

ORIGINAL

19-6002

FILED  
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OFFICE OF THE CLERK  
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

Nicole Rena McCrea  
Petitioner

V.

Mark S. Devan, et al  
Respondent(s)

ON PETITION FOR WRIT OF CERTIORARI TO THE MARYLAND  
COURT OF APPEALS

Nicole Rena McCREA

(Name)

5205 East Capitol St., SE

(Address)

Washington, DC 20019

(City, State, Zip Code)

202 - 491 - 9654

(Phone Number)

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### QUESTION(S) PRESENTED

Is the Maryland Court of Special Appeals' March 13, 2019 unpublished Opinion and Memorandum affirming the judgment of the Circuit Court of Charles County in material conflict with the Supreme Court of the United States' recent decision outlining what is facially sufficient (*Dahda v. US.* 138 S. Ct. 1491 at 1499 – Supreme Court 2018) with regards to the statutory provisions of Maryland Rule("MD Rule") § 14-211?

## LIST OF PARTIES

☐ All parties appear in the caption of the case on the cover page.

☒ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows: Mark S. Devan; Thomas P. Dore; Brian S. McNair; Angela Nasuta.

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Petitioner respectfully prays that a Writ of Certiorari issue to review the Judgment below.

### OPINIONS BELOW

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A and B to the petition and is

☐ reported at \_\_\_\_\_; or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

The opinion of the Circuit Court of Charles County appears at Appendix C to the petition and is

☐ reported at \_\_\_\_\_ or,

☐ has been designated for publication but is not yet reported; or,

☒ is unpublished.

### JURISDICTION

For cases from **state courts**:

The date on which the highest state court decided my case was 06-21-2019.

A copy of that decision appears at Appendix D

☐ A timely petition for rehearing was thereafter denied on the following date \_\_\_\_\_ and a copy of order denying rehearing appears at Appendix \_\_\_\_\_

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_\_

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

*United States Constitution, Amendment 5, Due Process Clause* provides, in relevant part:

No person shall ... be deprived of life, liberty, or property, without due process of law

*United States Constitution, Amendment 14, Equal Protection Clause* provides, in relevant part:

“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No 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.”

*Article 24 of the Maryland Declaration of Rights* provides, in relevant part:

“That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.”

*Maryland Rule §14-211, Stay of the Sale; Dismissal of Action* provides, in relevant part(s):

**“(a) Motion to Stay and Dismiss.**

**(1) *Who May File.*** The borrower, a record owner, a party to the lien instrument, a person who claims under the borrower a right to or interest in the property that is subordinate to the lien being foreclosed, or a person who claims an equitable interest in the property may file in the action a motion to stay the sale of the property and dismiss the foreclosure action.

**(2) *Time for Filing.***

**(A) *Owner-Occupied Residential Property.*** In an action to foreclose a lien on owner-occupied residential property, a motion by a borrower to stay the sale and dismiss the action shall 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 postfile mediation is granted; or
- (iii) if postfile mediation was requested and the request was not stricken, the first to occur of:
  - (a) the date the postfile mediation was held;

(b) the date the Office of Administrative Hearings files with the court a report stating that no postfile mediation was held; or

(c) the expiration of 60 days after transmittal of the borrower's request for postfile mediation or, if the Office of Administrative Hearings extended the time to complete the postfile mediation, the expiration of the period of the extension.

\*\*\*\*\*

**(C) Non-Compliance; Extension of Time.** For good cause, the court may extend the time for filing the motion or excuse non-compliance.

**(3) Contents.** A motion to stay and dismiss shall:

(A) be under oath or supported by affidavit;

(B) 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;

(C) be accompanied by any supporting documents or other material in the possession or control of the moving party and any request for the discovery of any specific supporting documents in the possession or control of the plaintiff or the secured party;

(D) state whether there are any collateral actions involving the property and, to the extent known, the nature of each action, the name of the court in which it is pending, and the caption and docket number of the case;

(E) state the date the moving party was served or, if not served, when and how the moving party first became aware of the action; and

(F) if the motion was not filed within the time set forth in subsection (a)(2) of this Rule, state with particularity the reasons why the motion was not filed timely.

**(b) Initial Determination by Court.**

(1) **Denial of Motion.** The court shall deny the motion, with or without a hearing, if the court concludes from the record before it that the motion:

(A) was not timely filed and does not show good cause for excusing non-compliance with subsection (a)(2) of this Rule;

(B) does not substantially comply with the requirements of this Rule; or

(C) 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.

(2) **Hearing on the Merits.** If the court concludes from the record before it that the motion:

(A) was timely filed or there is good cause for excusing non-compliance with subsection (a)(2) of this Rule,

(B) substantially complies with the requirements of this Rule, and

(C) states on its face a defense to the validity of the lien or the lien instrument or to the right of the plaintiff to foreclose in the pending action, the court shall set



the matter for a hearing on the merits of the alleged defense. The hearing shall be scheduled for a time prior to the date of sale, if practicable, otherwise within 60 days after the originally scheduled date of sale.

**(c) Temporary Stay.**

(1) *Entry of Stay; Conditions.* If the hearing on the merits cannot be held prior to the date of sale, the court shall enter an order that temporarily stays the sale on terms and conditions that the court finds reasonable and necessary to protect the property and the interest of the plaintiff. Conditions may include assurance that (1) the property will remain covered by adequate insurance, (2) the property will be adequately maintained, (3) property taxes, ground rent, and other charges relating to the property that become due prior to the hearing will be paid, and (4) periodic payments of principal and interest that the parties agree or that the court preliminarily finds will become due prior to the hearing are timely paid in a manner prescribed by the court. The court may require the moving party to provide reasonable security for compliance with the conditions it sets and may revoke the stay upon a finding of non-compliance.

(2) *Hearing on Conditions.* The court may, on its own initiative, and shall, on request of a party, hold a hearing with respect to the setting of appropriate conditions. The hearing may be conducted by telephonic or electronic means.”

## STATEMENT OF THE CASE

Wells Fargo, through Mark Devan, et al (“Respondents”) filed this case on **October 19, 2016** as an affidavit to docket the foreclosure process in the Circuit Court for Charles County Maryland (“Circuit Court”) styled *Mark S. Devan, et al v. Nicole Rena McCrea*, Case No. 08-C-16-002735. In **October 2016**, the Petitioner contested the foreclosure and sought mediation through the Circuit Court, citing Wells Fargo dilatory tactics and bad faith conduct, churning her mortgage requests, creating the high delinquency and/or high arrears of her 2010 HAMP loan and detriment to her credit history. In **November 2016**, the Circuit Court ordered mediation. The Petitioner attended a foreclosure mediation on **January 18, 2017**, with the Respondents, acting as authorized agents for Wells Fargo, and conferring with Wells Fargo, by phone, throughout the mediation. At the foreclosure mediation on **January 18, 2017** at which the Petitioner agreed to accept the Trial Payment Plan (“TPP”) to begin with her first payment on February 2017, as asserted by the Respondents it was the Petitioner’s only option to stop the foreclosure process; although the Respondents and Wells Fargo refused to articulate and/or outline any terms for the TPP. On **January 20, 2017**, an “unknown party” filed documents with the Circuit Court fraudulently asserting that the mediation had failed. On **January 27, 2017**, an “unknown party” filed documents with the Circuit Court fraudulently asserting that the mediation had failed. On **July 01, 2017**, Wells Fargo TERMINATED the April 17, 2017 Modification/ TPP. On **July 21, 2017**, Wells Fargo/ Respondents, filed a bond with the Circuit Court, to proceed with the actual foreclosure sale.

On **August 09, 2017**, Petitioner filed a *Pro Se* motion before the Circuit Court, “ Defendant’s Emergency Motion to Stay and Dismiss the Foreclosure Sale,” citing good cause and an ongoing federal administrative investigation before the Consumer Financial Protection Bureau (“CFPB”)

(**APPENDIX E**). **August 11, 2017**, the Circuit Court issued an Order DENYING, without Memorandum or cause, the Petitioner's motion "Defendant's Emergency Motion to Stay and Dismiss the Foreclosure Sale; *prior to the Respondents filing a response to the Petitioner's* motion "Defendant's Emergency Motion to Stay and Dismiss the Foreclosure Sale"

(**APPENDIX C**). **August 11, 2017**, The Respondents filed before the Circuit Court, opposition to the Petitioner's Motion before the Circuit Court "Defendant's Motion to Stay and Dismiss. The Petitioner's house at 12472 Turtle Dove Place Waldorf, Maryland was sold at auction on August 11, 2017. On **September 08, 2017**, the Petitioner filed before the Circuit Court "Defendant's Motion to Vacate the August 11, 2017 Judgment". **September 08, 2017** Petitioner filed a motion before the Circuit Court, "Defendant's Motion to Stay Enforcement of the August 11, 2017 Judgment" with certified request for a payment plan in lieu of supersedes bond.

**September 08, 2017** Petitioner filed a Notice of Appeal to Maryland Court of Special Appeals ("MCSA"). On **January 09, 2018**, the Petitioner filed the Opening Brief before the MCSA

(**APPENDIX F**). On **February 27, 2018**, the Petitioner filed the Reply Brief before the MCSA

(**APPENDIX G**). On **January 31, 2019** the MCSA issued an Unpublished Opinion affirming the Circuit Court August 11, 2017 Judgment (**APPENDIX B**). On **March 04, 2019**, the Petitioner filed a Motion for Reconsideration of the Court's January 31, 2019 Opinion Affirming Judgment before the MCSA (**APPENDIX H**). On **March 13, 2019**, the MCSA DENIED the Petitioner's Motion for Reconsideration of the Court's January 31, 2019 Opinion Affirming Judgment (**APPENDIX A**). On **March 13, 2019**, the COSA WITHDREW the January 31, 2019 Unpublished Opinion affirming the Circuit Court August 11, 2017 Judgment (**APPENDIX A**). On **March 13, 2019**, the MCSA issued an Unpublished Opinion affirming the Circuit Court August 11, 2017 Judgment (**APPENDIX A**). On **March 14, 2019**, the MCSA issued the

Mandate. On **April 15, 2019**, the Petitioner filed before the Maryland Court of Appeals (“MCA”) a Petition for Writ of Certiorari to the Maryland Court of Special Appeals (**APPENDIX I**). On **April 15, 2019**, the Petitioner filed before the MCA a Motion to Extend Time for the Petition for Writ of Certiorari to the Maryland Court of Special Appeals (**APPENDIX J**). On **May 06, 2019**, the Petitioner filed before the MCA a Reply in Support of the Motion to Extend Time for the Petition for Writ of Certiorari to the Maryland Court of Special Appeals (**APPENDIX K**). On **June 21, 2019**, the MCA DENIED the Petition for Writ of Certiorari to the Maryland Court of Special Appeals (**APPENDIX D**).

### **REASONS FOR GRANTING THE PETITION**

On **May 30, 2014** the Petitioner began to experience financial hardship due to an extended illness; having exhausted all of her sick leave and annual leave in lieu of sick leave her employer placed her into a Leave Without Pay (LWOP) Status. The Petitioner was forced into Involuntary Disability Retirement on **May 15, 2015**. On **July 01, 2015** the Petitioner began to receive a reduced source of income from a disability pension. The Petitioner once again sought home modification assistance and/or forbearance assistance from Wells Fargo, on her own and/or through her Housing Counselor, Ms Pauline Hilliard, on at least three separate times from **May 30, 2014 through May 2016**. On **May 23, 2016** Wells Fargo sent the Petitioner written Notice of Intent to Foreclose. The Petitioner contested the foreclosure and once again sought modification. **October 19, 2017**, the Respondents filed an affidavit to begin the foreclosure process. On **December 27, 2016**, Wells Fargo denied the Petitioner’s application for a HAMP Modification. On **January 17, 2017**, the Petitioner received Written Notice from Wells Fargo dated "December 27, 2016" the same day of Wells Fargo’s HAMP denial, offering Mortgage

Assistance in a Wells Fargo Loan Product. The Petitioner attended a foreclosure mediation with the Respondents on **January 18, 2017** at which the Petitioner agreed to accept the Trial Payment Plan to begin with her first payment on February 2017, as it was the only option that would stop the foreclosure process; although the Respondents as representative of Wells Fargo refused to articulate and/or outline any terms for the Trial Payment Plan. On **January 18, 2017** the Respondents through a representative of Wells Fargo sent the Petitioner a written Decision from Wells Fargo Regarding Oral and Written HAMP Appeal, reasserting its representations at the mediation and affirming to the Petitioner that the Trial Payment Plan was her only option to avoid foreclosure. On **January 20, 2017** the Respondents through a representative of Wells Fargo sent the Petitioner a Second Decision from Wells Fargo Regarding Oral and Written Wells Fargo Denial of HAMP and NPV Report Appeal, reasserting, once again, its representations at the mediation and affirming to the Petitioner that the Trial Payment Plan was her only option to avoid foreclosure.

The Petitioner made payments under the Trial Payment Plan from **February 01, 2017 through June 2017**: February 01, 2017 payment confirmation No. 0201559603; March 2017 payment confirmation number. 0301210056; April 2017 payment confirmation No. 0405144386; May 2017 payment confirmation No. 0502663937; June 2017 payment confirmation No. 0601236415. On **April 17, 2017** the Petitioner received instructions for Final Loan Agreement in Wells Fargo Modification Product. After seeking counsel from Ms. Pauline Hillard, her HUD Counselor, On **May 03, 2017**, the Petitioner filed a complaint of mortgage fraud and request for review with HUD and the Consumer Financial Protection Bureau ("CFPB"). The CFPB is a U.S. government agency created to protect and enforce consumer rights; ensure that banks, lenders and other financial companies treat consumers fairly.

Maryland Rule 14-211 (b)(1)(C) states in part, “The 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” [emphasis added]. In Dahda v. US, 138 S. Ct. 1491 at 1499 – Supreme Court 2018 defined what is considered facially sufficient when analyzing a statutes requirements and a party’s compliance with those requirements. In reasoning whether an Order was “insufficient on its face” the Supreme Court of the United States (“SCOTUS”) stated:

“An order is "insufficient" insofar as it is "deficient" or "lacking in what is necessary or requisite." 5 Oxford English Dictionary 359 (1933); accord, Webster's New International Dictionary 1288 (2d ed. 1957). And, looking, as the Dahdas urge us to do, at "the four comers of the order itself," Reply Brief 4, we cannot find any respect in which the Orders are deficient or lacking in anything necessary or requisite” Dahda v. US, 138 S. Ct. 1491 at 1499 - Supreme Court 2018

The Petitioner’s Motion to Stay and Dismiss was sufficient in meeting all of the articulated necessary and requisite contents outlined in Maryland Rule 14-211.

On **May 02, 2017**, the Respondents, through a representative of Wells Fargo, *acknowledged the Petitioner 's desire to continue with loss mitigation* and agreed to continue accepting Petitioner’s TPP payments during the outside reviews. On **May 03, 2017**, the Petitioner filed a complaint of mortgage fraud against Wells Fargo and sought review of Wells Fargo’s actions and the terms of the April 17, 2017 final agreement before the CFPB. Maryland Rule 14-211 (b)(1)(A) states in part, ‘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 non-compliance with subsection (a)(2) of this Rule” [emphasis added]. The Petitioner’s repeatedly supported assertions of her rights as a borrower in a 2010

HAMP modified loan and the Respondents' repeated and protracted violations of her rights as a HAMP borrower. The Respondents admissions that the post modification mediation was a success demonstrates good cause for the Petitioner's non-compliance in timely filing a motion to dismiss, that was asserted and supported with particularity. The Petitioner's successful completion of the Trial Payment Plan ("TPP") demonstrates good cause for the Petitioner's noncompliance in timely filing a motion to dismiss, that was asserted and supported with particularity. In addition, the Petitioner's May 02, 2017 contact with the Respondents to continue loss mitigation efforts with continued TPP payments, as directed in the April 17, 2017 loan modification agreement, and the Respondents subsequent agreement and acceptance of the TPP payments demonstrates good cause for the Petitioner's non-compliance in timely filing a motion to dismiss, that was asserted and supported with particularity. The Respondents agreement and willing participation in the CFPB review demonstrates good cause for the Petitioner's non-compliance in timely filing a motion to dismiss, that was asserted and supported with particularity.

The Petitioner repeatedly asserted and supported with documentation that she was a borrower in a 2010 modified Home Affordable Modification Program ("HAMP") loan. The Petitioner asserted and supported with particularity that Respondents' actions and misrepresentations to the Appellant, a 2010 HAMP borrower were subject to HAMP rules and regulations; the Consumer Financial Protection Bureau (CFPB); and the CFPB's authority to investigate Respondents' actions and misrepresentations to the Appellant, a 2010 HAMP Borrower, violates regulations or mandatory federal loss mitigation requirements alluded to in her 2010 HAMP modified deed of trust and that the lender failed to adhere to such regulations, as was the situation presented in Wells Fargo Home Mortgage, Inc. v. Neal 398 Md. 705. 922

A.2d 538 (2007) and Bates v. Cohn, 417 Md. 309, 9 A.3d 846 (2010). The Court of Appeals noted in the *Neal* case that under principles of equity, the commencement of a foreclosure proceeding on an FHA-insured mortgage, without adhering to mandatory HUD loss mitigation regulations referred to in the deed of trust, may invalidate the declaration of default. The HAMP guidelines for default; imminent default; requirement that all options for loss mitigation be assessed; post-file meditation; review before the CFPB during loss mitigation; the Petitioner's expressed request to the Respondents on May 02, 2017 to continue loss mitigation, *during her CFPB appeal*, as directed, by the Respondents in the April 17, 2017 loan modification agreement; suspension of foreclosure actions; dismissal of foreclosure actions; continuance of foreclosure actions are controlling of the Respondents' declarations of the Appellant's default and were all properly before the CFPB as asserted and supported, with particularity by the Petitioner. In addition, demonstrates with particularity, the Appellants asserted and supported arguments of the Respondents retaliatory intent to move forward with the foreclosure *during the CFPB review*. The Petitioner's repeatedly supported assertions of her rights as a borrow in 2010 HAMP modified loan and the Respondents' repeated and protracted violations of her rights as a HAMP borrower, in addition to her right to appeal to the CFPB to investigate the Respondents repeated and protracted refusal to comply with the HAMP guidelines is *a valid defense* that was asserted and supported with particularity.

In addition to disregarding the Petitioner's facially sufficient assertion of violations of her rights as a borrower in a 2010 HAMP modified loan to deny that the Petitioner stated a valid defense as required in Maryland Rule 14-211 (b)(1)(C) and cited in Wells Fargo Home Mortg., Inc. v. Neal 398 Md. 705 (2007), the Court of Special Appeals also added a heightened stipulation, that "a borrower must, nevertheless, *prove* such defenses with



particularity in accordance with the requirements of Rule 14-211, Neal, 398 Md. App. at 727-28,730. [emphasis added]. The Court of Special Appeals' stipulation that the Appellant had a heightened requirement to "proving defenses" is not articulated, stipulated and/or implied in *Maryland Rule 14-211*. The Court of Special Appeals' assertion that at the Motion to Dismiss stage the Appellant had the *heightened burden* of also proving her defenses goes against the Supreme Court's and this Circuit's precedent of the burden that a party must meet during the Motion to Dismiss stage of litigation. In addition, the Court of Special Appeals' assertion of the requirement that the borrower "'prove her defenses", *at the Motion to Dismiss stage* was not raised in briefs or proceedings below. Rather than address the issue raised in the Petitioner's Motion for Reconsideration the Court of Special Appeals withdrew the January 31, 2019 opinion and replaced it with the March 14, 2019 opinion minus the above stipulation.

The precedent of this Maryland circuit explains that the venerated equity doctrine of clean hands which requires that "he who comes into equity must come with clean hands," *Hlista v. Altevest*, 239 Md. 43, 48, 210 A.2d 153, 156 (1965), is applicable in foreclosure proceedings such as the one implicated in the present case. The clean hands doctrine states that "courts of equity will not lend their aid to anyone seeking their active interposition, who has been guilty of fraudulent, illegal, or inequitable conduct in the matter with relation to which he seeks assistance." *Hlista*, 239 Md. at 48, 210 A.2d at 156; see also *Hicks v. Gilbert*, 135 Md.App. 394, 400, 762 A.2d 986, 989-90 (2000).

The Circuit Court's actions were in direct conflict with this Court's precedent established in *Dahda v. US*, 138 S. Ct. 1491 at 1499 – *Supreme Court 2018* as pertaining to *Maryland Rule 14-211 (b)(1)*, *statutory guidelines* that support the denial of the Petitioner's Motion, establishes that the Circuit Court refused to exercise its discretion and its expressed disregard for

statutory guidelines were prejudicial and caused material harm. The Circuit Court's decision to deny the Petitioner's Motion to Stay and Dismiss expressly states that its denial was "*based on the arguments of the Respondents*" when at the time of its decision there were no arguments from the Respondents, against the Petitioner's Motion to Stay in the record before the Circuit Court at the time of its decision. The fact that there were no arguments directly supports that there was no basis, *on the record before the Court*, for its initial denial of the Petitioner's Motion to Stay. The review of the Circuit Court's denial of a foreclosure injunction is for an abuse of discretion." Anderson v. Burson, 424 Md. 232, 243 (2013). A trial court abuses its discretion when its ruling "*does not logically follow* from the findings from which it *supposedly rests* or has no reasonable relationship to its announced objective." [Emphasis added] *Id.* (internal quotation marks omitted). Maddox v. Stone, 174 Md.App. 489, 502, 921 A.2d 912 (2007); Kelly v. State, 392 Md. 511, 531, 898 A.2d 419, 430 (2006). The duty to exercise discretion is a guard against "arbitrary or capricious" actions or a judge's "unyielding adherence to a predetermined position." Maddox v. Stone, 174 Md.App. 489, 502, 921 A.2d 912 (2007) (citations omitted). The Petitioner expressly asserts that the Circuit Court abused its discretion by refusing to assess the Petitioner's assertions of good cause; mortgage fraud; and violations of *HAMP* mortgage regulations; to STAY the foreclosure.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nicole R. R. Mc

Date: September 19, 2019