N.A.*, 298 Ga. 732, 738, 783 S.E.2d 614, 619-20 (2016) citing *Calhoun First Nat. Bank v. Dickens*, 264 Ga. 285, 285–286, 443 S.E.2d 837 (1994) ("Where a grantee does not comply with the statutory duty to exercise fairly the power of sale in a deed to secure debt, OCGA § 23-2-114, the debtor may either seek to set aside the foreclosure or sue for damages for the tort of wrongful foreclosure." (citations omitted)); *Thompson-El v. Bank of Am., N.A.*, 327 Ga. App. 309. 310 (2014) ("A lender owes a borrower a duty

to exercise a power of sale in a security deed fairly, which includes complying with statutory and contractual notice requirements."). Similarly, Newtek represented that they had the power to renegotiate her loan but failed to do so. In fact, Petitioner was informed that Newtek would not assist her in respect to loss mitigation and had no authority to negotiate or modify the terms of loan. (DCD 1.2).

In terms of servicing the loan, Respondents negligently failed to timely or properly submit to the SBA Petitioner's request for servicing action. This is directly contrary to the SBA Servicing Guidelines. Moreover, FDIC-R did not have the authority to enter Petitioner's premise and change the locks because they did not follow the exclusive methods in O.C.G.A. § 44-7-50.

Negligence "is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situations…" *Baltimore & P. R. Co. v. Jones*, 95 U.S. 439, 441-42, 24 L. Ed. 506 (1877). In this situation, a reasonable and prudent person would have followed the SBA guidelines and provided Petitioner with the amount owed on the loan. A reasonable and prudent person would have done what it takes to help Petitioner pay them back. The evidence shows that Respondents lacked good faith and failed to deal fairly. As a result of Respondents' neglect, Petitioner suffered considerable economic harm. When viewing the contested facts in favor of the non-moving party, the lower courts should have granted Petitioner a trial, at the very least.

II. The Court Of Appeals Erred In Failing To Examine The Trial Court's Summary Judgment Findings As It Pertains To Contract Formation And Implementation And Wrongfully Gave Complete Deference To The Trial Court.

The Court of Appeals failed to conduct an independent, *de novo* review of Petitioner's contractual claims. The Eleventh Circuit Court of Appeals "reviews a district court's grant of summary judgment *de novo* applying the same legal standards as the district court. *Chapman v. AI Transp.*, 229 F.3d 1012, 1023 (11th Cir. 2000) (en banc)." (Pet. App. 5a). Moreover, issues involving contract interpretation are "pure questions of law which are also reviewed *de novo*. *Tims v. LGE Cmty. Credit Union*, 935 F.3d 1228, 1237 (11th Cir. 2019) citing *Gibbs v. Air Canada, 810 F.2d 1529, 1532 (11th Cir. 1987). De novo* review requires the reviewing court to not "defer to the lower court's ruling but freely consider the matter anew, as if no decision had been rendered below." *Dawson v. Marshall*, 555 F.3d 798 (9th Cir. 2008). In the present matter, deferential review was employed rather than *de novo* review.

Importantly, the Court of Appeals said they were going to review Petitioner's negligence, negligent misrepresentation, breach of contract, and breach of implied covenant of good faith and fair dealing *de novo*. (Pet. App. 5a). In its review, the Court simply restates the Petitioner's argument then immediately proceeded to completely defer to the District Court and cites the same case law. (Pet. App. 6a).

Significantly, this matter involves issues that are not directly mentioned to in the relevant statutes and there is no controlling precedent in Georgia or the Eleventh Circuit. The lower courts cite to case law which states that "no private right of action exists for the violation of the [Small Business] Act of the regulation." *United States v. Fid. Capital Corp.* 920 F.2d 827, 838 n.39 (11th Cir. 1991). However, this case does not address Petitioner's claims. *Fidelity Capital Corporation* involved corporate law issues whereas Petitioner brings negligence and contract claims. Additionally, Petitioner does not seek to use the Act as her cause of action whatsoever, and any assertion otherwise is a mischaracterization of the claim.

The law employed by the District Court and the Court of appeals may be useful norms in some cases, but Petitioner claims are different and required meaningful appellate review. Appellate Courts are much better situated to determine the meaning and limits to statutory and quasi-statutory issues. Surely lenders cannot blatantly disregard the SBA's Guidelines and face zero repercussions. Just like in all areas of law, there are limits. To determine these limits is quintessential legal analysis requiring *de novo* review. "Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration." *See Salve Regina Coll. v. Russell*, 499 U.S. 225, 231 (1991).

As such, the Court of Appels' failure to engage in de novo review constitute an error.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: June 19, 2020