

No. _____
6th Circuit
20-1255

IN THE
Supreme Court of the United States

CORNELIUS S. BERRY and
CASSANDRA D. BERRY,
PETITIONER,

v.

DEUTSCHE BANK, NATIONAL TRUST COMPANY
as Trustee for GSAA Home Equity Trust 2006-17
TIMOTHY CHERVENAK, PHH MORTGAGE, and
OCWEN LOAN SERVICING, LLC,

RESPONDENTS.

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN AFFIRMING THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MICHIGAN OPINION GRANTING RESPONDENTS' MOTION TO DISMISS WHEN THE CASE WAS ADJOURNED NUMEROUS TIMES IN ORDER FOR THE PARTIES TO RESOLVE THE CASE OR ALLOW PETITIONERS TO ANSWER THE MOTION TO DISMISS OR IN THE ALTERNATIVE ALLOW THE PETITIONERS TO AMEND THE COMPLAINT?

PARTIES TO THE PROCEEDING

CORNELIUS S. BERRY and CASSANDRA D.
BERRY,
PETITIONERS

DEUTSCHE BANK NATIONAL TRUST COMPANY,
as Trustee for GSAA Home Equity Trust 2006-17;
TIMOTHY CHERVENAK; PHH MORTGAGE; and
OCWEN LOAN SERVICING, LLC.,
RESPONDENTS

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the opinion of the United States District Court for the Eastern District of Michigan were unpublished opinions.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the appeal from the District Court's Granting Respondents' Motion to Dismiss When the Case was Adjourned Numerous Times in Order for The Parties to Resolve the Case or Allow Petitioners to Answer the Motion to Dismiss or in The Alternative Allow the Petitioners to Amend the Complaint on December 14, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

Jones v. Northcoast Behavioral Healthcare Sys., 84 F. App'x 597, 599, 2003 WL 23140062 (6th Cir. 2003) (citing *In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996)).

STATEMENT

In the State Circuit Court, Petitioners filed an In Pro Per action for Quite Title and Injunction. The action was removed to Federal Court based upon diversity of citizenship.

Respondents filed a Motion to Dismiss which was granted When the Case Was Adjourned Numerous Times in Order for The Parties to Resolve the Case or Allow Petitioners to Answer the Motion to Dismiss or In the Alternative Allow the Petitioners to Amend the Complaint.

The Petitioners appealed to the Sixth Circuit Court of Appeals which affirmed the Federal District Court opinion.

On June 3, 2019, Petitioners filed the above captioned case against the Respondents in the Macomb County Circuit Court. On June 27, 2019, Respondents removed the case to Federal Court.

On July 3, 2019, Respondents filed a Motion to Dismiss Petitioners Complaint.

On July 11, 2019, Darwyn P. Fair filed a Notice of Appearance on behalf of All Petitioners. On July 22, 2019, Darwyn P. Fair filed an Amended Attorney Appearance on behalf of Petitioners.

There were several Stipulations and Orders Extending Time for Response to Respondents' Motion to Dismiss. Orders were entered: July 29, 2019, August 19, 2019 and September 9, 2019.

After a Status Conference on February 12, 2020, the District Court entered an Order granting Respondents' Motion to Dismiss.

On March 16, 2020, Petitioners timely filed a Notice of Appeal.

REASONS FOR GRANTING THE PETITION

This is more than a docket management issue. “The court of appeals will not interfere with the trial court’s control of its docket except upon the clear showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant.” *Jones v. Northcoast Behavioral Healthcare Sys.*, 84 F. App’x 597, 599, 2003 WL 23140062 (6th Cir. 2003) (citing *In re Air Crash Disaster*, 86 F.3d 498, 516 (6th Cir. 1996)).

Because of the abrupt dismissal, Petitioners were not given an opportunity to answer the Motion to Dismiss. Although Petitioners did not “object to the Dismissal” Petitioners filing of the current appeal is an objection to the dismissal. Moreover, the Parties were still in the process of negotiating the process for payment to settle the case.

Thus, the District Court’s ruling has had a devastating effect on the Petitioners ability to pay the Respondents in that Petitioners had and still have the ability to pay the Respondents in order to settle the case. However, Respondents refused to accept how the payment would be made. The District Court’s dismissal gives the Respondents Carte Blanc to refuse any settlement even though the Petitioners had the ability to pay. Thus, the District Court ruling dismissing the case resulted in an actual or substantial prejudice to the Petitioners.

In ruling on a motion to dismiss, the Court may consider the complaint as well as (1) documents referenced in the pleadings and central to Petitioners claims, (2) **matters of which a court may properly take notice**, (3) public documents, and (4) letter decisions of government agencies which are appended to the motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.* , 551 U.S. 308, 127 S.Ct. 2499, 2509 (2007)

In the case at bar, at the time of the dismissal it was not about who would prevail in the litigation but about how the Parties could settle. And specifically, in this case how could the Petitioners repurchase the subject property? The case was adjourned in order for Parties to negotiate a settlement amount for the subject property. The opportunity to repurchase the subject property is now past and the purchase price and the process for the payment for the subject property is at the discretion of the Respondents.

Petitioners maintain this is why this matter should be remanded to the District Court in order for the Petitioners to pay the settlement amount. Without the remand, it is extremely unlikely that the Respondents will attempt to settle the case in light of the District Court's February 13, 2020, Order and Opinion dismissing Petitioners, Complaint.

This Honorable Court has the equitable powers to reverse the District Court's Order and Opinion granting Respondents' Motions to Dismiss when Respondents refused to accept the Petitioners' payment for the subject property.

V. CONCLUSION

For the above and foregoing reasons, Petitioners respectfully request the issuance of a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DARWYN P. FAIR & ASSOCIATES

/s/Darwyn P. Fair

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Dated: May 13, 2021

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 540
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CINCINNATI, OHIO 45202-3988

Deborah S. Hunt
Clerk

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Filed: December 14, 2020

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Re: Case No. 20-1255, *Cornelius Berry, et al v. Deutsche Bank Natl Trust Co, et al*
Originating Case No.: 2:19-cv-11912

Dear Counsel,

The Court issued the enclosed opinion today in this case.

Sincerely yours,

s/Cathryn Lovely
Opinions Deputy

cc: Mr. David J. Weaver
Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0692n.06

Case No. 20-1255

UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

FILED

Dec 14, 2020

DEBORAH S. HUNT, Clerk

CORNELIUS S. BERRY; CASSANDRA D. BERRY,

Plaintiff-Appellants,

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT
OF MICHIGAN

v.
DEUTSCHE BANK NATIONAL TRUST
COMPANY, As Trustee for GSAA Home Equity
Trust 2006-17; TIMOTHY CHERVENAK; PHH
MORTGAGE CORPORATION; OCWEN LOAN
SERVICING, LLC.,

Defendant-Appellee.

BEFORE: MOORE, COOK, and STRANCH, Circuit
Judges.

COOK, Circuit Judge. Plaintiffs Cornelius and Cassandra Berry defaulted on their mortgage and lost their home in a foreclosure sale. They sued to extend the six-month period for redeeming a foreclosed property under Michigan law. The defendants—the loan servicer and mortgage trustee—moved to dismiss the case for failure to state a claim. The district court dismissed the case and the plaintiffs appeal.

I.

The Berrys bought their Michigan home with a \$261,200.00 loan secured by a mortgage. Defendant PHH Mortgage Corporation, successor by merger to defendant Ocwen Loan Servicing, LLC, serviced the loan and the mortgage was assigned to defendant Deutsche Bank National Trust Company, as Trustee for GSAA Home Equity Trust 2006-17 (the “Trustee”).

The Berrys defaulted on the loan and the Trustee purchased the property at a sheriff’s sale. Michigan law allows six months from the date of sale to redeem foreclosed property. *See Mich. Comp. Laws § 600.3240(8).* For the Berry property, that period lapsed without a redemption.

Then, five weeks beyond the redemption period, the Berrys filed a pro se complaint seeking “Chain of Title and 3 additional weeks” to redeem the property. (R. 1-2 at PageID#: 20.)

The defendants moved to dismiss the complaint, arguing that the Berrys lacked standing because the expiration of the redemption period extinguished their prior rights and title to the property. The Berrys—now represented by counsel—engaged in negotiations with the defendants and five times over the course of five

months obtained their agreement to extend the Berrys' deadline to respond to the motion to dismiss. The district court accepted these agreements, entering a stipulated order on the docket for each.

Nearly two months after the expiration of the last stipulation—and seven months after the defendants filed their motion to dismiss—the Berrys still had not filed a response, prompting the district court to hold a status conference. At this conference, the Berrys, through their attorney, finally acceded to dismissal. The district court memorialized the status conference in an order dismissing the case, agreeing with the defendants that the Berrys lacked standing and noting that they “neither filed a response to Defendants’ motion nor object[ed] to dismissal.” (R. 16 at PageID#: 144.) This appeal followed.

II.

The Berrys center their appeal on when the district court dismissed the case, complaining that the district court did so “before the parties could settle on the process for the purchase of the subject property.” (Appellant Br. at 2.) This argument lacks merit.

The district court granted the Berrys five extensions to file a response to Defendants’ motion to dismiss. In the fifth of these extensions, the court ordered the Berrys to respond by December 18, 2019. But the Berrys never filed any response. On February 12, 2020, the district court held a status conference, during which the Berrys did “no[t] object to dismissal.” (R. 16 at PageID#: 144.) The Berrys concede that they did not object to dismissal at the status conference. Under these circumstances, we cannot conclude that

the district court abused its discretion by dismissing the Berrys' suit.

We AFFIRM.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORNELIUS S. BERRY ET AL.,

Plaintiffs,

Case No. 19-11912

v.

SENIOR U.S. DISTRICT
JUDGEARTHUR J.
TARNOW

U.S. MAGISTRATE JUDGE
R. STEVEN WHALEN

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR GSAA HOME EQUITY TRUST
2006-17, ASSET-BACKED CERTIFICATES SERIES
2006- 17 ET AL.,

Defendants.

/

JUDGMENT

All issues having been resolved by the Court's
Order [16] of February 13,2020, **THIS CASE IS
CLOSED.**

Dated at Detroit, Michigan, this 13th day of
February 2020.

DAVID J. WEAVER
CLERK OF THE COURT

BY: s/Michael E. Lang
Deputy Clerk

APPROVED:

s/Arthur J. Tarnow
ARTHUR J. TARNOW
SENIOR UNITED STATES DISTRICT
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CORNELIUS S. BERRY ET AL.,

Plaintiffs,

Case No. 19-11912

v.

SENIOR U.S. DISTRICT
JUDGEARTHUR J.
TARNOW

U.S. MAGISTRATE JUDGE
R. STEVEN WHALEN

DEUTSCHE BANK NATIONAL TRUST COMPANY,
AS TRUSTEE FOR GSAA HOME EQUITY TRUST
2006-17, ASSET-BACKED CERTIFICATES SERIES
2006- 17 ET AL.,

Defendants.

/

**ORDER GRANTING DEFENDANTS' MOTION TO
DISMISS [5]**

On June 3, 2019, Plaintiffs Cornelius Berry and Cassandra Berry commenced this action in Macomb County Circuit Court asking for three additional weeks to redeem their foreclosed property. Dkt. #1, Ex. A. Under 28 U.S.C. 1446, Defendants Deutsche Bank National Trust Company, As Trustee for GSAA Home Equity Trust2006-17, Asset-Backed Certificates Series

2006-17, PHH Mortgage Corporation, and Ocwen Loan Servicing, LLC removed Plaintiffs' complaint to this Court on June 27, 2019.

On July 3, 2019, Defendants filed a Motion to Dismiss [5] arguing, *inter alia*, that Plaintiffs lack standing because they failed to redeem their property within the statutory redemption period. Dkt. #5, pg. 5-7; *see also Bryan v. JPMorgan Chase Bank*, 304 Mich. App. 708, 713 (2014). This Court agrees. Furthermore, Plaintiffs neither filed a response to Defendants' motion nor object to dismissal, as indicated during a status conference with the Court held on February 12, 2020.

Therefore, for the foregoing reasons and the reasons stated in Defendants' motion,

IT IS ORDERED that Defendants' Motion to Dismiss [5] is **GRANTED**.

SO ORDERED.

s/Arthur J. Tarnow
Arthur J. Tarnow
Senior United States
District Judge

Dated: February 13, 2020

