No-_____

In the Supreme Court of the United States

BARBARA NINA DAVIS,

Petitioner,

v.

MTGLQ INVESTORS, LP,

Respondent.

On Writ of Certiorari to the District Court of Appeal for the State of Florida, Fourth District

PETITION FOR A WRIT OF CERTIORARI

JOHN J. ANASTASIO
Counsel of Record
Suite 203
3601 South East Ocean Blvd. Stuart, Florida 34996
(772) 286-3336
ESERVICE@PSLLAW.NET

Counsel for Petitioner Dated November 27, 2019

QUESTION PRESENTED

INTRODUCTION

This is a residential foreclosure case, concerning the Fannie Mae/Freddie Mac Uniform Mortgage, used for tens of millions of mortgages. This mortgage requires the lender give the homeowner a default notice, prior to filing suit, giving the homeowner, a consumer due process right of notice and an opportunity to cure the default. Under the mortgage, service of the notice is deemed given the homeowner, either when sent first class mail, or when actually received, if sent by other means.

At trial the lender's evidence showed, that the lender did not give the homeowner the default notice by first class mail. Instead, the lender sent the notice only once, by certified mail return receipt requested. The notice sent by certified mail return receipt requested was never claimed by the homeowner. The default notice was never received by the homeowner.

QUESTION

Whether under the Fannie Mae/Freddie Mac Uniform Mortgage, a notice given by certified mail return receipt requested is a means other than first class mail, thus requiring actual delivery.

PARTIES TO THE PROCEEDING

Petitioner-homeowner Barbara Nina Davis was the defendant in the Circuit Court proceedings, appellee in the District Court of Appeals proceedings, and petitioner in the Florida Supreme Court proceedings.

Respondent-lender MTGLQ Investors, LP was the plaintiff in the Circuit Court proceedings, appellant in the District Court of Appeals proceedings, and respondent in the Florida Supreme Court proceedings.

RELATED CASES

MTGLQ Investors, LP v. Barbara Nina Davis, No. 43-2010-CA-301, Circuit Court of the 19th Judicial Circuit Martin County, Florida. Judgment entered February 26, 2018.

MTGLQ Investors, LP v. Barbara Nina Davis, No. 4D18-1618, District Court of Appeal for the Fourth District, Florida. Judgment entered March 20, 2019

Barbara Nina Davis MTGLQ Investors, LP, No. SC19-1020, Florida Supreme Court. Judgment entered August 30, 2019.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

Constitution

Statutes

Regulations

PETITION FOR A WRIT OF CERTIORARI

Barbara Nina Davis petitions for a writ of certiorari to review the judgment of the District Court of Appeal for the State of Florida, Fourth District in this case.

OPINIONS BELOW

The District Court of Appeal for the State of Florida, Fourth District's opinion is reported at *MTGLQ Inv'rs, L.P. v. Davis*, 270 So. 3d 392 (Fla. 4th DCA 2019) and reproduced at App. 1-6. The Fourth District's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at App. 7. The Florida Supreme Court's order denying discretionary review is reported at *Davis v. MTGLQ Inv'rs, LP*, 2019 Fla. LEXIS 1543 (August 30, 2019) is reproduced at App. 8.

JURISDICTION

The District Court of Appeal for the State of Florida, Fourth District entered judgment on March 20, 2019. App. 1-6. The court denied a timely petition for rehearing and rehearing *en banc* on May 17, 2019. App. 7. The Florida Supreme Court denied a timely filed petition for discretionary review on August 30, 2019. App. 8.

This Court has jurisdiction under 28 U.S.C. § 1257(a), as a federal question concerning United States mail, which was actually passed upon by the highest state court. *Raley v. Phio*, 360 U.S. 423,

436-37 (1959). It is a final decision for jurisdiction purposes, because it conclusively disposes of the federal question, distinct from the foreclosure action. *Clark v. Willard*, 393 U.S. 112, 117-19 (1934).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions

STATEMENT OF THE CASE

Article I, Section 8, Clause 7 of the United States Constitution, known as the Postal Clause or the Postal Power, empowers Congress, "To establish Post Offices and Post Roads". While not mandated, Congress has established the United States Postal Service. The Postal Service has established categories of mail delivery.

This case revolves around the question: Is there a difference between service of a required mortgage pre-suit default notice, by United States Postal Service category of first-class mail, and United States Postal Service category of certified mail return receipt requested?

At issue is the interpretation of the notice language in the Fannie Mae/Freddie Mac Uniform Mortgage, used for tens of millions of mortgages in the United States.

Section 15 of the mortgage (Record p. 943-944), requires the lender give the homeowner a default notice, prior to filing suit. Under the mortgage, service of the notice is deemed given, either when sent first class mail, or when actually received, if sent by other means.

The exact language of Section 15 in part states:

> Any notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means….
>
> Any notice in connection with this Security Instrument shall not he deemed to have been given to Lender until actually received by Lender.

At trial the lender introduced as Exhibit 6, the default letter, also commonly called an acceleration letter or breach letter. (Record p. 907-908) And, the lender introduced a certified mail return receipt record, (Record p. 909-910, App. 9) reflecting that the notice was never claimed by the homeowner. Thus, default notice was never received by the homeowner.

The record is devoid of any attempt made by the lender to resend the default notice.

The trial judge posed the following question during trial, "Well how did the borrower cure the default if they don't get a default [notice]?" (Trial Transcript p. 77, Line 23-24) This reflected a concern about Section 20 of the mortgage, App. 6a footnote 1) which twice refers to notice and an opportunity to cure or take corrective action.

The trial judge then went on to find (Trial Transcript p 79 line 19-20) that, "I'm don't think first class is the same thing as certified mail." The court went on to conclude in regard to first class mail and certified mail return receipt requested that, "they're not the same thing." (Trial Transcript p 78 line 19-20) Also noting that, "One comes with certified mail comes with a little green return card to show that it was actually received." (Trial Transcript p. 79, Lines 1-3) The court concluded that, "but for the fact that if it would have been sent by regular mail, it would be left in the mailbox and the person would've been presumed to have received that once it was left in the mailbox."

After making that determination, the trial judge granted the homeowner's motion for an involuntary dismissal. (Trial Transcript p. 88, Line 14-15)

The import of this notice requirement is that

under the second paragraph of Section 20 (Record p. 945) and Section 22 (Record p. 946) of the mortgage, no judicial action, (in this case a foreclosure action) by the lender can commence until 30 days after the homeowner is given a notice of default, which among other things, must specify the default, and the date at least 30 day later, on which the default must be cured.

The failure to comply with the condition precedent of the lender giving the homeowner a default letter, resulted in the dismissal of the action. (Trial Transcript p. 90, Line 12-14)

The lender appealed and the Fourth District reversed the trial court. (App. 1-6)

The Fourth District relied upon the concept that certified mail return receipt requested was only first-class mail with an "add-on". "USPS website shows that certified mail is simply enhanced first-class mail…. This indicates that certified mail is basically a service that can be added-on to first-class mail." (App. 4)

The District Court held that because certified mail return receipt requested was first class mail, the never received default notice was given to the homeowner under the language of the mortgage. (App. 4)

The Court in its opinion (App. 1-6) ignored a functional analysis of what occurs with certified mail return receipt requested. And, an analysis of the perception of the consumer and intent of a party to the Fannie Mae/Freddie Mac Uniform Mortgage.

The user perception of a mortgagor, consumer, or American society in general is different for certified mail return receipt requested, than it is for first-class mail, because of the functional difference between them. In a society where more and more people are working, or not waiting at home for mail, or any other packages, certified mail return receipt requested is really different and not in line with the past decade of American consumer behavior and perception.

The homeowner petitioned for discretionary review by the Florida Supreme Court, which was denied in a *per curiam* decision on August 30, 2019. (App. 7)

REASONS FOR GRANTING THE PETITION

A. Introduction.

The District Court of Appeals for the Fourth District has decided the homeowner's case below on an important question of federal law, concerning the effect of U.S. mail classification, that has not been directly decided, but should be settled by this court.

The notice language of the mortgage at issue is contained in tens of millions of Fannie Mae/Freddie Mac Uniform Mortgages throughout the United States. The statistics on the prevalence of such mortgages are both well known to the public, and readily ascertained from Freddie Mac's website www.freddiemac.com, and Fannie Mae's website. www.fanniemae.com.

B. This court has previously distinguished between first-class mail and certified mail return receipt requested, on due process notice grounds.

This court held in *Jones v. Flowers*, 547 U.S. 220, 126 (2006), in the context of a tax sale, (analogous to a foreclosure) when the mailed notice of a tax sale is an unclaimed certified return receipt requested mail, additional reasonable steps, if practical, should be taken to attempt to provide notice before taking action.

In *Jones Id.* 547 U.S. at 18-19, this court observed that, "We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a home he owns would do nothing when a certified letter sent to the owner is returned unclaimed." Otherwise, the homeowner is "no better off than if the notice had never been sent." *Id.* at 20.

Even *Ming Kuo Yang v. City of Wyo.*, 793 F.3d 599, 603 (6th Cir. 2015), cited by the District Court of Appeals below, held that, "unclaimed certified mail represents a first attempt at notice. One must take "additional reasonable steps" to notify the interested party." And that, "posting notice or sending it by regular mail generally will do the trick". *Id*.

Procedural due process was the basis for *Jones, Id*., and *Ming, Id.,* in distinguishing between first class mail and certified mail return receipt requested mail for notice purposes.

Had the default notice simply been certified mail, rather than certified mail return receipt requested, it would have arrived in the homeowner's mailbox. And, the lender would have had a record of delivery. Use of the receipt service frustrated the purpose of the notice under Section 20 of the mortgage, (App. 1a footnote 1) which was to provide an "opportunity to take corrective action."

Notice for private parties in a contractual setting has parallel support for a reasonable attempt if certified return receipt requested mail is unclaimed. This can be found in the common law doctrine of the covenant of good faith and fair dealing. And, is codified in the Uniform Commercial Code § 1-304 and Section 671.203 Florida Statutes. "Every contract or duty within the

Uniform Commercial Code imposes an obligation of good faith in its performance and enforcement." (As a security instrument, the mortgage comes within the provisions of Article 9 of the Uniform Commercial Code).

The homeowner is suggesting nothing other than, the reasonable step of sending out a default notice by regular mail, so that it actually gets to the homeowner. Contrast this with the lender seeking $1,094.00 for drive by property inspections, (Record p. 499) demonstrating that when a lender wants to make contact, it does so.

Distinguishing between first-class mail and certified mail return receipt requested, accomplishes the purpose and intent of notice in Section 20 of the mortgage of the, "Notice… and opportunity to cure" and "opportunity to take corrective action." (App. Footnote 1)

C. A functional analysis comparing first-class mail to certified mail return receipt requested demonstrates there is a difference.

The Court in its opinion (App. 1-6) ignored a functional analysis of what occurs with certified mail return receipt requested.

Functionally first-class mail travels as follows: (1) sender places the mail in a mailbox. (2)

The mail is placed in the mailbox of the recipient. There is no intermediate step as far as users of the postal system are concerned. You do not need to take any further step, or even be present for first-class mail. Mailing Standards of the United States Postal Service *Domestic Mail Manual* 1.1.1 "Without a contrary order, the mail is delivered as addressed."

Certified mail return receipt requested travels differently. It does not travel from the mailbox the sender placed the letter, to the mailbox of the recipient. It leaves the mailbox the sender places the mail into, but never reaches the recipient's mailbox. Instead, it is either handed to the recipient, if they are physically present. Or, a little card, not the mail itself, is placed in the recipient's mailbox. In contrast, "Certified Mail Restricted Delivery permits a mailer to direct delivery only to the addressee". *Id.* 3.2.2.

Certified mail alone, without a receipt, would have accomplished proof of sending of the notice. "Certified Mail provides the sender with a mailing receipt and, upon request, electronic verification that an article was delivered or that a delivery attempt was made." *Domestic Mail Manual* 3.1.1.

The physical process and the practice effect of each of the categories of mail under the *Domestic Mail Manual* under 39 C.F.R. 111 is fundamentally different in both handling and physical delivery.

D. Because first-class mail and certified mail return receipt requested are fundamentally different, the public perception and common usage also distinguishes both categories of mail, not physical standards made by the Mailing Standards of the United States Postal Service *Domestic Mail Manual*.

An analysis of consumer perception, and intent of a party to the Fannie Mae/Freddie Mac Uniform Mortgage, also factors into such analysis.

The user perception of a mortgagor, consumer, or American society in general is different for certified mail return receipt requested, than it is for first-class mail. There is a functional difference between them. In a society where more and more people are working, or not waiting at home for mail, or any other packages, certified mail return receipt requested is really different, and not in line with the past decade of American consumer behavior and perception.

As reflected by the trial judge's findings, there is a perception that people view first-class mail different from certified mail return receipt requested.

This court has previously ruled, that

common knowledge can form the basis for interpretation of language. In *Nix v. Hedden*, 149 U.S. 304, 307 (1893), this court considered in a tax context, whether a tomato was a fruit or a vegetable. The Court conceded that a tomato was botanically a fruit. However, because in commerce and common parlance it was conserved a vegetable, for purposes of taxation it was a vegetable.

So too here. While, the United States Postal Service may consider certified mail return receipt requested just an "add-on" service, business and the public do not treat them the same. Thus, certified mail return receipt requested is a means other than first-class mail.

CONCLUSION

To consider a default notice given by unclaimed certified mail return receipt requested the same as first class mail, is to make the homeowner, "no better off than if the notice had never been sent." And, to void the consumer due process right, under contract, common law, and statue to notice and an opportunity to cure or correct.

This Court should grant the Petition for Writ of Certiorari.

In the alternative, this Court should summarily reverse the Fourth District's decision.

And, hold that United States Postal Service certified mail return receipt requested, is a means other than first-class mail.

Respectfully submitted,

JOHN J. ANASTASIO
Counsel of Record
Suite 203
3601 South East Ocean Boulevard
Stuart, Florida 34996
(772) 286-3336
eservice@psllaw.net

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

No. 4 D18-1618

[March 20, 2019]

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, Martin County; William L. Roby, Judge; L.T. Case No. 1000030lCAAXMX.

PER CURIAM.

MTGLQ Investors, L.P. ("the Bank") appeals a final judgment dismissing its foreclosure complaint, entered in favor of Barbara Nina Davis ("the Homeowner"). We agree with the Bank that the trial court erred in finding that it failed to substantially comply with conditions precedent to bringing a foreclosure suit. We reverse and remand for further proceedings.

The mortgage contract at issue requires notice of default before a foreclosure action may be brought[1] and further provides in paragraph 15 that "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class that "[a]ny notice to Borrower in connection with this Security Instrument shall be deemed to have been given to Borrower when mailed by first class mail or when actually delivered to Borrower's notice address if sent by other means." The lender sent a default notice to the Homeowner in December 2009. The letter indicates that it was sent via certified mail with a return receipt requested. The

corresponding return receipt indicates the letter was sent via first-class mail with return receipt requested and was returned to the lender as "unclaimed" and "unable to forward."

The Bank brought a complaint for foreclosure in February 2010. The Homeowner asserted in her responsive pleading that the Bank did not serve and she did not receive a presuit notice "that was either served by regular mail or actually received if delivered by other means, including but not limited to certified mail, certified mail return receipt requested .... "

At trial, the Bank admitted a copy of the default notice along with the postmark indicating "First-Class Mail" and the return receipt indicating that the letter was returned to the sender and unclaimed by the intended recipient. At the close of evidence, the Homeowner moved to dismiss the action for the Bank's failure to comply with presuit notice requirements. Specifically, she contended that the notice was sent by certified mail, not first class mail and therefore, the Bank had to prove actual delivery, which it did not. The Bank responded that certified mail is a type of first class mail, and that the evidence reflected the letter was designated first class mail.

The trial court stated that it did not believe certified mail was the same thing as first class mail and it found that because the letter was returned as undelivered, the Bank did not establish compliance with the condition of presuit notice of default. The trial court dismissed the case.

We hold that the trial court erred in dismissing the case based on failure to satisfy the presuit notice requirement. The return receipt indicates on its face that the default notice was sent by first class mail. Thus, under paragraph 15 of the mortgage, the notice was "deemed to have been given to Borrower."

An opinion of the Ohio Court of Appeals contains similar facts and is instructive. In *Ocwen Loan Servicing, LLC v. Malish*, 109 N.E.3d 659, 668 (Ohio Ct. App. 2018), the mortgage contract contained the same language that is contained in the subject mortgage's paragraph 15, relied on by the Homeowner. The letter was sent via certified mail and was unclaimed. Id. The court declined to find that the conditions precedent were not satisfied merely because the notice was sent via certified mail and reasoned:

> (T]he evidence here shows that certified mail is first-class mail. The Malishes' tracking-information printout they submitted from the USPS website shows that certified mail is simply enhanced first-class mail. Under the heading "Postal Product" is stated "First-Class Mail." And beside this under the heading "Features" is stated "Certified Mail. " This indicates that certified mail is basically a service that can be added-on to first-class mail It stands to reason that a sender purchases this

> service if the sender wants to ensure that the first-class mail gets to the recipient. Therefore, because Ocwen sent the notice of default to the Malishes by first-class mail, the notice must be "deemed to have been given" when it was sent on August 14, 2015.

Id. at 668-69; s*ee also Md. State Bd. of Nursing v. Sesay*, 121 A.3d 140, 144 n.3 (Md. Ct. Spec. App. 2015) ("Certified mail ... is an extra service that a mail sender may, by paying extra, add to first-class mail."); *Ming Kuo Yang v. City of Wyoming*, 31 F. Supp. 3d 925, 932 n. 6 (W.D. Mich. 2014), *aff'd, Ming Kuo Yang v. City of Wyoming*, 793 F.3d 599 (6th Cir. 2015) (noting that "[a]ccording to the United States Postal Service, certified mail is an extra service option that may be combined with first class or priority mail. www.usps.com" and holding that "[t]here is nothing in the Ordinance [permitting notice by first class service] to suggest that combining first-class mail with the added certified mail service does not satisfy the Ordinance's requirement that notice be sent by first-class mail").

The Homeowner argues that the use of the word "deemed" in paragraph 15 is ambiguous. But our courts have held that such language is not ambiguous. In *Best Meridian Insurance Co. v. Tuaty*, 752 So. 2d 733, 735 (Fla. 3d DCA 2000), the court addressed a similar provision that stated, "All notices or reports .. . will be deemed delivered to the persons entitled to notices or reports when we mail

them." The Third District concluded:

> Under this type of notice provision, notice to the insured is deemed to be complete upon mailing, even if the insured does not actually receive the notice. See *Service Fire Ins. Co. v. Markey*, 83 So. 2d 855, 856 (Fla. 1955); *Bradley v. Assocs. Discount Corp.*, 58 So. 2d 857, 859 (Fla. 1952); *Burgos v. Independent Fire Ins. Co.*, 371 So. 2d 539, 541 (Fla. 3d DCA 1979); *Allstate Ins. Co. v. Dougherty*, 197 So. 2d 563, 566 (Fla. 3d DCA 1967); *Aetna Cas. & Sur. Co. v. Simpson*, 128 So. 2d 420, 424 (Fla. 1st DCA 1961). The insurer need only establish that the required notices were actually mailed. The insurer need not establish that the insured actually received the notice.

Because the evidence in the instant case showed that the default notice was mailed via first class mail and there is nothing in the mortgage to suggest that adding a return receipt defeats first class mail status, the default notice "shall be deemed to have been given to Borrower when mailed" pursuant to the terms of the mortgage. Accordingly, the trial court erred in dismissing the case based on its determination that the Bank failed to comply with conditions precedent to bringing suit.

Reversed and remanded for further proceedings.

GERBER, C.J., CIKLIN and KUNTZ, JJ., concur.

[1] Paragraph 20 provides in relevant part:

> Neither Borrower nor Lender may commence, join, or be joined to any judicial action ... that arises from ... this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such Borrower or Lender has notified the other party (with such notice given in compliance with the requirements of section 15) of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. ... The notice of acceleration and opportunity to cure given to Borrower pursuant to section 22 and the notice of acceleration given to Borrower pursuant to Section 18 shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this Section 20.

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

No. 4 D18-1618
[Ma, 17, 2019]

BY ORDER OF THE COURT:

ORDERED that the appellant's April 4, 2019 motion for rehearing en banc is denied.
Further,
ORDERED that the appellant's April 4, 2019 motion for rehearing is denied. Further,
ORDERED that the appellant's April 5, 2019 "amended motion for certification- of district court decision of great public importance" is denied.

s/ Lonn Weissblum
LONN WEISSBLUM, Clerk

District Court of Appeal
State of Florida
(SEAL)

Supreme Court of Florida
FRIDAY, AUGUST 30, 2019

CASE NO.: SC19-1020
Lower Tribunal No(s).:
4D18-1618;
432010CA000301

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d)(2).

POLSTON, LABARGA, LAWSON, LUCK, and MUÑIZ, JJ., concur.

A True Copy
Test:

s. John A. Tomasino
John A. Tomasino
Supreme court clerk

Supreme Court of the
State of Florida
(SEAL)

Certified Mail Return Receipt Record

CERTIFIED MAIL RETURN RECEIPT RECORD