20-764

In The

Supreme Court of the United States

SEP 05 2020

Mark E. O'Brien, *Petitioner*

v.

United Bank Trust N.A., as Trustee for LSF9 Master Participation Trust, *Respondent*

On Petition For A Writ of Certiorari

To The Connecticut Court of Appeals

PETITION FOR WRIT OF CERTIORI

Mark E. O'Brien

Post Office Box 342

Lunenburg, Massachusetts 01462

978-790-1936

QUESTIONS PRESENTED FOR REVIEW

Were the Defendants' due process rights violated when they were not given notice of the foreclosure proceeding?

Were the Defendants' due process rights violated when the foreclosing party did not have possession of the mortgage promissory note, and for secondary evidence, relied on a fraudulent assignment of mortgage?

Can a judicially-supervised foreclosure be allowed where serious doubt has been raised concerning standing of the Plaintiff?

Is it incumbent on a Trial Court Justice to make further inquiry when post-trial, new and material evidence has been brought to the Court's

attention, irrespective of whether the new evidence has been brought according to proper procedural protocol?

Did the Trial Court err when it allowed the testimony of the Caliber witness—a witness with no personal knowledge of the mortgage loan, the note, or relevant events? [Caliber is the loan servicer on the subject mortgage].

PARTIES TO PROCEEDING AND RELATED CASES

Kathleen M. O'Brien, 114 Wetmore Avenue, Winsted, CT 06098

Thomas J. O'Brien, 114 Wetmore Avenue, Winsted, CT 06098

RELATED CASES

Connecticut Superior Court LLICV166014383-S

U.S. Bank Trust, N.A. as Trustee for LSF9 Master Trust v. O'Brien, Mark E. et al.

Summary Judgment Motion by Plaintiff denied. 6/4/2018. "There is a genuine issue of material fast as to whether notice of default and the intent to accelerate was properly given." [John David Moore, J].

Summary Judgment Motion by Plaintiff denied. 12/7/2017. "...the Plaintiff has not met his burden of showing that is the holder of the promissory note." [John Pickard, J].

Order of Strict Foreclosure. 5/20/2019. [John Pickard, J].

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTION

PETITION

> *"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."* United States Constitution, 14th Amendment.

In Connecticut, foreclosures are judicially supervised. That said, the Court there failed to protect the rights of the Defendants in this case—failed to afford them due process of law.

STATEMENT OF THE CASE

Plaintiff-Respondent commenced the foreclosure action by Complaint on 13 October 2016 regarding a mortgage encumbering real property located at 114 Wetmore Avenue, Winsted,

Connecticut. The deceased borrower, Caroline O'Brien was in default of the subject promissory note dated 16 December 2004, secured by a mortgage given to Fleet National Bank, recorded in Winsted Land Records, Volume 346, Page 978.

Mark E. O'Brien is the Defendant-Petitioner in this action and claims an interest as heir to the Estate of Caroline O'Brien, and by quitclaim deed from other heirs.

Defendant filed an Answer on 27 February 2017, alleging Counterclaims which were disposed of by Summary Judgment. However, the Court denied Summary Judgment concerning liability on the Complaint because the Plaintiff had not met its burden of demonstrating that it was the holder of the note.

Plaintiff filed a second Motion for Summary Judgment on 4 April 2018, as to liability on the Complaint, which was denied because there remained an issue of fact as to whether notice of default was properly given.

This matter went to trial on February 27, 2019, and the Trial Court ordered post-trial briefs. The Trial Court ultimately entered judgment of strict foreclosure on May 20, 2019, which the Defendant appealed.

The Trial Court decision was affirmed by the Appellate Court on 16 April 2020. A petition for review by the Connecticut Supreme Court was denied.

FAILURE OF NOTICE

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Contrary to the rule in *Mullane,* the Plaintiff here served a dead woman at an address where she had never been. And the Plaintiff later relied on this fatally flawed service in Court filings. "Notice of default was given to Caroline S. O'Brien on or about August 8, 2015 (the Notice)." [6/16/17 Affidavit of Alyssa Salyers, authorized officer, Caliber Home Loans, Inc]. [Connecticut Superior Court filing. LLI-CV-601483-S].

Caroline O'Brien had died 8 years earlier on 3 August 2009.

It should be noted that the Petitioner was allegedly served the Summons and Complaint at a place he hadn't lived for several years; and that the Notice Regarding Foreclosure Mediation was served at an address where the Petitioner had *never* lived. The Plaintiff relied on this phantom service in Connecticut Superior Court documents.

ASSIGNMENT OF MORTGAGE

A FACTUAL IMPOSSIBILITY

As pointed-out by the Defendant at trial, the assignment of mortgage is a factual impossibility. A fraud dummied-up at Caliber headquarters because—absent the note-- Caliber needed an

assignment in order to foreclose. [Caliber Home Loans, Inc. is the servicer on the mortgage].

The assignment-in-question is dated 25 July 2016, and purports to move the mortgage from Bank of America to the Plaintiff on that date. However, for a mortgage to be in the LSF9 Trust, it had to be part of a deal where at auction in June 2014, Lone Star Funds [Lone Star] purchased a bundle of distressed mortgages from the Department of Housing and Urban Development. The winning bid was roughly $3.8 billion, and the subject mortgage was among other distressed mortgages. But later, in 2016, Bank of America no longer had the mortgage which had two years earlier moved from Bank of America, to HUD, to Lone Star.

The Assignment was drafted and Notarized at a Caliber office in Oklahoma and purports to memorialize a transaction between Bank of America

in California, and U.S. Bank by its attorney-in-fact—Caliber, concerning a mortgage on a property in Connecticut, two years after that conveyance was possible.

In pleadings, the Plaintiff insisted that it didn't need the note anyway—that it could rely on secondary evidence. "The loss of a bill or note alters not the rights of the owner, but merely renders secondary evidence necessary and proper." *New England Savings Bank v. Bedford Realty Corp.*, 238 Conn. 745, 760 (1996)

However, if the secondary evidence alluded to by the Plaintiff is a fraudulent document; that evidence is by any analysis, inadmissible.

In the Assignment, Caliber purports to be the attorney-in-fact for Bank of America. This is a glaring, if not illegal, conflict of interest because

Caliber is owned by Lone Star, the outfit that purchased the subject mortgage and other distressed mortgages back in 2014, bundling them into a securitized Trust known as LSF9. [Lone Star Funds].

STANDING TO FORECLOSE

A PREMISE BUILT ON SHIFTING SAND

The Defendant had not seen the Assignment of Mortgage until the day of the trial. In researching that transaction post-trial but before a decision by the Court, the Plaintiff discovered a parallel case from the New York Federal Court with identical Plaintiff and similar facts. The Court there questioned the standing of United Bank Trust, N.A., as Trustee for LSF9 Master Participation Trust. *U.S. BANK TRUST, N.A., as Trustee for LSF9 Master Participation Trust v. MONROE.* 1:15-CV-1480

(LEK/DJS). United States District Court, N.D. New York. Memorandum and Order. 8 March 2017.

"While U.S. Bank is the nominal plaintiff in this case, it is longstanding federal law that "court[s] must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 461 (1980). "Where an agent acts on behalf of a principal, the principal, rather than the agent, has been held to be the real and substantial party to the controversy. As a result, it is the citizenship of the principal—not that of the agent—that controls for diversity purposes." *Hilton Hotels Corp. v. Damornay Antiques, Inc.*, No. 99-CV-4883, 1999 WL 959371, at *2 (S.D.N.Y. Oct. 20, 1999) (citing *Airlines Reporting Corp. v. S&N Travel, Inc.*, 58 F.3d 857, 862 (2d Cir. 1995)). At issue here is the application of

this rule in lawsuits brought by a trustee on behalf of a trust."

The question in this case is the same as it was in the New York case: Is the *nominal* Plaintiff—U.S. Bank—the, "real and substantial party to the controversy," or is the principal, the LSF9 Master Participation Trust the real party to the controversy, or some other entity?

"Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause." *J.E. Robert Co.* v. *Signature Properties, LLC,* 309 Conn. 307, 318, 71 A.3d 492 (2013).

In a similar Massachusetts case, involving U.S. Bank, N.A. [U.S. Bank], part of the record was a July 2018 letter to a homeowner facing foreclosure, in which U.S. Bank concedes that it isn't a real party

to the controversy. "Please note, the Trust is the owner of the mortgage and note, not the trustee, or us in our individual capacity." By this reasoning, U.S. Bank cannot be, "the real and substantial party to the controversy." *Damornay* at *2.

It should be noted that in Footnote 4 to his Memorandum and Decision, Judge Kahn wrote of another case involving a Lone Star Funds Trust and U.S. Bank. "When it did file the trust instrument, "the text . . . was almost entirely redacted," and the only visible portion seemed to oppose the notion that U.S. Bank was an active trustee with real and substantial control over the trust assets. This failure should not be repeated here." [The case was later dismissed and Judgment entered in favor of the Defendant on 12 April 2017. Plaintiff U.S. Bank did not appeal]

These concerns of Judge Kahn—along with a copy of the letter from U.S. Bank to the Massachusetts mortgagors-- were presented the Trial Court and later to the Connecticut Court of Appeals. Unfortunately, the question of legitimate standing fell on deaf ears.

JUDGMENT IS PREMATURE

WHERE PROPOSED AMENDMENTS WOULD MATERIALLY CHANGE THE OUTCOME OF THE PROCEEDINGS

The Defendant brought new evidence to the Court after the trial. However, the Trial Court issued an Order of Strict Foreclosure to the exclusion of the new evidence. "Based on the evidence that was admitted, the court finds that the plaintiff is the party entitled to collect the debt reflected by the lost note and is the party entitled to enforce the

mortgage." [Court Order and Memorandum. 20 May 2019].

Other Courts *have* allowed post-trial amendments to the pleadings where those amendments would rescue the case from dismissal or summary judgment. "In granting a motion to dismiss, a district court should provide leave to amend unless it is clear that the complaint could not be saved by any amendment. See *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008).Exceptions to the general policy of granting leave exist "where the amendment: (1)prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile." *AmerisourceBergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006)."

Connecticut Courts reach the issue more loosely. ""[T]he purpose of a reargument is ... to demonstrate to the court that there is some decision or some principle of law which would have a controlling effect, and which has been overlooked, or that there has been a misapprehension of facts.... It also may be used to address alleged inconsistencies in the trial court's memorandum of decision as well as claims of law that the [movant] claimed were not addressed by the court.... [A] motion to reargue [however] is not to be used as an opportunity to have a second bite of the apple or to present additional cases or briefs which could have been presented at the time of the original argument." *Opoku v. Grant,* 63 Conn.App. 686, 692-93, 778 A.2d 981, 985 (2001).

However, the Supreme Court in *Foman* brings us back to the overarching justification for amendments, and the tenet that mistakes or

omissions made at the pleading stage should not be fatal to the argument. "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Foman v. Davis*, 371 US 178, 182 (1962) citing *Conley* v. *Gibson,* 355 U. S. 41, 48 (1957).

The Petitioner in the present case brought matters to the attention of the Court when those matters became available to the Petitioner. The post-trial brief of the Petitioner contained five Motions to the Court which in sum asked that the any decision on the merits be delayed until new evidence could be considered. "... the Court of Appeals should have treated the appeal from the denial of the motions as an effective, although inept,

attempt to appeal from the judgment sought to be vacated." *Foman* at 181.

The Court made no comment on the Motions except to say that, "Most of them [arguments] rely on citations to internet articles which were not introduced into evidence. He makes allegations of fact which are not based on any evidence offered or admitted at the trial."

The Petitioners post-trial brief, however, is an, "effective, although inept attempt," to stop the proceedings pending leave to amend with evidence not available at trial.

"...the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason

appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." *Foman* at 182.

THE PLAINTIFF WITNESS WITH NO PERSONAL KNOWLEDGE

At trial, the Defendant objected to the testimony of the Caliber witness because the witness had no personal knowledge of the subject mortgage or promissory note, but could only comment on how things are done at Caliber, and that he had seen photocopies of relevant documents including the Assignment of Mortgage.

The witness stood by the Assignment of Mortgage that purports to transfer interest in the subject property from Bank of America to the Plaintiff here, on 25 July 2016, when Bank of

America did not have the subject mortgage to transfer. It had been bought by the Department of Housing and Urban Development and bundled together with other distressed mortgages to be sold at auction in June of 2014. The high bidder was Lone Star Funds which placed the mortgages into a securitized Trust—the LSF9 Master Trust.

The witness also stood by the Affidavit of Bank of America employee Yamilla Soto—that the subject promissory note is, "destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person."

As the Defendant said at trial—the information contained in the Yamilla Soto Affidavit is neither instructive nor dispositive to the question—who holds the note? And the secondary evidence—the factually impossible Assignment of

Mortgage—is less convincing concerning the prospective party entitled to enforce the mortgage.

The Caliber witness admitted that he had never been to the Bank of America office where the deceased debtor allegedly signed the promissory note; that he had only seen copies of original documents, but that he knew that Caliber's procedures were the correct procedures. Caliber is owned by Lone Star Funds, and has a vested interest in protecting the purported assets of Lone Star.

No witness from Lone Star or U.S. Bank appeared, although absent a witness from Bank of America, they would have been most helpful to the trier of fact. On the contrary, the foreclosure was rubber-stamped by the Court on the basis of factually impossible documents—a mortgage transferred two years after it had left the transferrer's hands, and

sworn service on a dead woman, among other improprieties.

Slip shod foreclosures of this sort shouldn't get past the watchful eye of the Court, especially in a state where foreclosures are judicially supervised and the 14th Amendment guarantees the legal process due—a process not afforded the Defendants in the instant case.

CONCLUSION RULE 14.1(h)

WHEREFORE, because the petitioner has been deprived of property without due process of law in violation of the United States Constitution, 14th Amendment, the petitioner asks that this Honorable

Court grant certiorari and take a second look at the decisions of the Connecticut Courts.

Specifically, the lower Court did not afford the petitioner the process due when failed to admit new evidence after trial, and when it allowed the Plaintiff's use of factually-impossible documentation as material evidence at trial.

Respectfully Submitted,

/s/_____Mark E. O'Brien_____
Post Office Box 342
Lunenburg, Massachusetts 01462
978.790.1936.