ORIGINAL

No. 19-5311

In the Supreme Court of the United States

GERALD J. RICKE

Respondent,

v.

IVAYLO DODEV,

Petitioner.

On Petition for a Writ of Certiorari to the Supreme Court of the State of Arizona

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Arizona Court of Appeals, Division One abused its discretion by not ruling on the applicability of Rule 41(a)(1) of the Arizona Rules of Civil Procedure to eviction proceedings, after Respondent used Rule 41(a)(1) to voluntarily dismiss two prior eviction proceedings identical to the underlying action.

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

1. Gerald J. Ricke, successor in-interest via assignment of judgment, subject of this petition, by BANK OF NEW YORK MELLON, Trustee for the Certificateholders of CWALT, Inc., Alternative Loan Trust 2007-0A7, Mortgage Pass-Through Certificates, Series 2007-0A7, FKA Bank of New York.

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PRAYER

The Petitioner, Ivaylo Dodev, respectfully prays that a writ of certiorari be granted to review the Arizona Court of Appeals, Division One (the "Court of Appeals") Opinion, issued on November 20, 2018 (the "Opinion"), affirming a judgement from the Superior Court of the State of Arizona (the "Superior Court"). The Petitioner's Petition to Review the Opinion was denied by the Supreme Court of Arizona on April 22, 2019.

OPINION BELOW

The Opinion affirming the Superior Court's judgment is attached as **Appendix A** to this Petition. The Superior Court's judgment is attached as **Appendix B** to this Petition. The Supreme Court's denial of Petitioner's Petition for Review is attached as **Appendix C**.

JURISDICTION

The Supreme Court of Arizona denied Petitioner's Petition for Review on April 22, 2019. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendments V and XIV to the Constitution of the United States of America.

Rule 41(a)(1)(B), Arizona Rules of Civil Procedure ("ARCP"), which states, in relevant part:

> (B) Effect. ... But if the plaintiff previously dismissed an action in any court based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(Ariz. R. Civ. P. Rule 41(a)(1)(B).)

INTRODUCTION

Petitioner, although *pro se*, has been litigating the title of the property—and the right to possess said property—located at 6312 South 161st way, Gilbert, Arizona (the "subject property") since 2013. (*See* Dodev v. ReconTrust Co., et al, No. 2:13-cv-02155 (D. Ariz. Oct 23, 2015).) He comes to the highest court of the nation not to seek reversal of the Arizona Court of Appeals Opinion but to seek uniformity within the circuit, and all judicial circuits, on the applicability of each state's Civil Procedure ("CP") Rule 41(a)(1)(B), and the preclusive effect of two voluntary dismissal thereunder, to eviction proceedings.

Despite the lack of ambiguity of ARCP Rule 41—*"[b]ut if the plaintiff previously dismissed an action in any court based on or including the same claim, a notice of dismissal operates as an adjudication on the merit"* (ARCP Rule 41(a)(1)(B))—the Court of Appeals held that two voluntary dismissals under said rule in an eviction are without this preclusive effect. At common law in Arizona, a plaintiff has the right to voluntarily dismiss his case at any point before the defendant enters a cross-claim or counterclaim. *See* R.L. Harris & Co. v. Houck, 22 Ariz. 340, 342, 197 P. 575, 575 (1921). ARCP Rule 41 codified this notion, but with

an important limitation: the two dismissals rule. This Supreme Court of Arizona has held before that ARCP Rule 41 was adopted "to put an end to abusive practices whereby defendants were put to expense by plaintiffs who had no real object in mind other than such harassment." Goodman v. Gordon, 103 Ariz. 538, 540, 447 P.2d 230, 232 (1968); *See also* 19 A.L.R.7th Art. 8 (2017) ("The virtually unlimited number of times that a plaintiff may repeat the process of filing and dismissing an action had resulted in the misuse . . . prompting courts and legislatures to adopt rules to limit the right, including the so-called 'two-dismissal' rule . . . as embodied in Fed. R. Civ. P. 41(a)(1).") Other states have adopted their own CP Rule 41, modeled after the Federal Rules of Civil Procedure, for the same purpose.

Subsequently, the legislative history and case law in Arizona—along with that of the rest of the judicial circuits—concedes that voluntary dismissals are prone to abuse and the judicial system has made a conscious choice to uphold *res judicata* in cases with two voluntary dismissals. The two-dismissal rule would have clearly applied before the Arizona Rules of Procedure for Eviction Actions ("RPEA") were adopted in 2009, introducing ambiguities and creating a split within the circuit regarding the applicability of CP Rule 41 in eviction proceedings, as other states within the circuit recognize its applicability to evictions.

Granting a petition for a writ of certiorari is warranted when, among other reasons, "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." (Sup. Ct. R. 10(b).) "'[T]he 'single most important' factor for granting certiorari petitions . . . is a split within the circuits that have considered the issue below.'" Allapattah Services, Inc. v. Exxon Corp., 362 F.3d 739, 746 (11th Cir. 2004) (quoting Sanford Levinson, *Book Review:* Strategy, Jurisprudence, and Certiorari. Deciding to Decide: Agenda Setting in the United States Supreme Court, 79 Va. L. Rev. 717, 726 (1993) (quoting H.W. Perry, Jr., Deciding to Decide: Agenda Setting in the United States Supreme Court 251 (1991))); *see also* Robert L. Stern et al., Supreme Court Practice 231-32 (8th ed. 2002) (stating that a conflict between decisions of courts of appeals "is frequently sufficient to obtain review" and that "this remains the most important basis for review").

STATEMENT OF THE CASE

On March 29, 2016, Respondent filed an eviction against Petitioner and his wife in the Superior Court of Arizona's Downtown Phoenix location. (*See* CV2016-004500.) Respondent later filed a second eviction against Petitioner's wife only in the Superior Court's Northeast location. (*See* CV2016-054110.) Both actions were voluntarily dismissed by Respondent under ARCP Rule 41. (*See* CV2016-004500 and CV2016-054110.)

On January 31, 2017, Respondent commenced a third eviction against Petitioner, which was eventually dismissed without prejudice by a court order because Respondent "failed to demonstrate that personal service was impracticable

and, therefore, alternative service by posting and mail was insufficient." (*See* CV2017-002670, ME 5/11/2017.)

Respondent commenced the underlying fourth eviction on July 12, 2017. On October 2, 2017, the trial Court granted Respondent's default judgment against Petitioner for failure to answer the complaint. On October 6, 2017, Petitioner timely filed a Notice of Appeal and on November 20, 2018, the Court of Appeals affirmed the default judgment against Petitioner through the Opinion. Petitioner's Petition for Review of the Court of Appeals Opinion was denied by the Supreme Court of Arizona on April 22, 2019.

REASONS FOR GRANTING THE WRIT

The matter at bar presents a unique opportunity for a uniform ruling on the applicability of CP Rule 41 to eviction proceedings. Granting Petitioner's writ—regardless of the outcome of the ruling—would serve the judicial economy within the circuit and will bring uniformity to the rest of the circuits.

It is unclear to the Petitioner whether CP 41's incorporation of the two dismissals rule—*res judicata*—is a direct result of Amendments V and XIV to the U.S. Constitution, reading in pertinent part: "... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb [or property]" (U.S. Const. amend. V.); and "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive

any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const. amend. XIV, § 1.).

If this Hon. Court determines that *res judicata* in civil matters is governed by the U.S. Constitution then the Opinion is repugnant to the Supremacy Clause thereto, providing that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Under the Due Process Clause of the Fifth Amendment, no person shall be prosecuted for the same offence twice, and put in jeopardy of life, limb or property. The Fourteenth Amendment incorporates these protections as they relate to state interference of individual rights with its own Due Process clause, which prohibits the state, under color of state law, from depriving "any person of life, liberty, or property, without due process of law."

Assuming, *arguendo*, that the two dismissals rule under CP Rule 41 is not derived from the US Constitution, Petitioner's writ should be granted in order to avoid future conflicting rulings within the circuit on the applicability on CP Rule 41 to eviction proceedings.

The Opinion ruled that ARCP Rule 41 does not apply to evictions, and thus did not rule on whether the second voluntary dismissal was with prejudice. The Court of Appeals based its decision on RPEA Rule 1, which states that "[t]he Arizona Rules of Civil Procedure apply only when incorporated by reference in these

rules." RPEA does not incorporate ARCP Rule 41 by reference, and does not have a separate RPEA rule which allows for voluntary dismissals. Because RPEA does not have a rule regarding voluntary dismissals, plaintiffs, as in the case herein, routinely dismiss their complaints under ARCP Rule 41(a). If ARCP Rule 41 applies in evictions, it is axiomatic that the rest of the rule, the preclusive effect of two voluntary dismissals under 41(a)(1)(B), applies as well. Even if ARCP Rule 41 does not apply, judicial history and legislative intent caution against allowing plaintiffs in evictions unlimited voluntary dismissals, and this court should uphold the two-dismissal rule.

Given that there is no voluntary dismissal rule in RPEA, granting the writ would elucidate whether plaintiffs can voluntarily dismiss under ARCP Rule 41(a) in evictions, and if not, what eviction rule gives them the authority to do so. In absence of a controlling decision in the circuit on the preclusive language of CP Rule 41(a)(1)(B) in evictions, the Court of Appeals Opinion, which allows for unlimited voluntary dismissals in evictions, will create conflicts with the judicial circuit and open up the eviction process to abuse if other courts use the Opinion for precedential or persuasive value.

The Hon. Court of Appeals "disagree[s] that there is an 'open question' regarding the applicability of ARCP Rule 41 to eviction actions. No Arizona caselaw supports the proposition that a plaintiff will be barred from bringing an eviction

action after two voluntary dismissals." *See* Opinion at ¶ 24. The Opinion is correct, to an extent, that there is no Arizona decision controlling on the point in question after the Supreme Court of Arizona enacted the current RPEA rules. Therefore, it is prudent and perhaps imperative to review *de novo* the applicability of CP Rule 41(a)(1) in evictions, under which Respondent and others within and outside of Arizona have voluntarily dismissed their complaints. Despite the Opinion's holding that ARCP Rule 41 does not apply in evictions, the same court has previously upheld the applicability of Rule 41 in eviction proceedings with their ruling in Brosnahan v. Fed. Nat. Mortg. Ass'n, No. 1 CA-CV 11-0709, 2012 WL 4963189, at *1 (Ariz. Ct. App. Oct. 18, 2012). In Brosnahan, the Appellate Court found that the complaint was dismissed under ARCP Rule 41(a)(1) but did not find *res judicata* under 41(a)(1)(B) because there was only one voluntary dismissal by the plaintiff.

This Hon. Court should grant the writ at bar to determine whether plaintiffs are allowed unlimited voluntary dismissals in evictions, period. There is not a single decision in Arizona and in the ninth circuit, other than this Opinion, that does not support the applicability of CP Rule 41 in evictions. *See* Volpert v. Papagna, 83 Nev. 429, 434, 433 P.2d 533, 536 (1967) ("The first unlawful detainer suit was voluntarily dismissed by the lessors pursuant to NRCP 41(a)(1) . . . The plaintiffs had the right to dismiss."); Triune Family Charitable Remainder Unitrust v. Pfeifer, 157 Wash. App. 1045 (2010) (Considering the argument that "the special proceedings provided in unlawful detainer statutes supersedes general court rules to the extent they are

inconsistent" and finding instead that "in general, voluntary dismissal without prejudice under CR 41(a)(1)(B) is available in unlawful detainer actions even though they are special proceedings."); Zaisan Enterprises LLC v. Green Tree Servicing, LLC, 389 P.3d 1036 (Nev. 2017) ("Appellant has provided a copy of a notice of voluntary dismissal pursuant to NRCP 41 . . . ")

These jurisdictions have also applied other parts of their respective CP Rule 41 to the eviction proceedings after the voluntary dismissal. See Volpert, 83 Nev. At 434, 433 P.2d at 536 (Discussing the application of NRCP 41(d) after voluntary dismissal under NRCP 41(a)(1)); Triune Family, 157 Wash. App. 1045 at *7 (Applying part CR 41(a)(4): "The dismissal [under CR 41(a)(1)(B)] is without prejudice unless otherwise stated in the order of dismissal. CR 41(a)(4).").

Accordingly, in this instant case, the fourth eviction action was barred by *res judicata* and the court was deprived of jurisdiction from the outset, as the record unequivocally shows that Respondent voluntarily dismissed the same causes of action against Petitioner twice under ARCP Rule 41(a). *See* CV2016-004500 and CV2016-054110. During the third eviction, Hon. Comm. Michael Barth acknowledged the dichotomy of Respondent's arguments that ARCP Rule 41(a) does not apply in eviction proceedings, although they voluntarily dismissed under the

same rule, during the Hearing and in his minute entry.[1] (ME, 4/25/2017, CV2017-002670.)

In a wobbled attempt to buttress the Opinion, the Hon. Paul J. McMurdie pled from the bench for Respondent by arguing that "[t]he Bank's mislabeling of a voluntary request to dismiss as a Rule 41(a)(1) motion did not alter its effect, which was a dismissal based on lack of service" under RPEA Rule 5(f). *See* Opinion ¶ 23. The record begs to differ as Respondent, in any of the underlying evictions, never made the argument that the previous evictions were dismissed under RPEA Rule 5(f). Respondent similarly never brought up RPEA Rule 5(f) in the underlying appeal in which the Opinion was issued. Each of the previous evictions were voluntarily dismissed by Respondent under ARCP Rule 41(a) *only*.

In the biased Opinion, the Court of Appeals relied on neither the facts nor on the law, as it was not possible that Respondent dismissed under RPEA Rule 5(f). RPEA Rule 5(f) allows for "[a] complaint that is *not served* within the time required by applicable statute [to] be dismissed at the *initial appearance date*." Respondent dismissed the second and third eviction under ARCP Rule 41(a) *after* service of process was established on the record, and well after the initial hearing. Thus,

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[1] "Indeed, the Plaintiff in this case filed such motion/notice in both CV2016-004500 and CV2016-054110 against Defendants, and now upon Defendant making a motion to dismiss under the same Rule, Plaintiff asserts its inapplicability. The unfairness of this position is obvious. Unfortunately, there are no Arizona cases on point. Hence, the Court is left to interpreting Rules 1 and 9(h)." (Hon. Bart, ME, 4/25/2017, CV2017-002670.)

Respondent could not have dismissed under RPEA Rule 5(f) even if it had elected to. The Opinion leaves open the question of what gives plaintiffs the authority to voluntarily dismiss a complaint after it has been served and after the appearance date, once RPEA Rule 5(f) cannot apply. Petitioner contends that the only proper way to voluntarily dismiss here was under ARCP Rule 41(a), incorporated by RPEA Rule 9(h), which is precisely what Respondent did.

The Hon. Appellate Court's determination that Respondent voluntarily dismissed due to lack of service (Opinion ¶ 23) is thus plainly erroneous because service had already been effectuated. What actually prompted Respondent's dismissals was its unwillingness to respond to Petitioner's subpoena which asked for the Representation Agreement between The Bank of New York Mellon ("Mellon"), on behalf of the CWALT certificateholders, and Counsel, in order to ensure that the action was being brought in the name of the right party of interest.[2] Respondent dismissed the complaint hours after the motion to compel was granted on August 11, 2016. (*See* CV2016-004500, ME 8/11/2017.) The Hon. Michael Barth granted Petitioner's motion to compel Respondent to answer the subpoena because he found that there was enough evidence of a lack of connection between the party listed on the complaint as Plaintiff and the party standing before him in the courtroom. Rather than answering the subpoena, Counsel for Respondent elected to

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[2] RPEA Rule 5(b)(1): "The complaint shall: (1) Be brought in the legal name of the party claiming entitlement to possession of the property."

dismiss in order to avoid fraud on the court, as Counsel had already testified under an oath and on the record [CV2016-004500, Hearing 6/27/16] that he represents Select Portfolio Servicing, Inc., rather than the real party in interest – Mellon.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for writ of certiorari OR order the Arizona Supreme Court to rule on this matter.

Respectfully Submitted on this 19th day of July, 2019.

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CERTIFICATE OF COMPLIANCE

I, Ivaylo Dodev, hereby certify that foregoing Petition for a Writ of Certiorari is in compliance of Sup. Ct. R.33(2).

By, Ivaylo T. Dodev
Petitioner in Pro Se