No. 20-764

In The
Supreme Court of the United States

MARK E. O'BRIEN,

Petitioner,

v.

U.S. BANK TRUST, N.A., AS TRUSTEE FOR LSF9 MASTER PARTICIPATION TRUST,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Connecticut

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Petitioner rightly asserts that his procedural due process rights have been violated such that review by this Court is proper.

Whether the Petitioner has improperly asserted new evidence on appeal.

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INTRODUCTION

U.S. Bank Trust, N.A., as Trustee for LSF9 Master foreclosed on a borrower of a mortgage loan based on borrower's failure to pay required amounts due under the note. The State Trial Court, and court with original jurisdiction entered a Judgment of Strict Foreclosure in favor of the foreclosing Plaintiff. The judgment was affirmed by the Connecticut Appellate Court who remanded the matter back to the Trial Court solely for the purpose of resetting the law days.[1] The Defendant, Mark E. O'Brien filed a Petition for Certification with the Supreme Court of Connecticut. Said petition was denied.

O'Brien now seeks review of the denial of the Petition for Certification by the Supreme Court of Connecticut. The Connecticut Supreme Court's denial of the Petition is not within this Court's certiorari jurisdiction under 28 U.S. Code § 1257. The questions presented are strictly ones of state court law, they do not present a United States Constitutional question, nor represent a split of authorities or a pressing public

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[1] "Strict foreclosure is the normal method of foreclosure only in Connecticut and Vermont." (Internal quotation marks omitted.) *In re John R. Canney, III*, 284 F.3d 362, 369-370 (2d Cir. 2002). When a strict foreclosure rather than a sale is ordered, it entails a foreclosure judgment in favor of the mortgagee that results from a proceeding against the debtor and leaves the mortgagor with a right to redeem within a specified time frame, ending with the law day. *See Citicorp Mortgage, Inc. v. Weinstein*, 52 Conn.App. 348, 350, 727 A.2d 720 (1999).

interest issue and therefore should not be reviewed by the highest Court in the land.

STATEMENT OF THE CASE

U.S. Bank Trust, N.A., As Trustee for LSF9 Master commenced the instant action by complaint dated October 13, 2016 to foreclose a mortgage encumbering real property located at 114 Wetmore Avenue, Winsted, Connecticut. The sole borrower on the note secured by the mortgage, Caroline O'Brien, was deceased at the time Plaintiff commenced the action. The borrower was in default of said note and mortgage by virtue of failing to remit the contractually provided payments to Plaintiff. The appearing Defendant in this action is Mark E. O'Brien who is an heir of the Estate of Caroline S. O'Brien and also claims an interest in the property by virtue of a Quit Claim Deed recorded on the Winsted Land Records on November 23, 2011.

Defendant filed an answer containing several counterclaims on February 27, 2017. The Trial Court entered summary judgment in favor of Plaintiff as to the counterclaims on December 7, 2017. The Trial Court however twice declined to enter summary judgment as to Plaintiff's prima facie case for foreclosure.

This matter proceeded to trial on February 27, 2019. At trial, Plaintiff presented, *inter alia*, an affidavit of lost note, the mortgage, the mortgage modification, the assignment of mortgage, the demand letter, and an affidavit of debt. The Trial Court admitted all

of Plaintiff's exhibits into evidence. Defendant presented no evidence at trial.

The parties submitted post-trial briefs. Defendant's post-trial brief raised four (4) main arguments: 1) that Plaintiff lacks standing, 2) that the lost note affidavit is insufficient to confer entitlement to enforce the lost note, 3) that the assignment of mortgage is invalid, and 4) that Plaintiff's business records were inadmissible. After considering the Defendant's arguments, the Trial Court entered judgment in favor of the Plaintiff on May 20, 2019. The order entering judgment of strict foreclosure notes that "[t]he arguments made by Mr. O'Brien in his memorandum of law are rejected. Most of them rely on citations to internet articles which were not introduced into evidence, nor was judicial notice of these articles ever requested. He makes allegations of fact which are not based on any evidence offered or admitted at the trial." *Id.*

An appeal followed. Connecticut's intermediary court of appellate jurisdiction affirmed the Trial Court's entry of judgment *per curiam* by way of order dated March 10, 2020. The Defendant moved to reargue this decision *en banc* on March 19, 2020. The Connecticut Appellate Court denied Defendant's motion for reconsideration by way of order dated April 15, 2020.

Defendant then filed a Petition for Certification to the Connecticut Supreme Court. The Connecticut Supreme Court denied Defendant's petition on June 10, 2020. After the Connecticut Supreme Court's denial of

Defendant's Petition for Certification, Defendant filed a Motion to Stay Pending Decision by the U.S. Supreme Court per Connecticut Practice Book § 71-7 on July 14, 2020. The Connecticut Appellate Court denied the motion on July 31, 2020.

REASONS TO DENY PETITION

I. This Case Is a Flawed Vehicle for Determining Due Process Rights

The Fifth Amendment to the United States Constitution (incorporated and applied to the states through the Fourteenth Amendment) provides a right of due process, which includes the right of notice and the opportunity to be heard. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 783 (1914). Specifically, O'Brien's claim alleges a deficiency in procedural due process. "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 . . . But if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met, the constitutional requirements are satisfied." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 657 (1950). *See also*

Robinson v. Hanrahan, 409 U.S. 38, 39-40, 93 S. Ct. 30, 31 (1972).

O'Brien argues that he was fundamentally denied his procedural due process rights via a 'fatally flawed service in Court filings.' "Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits . . . What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,'" *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), "for [a] hearing appropriate to the nature of the case, *Mullane v. Central Hanover Tr. Co.*, supra, at 313." *Boddie v. Connecticut*, 401 U.S. 371, 378, 91 S. Ct. 780, 786 (1971). O'Brien had the opportunity to be heard: he filed a timely appearance in the matter and received multiple hearings, including a full evidentiary trial at the state court level. He was also provided, and availed himself of, the opportunity to appeal to the Appellate Court of Connecticut, as well as the opportunity to file a Petition for Certification to the Supreme Court of Connecticut. The Connecticut Appellate Court affirmed the trial court's decision *per curiam*, and remanded the case solely for the purpose of setting new law days. The Connecticut Supreme Court denied O'Brien's Petition for Certification on Appeal from the Connecticut Appellate Court. Not only has O'Brien completely exhausted all possible appeals for these proceedings, his constitutionally given due process rights have been completely satisfied.

For the first time since the commencement of the proceedings at the Trial Court level, O'Brien has put

forth an argument that he was served incorrectly. However, this argument is not supported by the Connecticut Rules of Practice nor by his actions at the trial court level. The Connecticut Practice Book § 10-30(b) states that, "[a]ny Defendant wishing to contest the court's jurisdiction, shall do so by filing a motion to dismiss within thirty days of the filing of an appearance." As Mr. O'Brien's appearance was filed on November 29, 2016 he has, pursuant to the construction of the Connecticut Rules of Practice, waived any challenges to the Trial Court's jurisdiction over his person by not filing a Motion to Dismiss within thirty days of filing his appearance. *Foster v. Smith*, 91 Conn. App. 528, 536, 881 A.2d 497, 502 (2005), *see also* Connecticut Practice Book § 10-30, § 10-32. O'Brien cannot now bring up new evidence on appeal to any court as to this issue. The opposing party should not be surprised on appeal of a final decision for facts they had no opportunity to introduce evidence on. *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976), *see also Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

This Court would be significantly impaired in considering the due process issue put forth by O'Brien as it does not have the benefit of being tested and refined in the lower courts. *United States v. Bestfoods*, 524 U.S. 51, 72-73 (1998) (declining to entertain an issue on which the courts below did not focus). It is inappropriate and improper for O'Brien raise, on appeal to the United States Supreme Court, arguments of this sort as this is not the forum to develop key facts of the case.

II. Defendant Has Not Submitted Any Reason Why Further Review of the Case Is Necessary, Especially Review in The United States Supreme Court.

O'Brien has not provided any reasoning, substantial or not, as to why further review of his case is necessary. He has not put forth any claims that mitigate or excuse the fact that he completely failed to submit any evidence or any legitimate legal authority that he relied on to the Trial Court. O'Brien fails to overcome the need for this Court to have been presented a Constitutional Federal question for review and couches a purely state court issue as a 14th Amendment challenge. In his Petition of Certiorari, O'Brien has used nearly the exact same claims as he did in his Petition for Certification to the Connecticut Supreme Court. The only difference between the two documents is a due process argument regarding notice, an assignment of mortgage, and standing. Although banks are regulated under federal law, they have always been subject to the laws of the state in which they do business and the only time state law is preempted, is if the operation of the state law expressly conflicts with the laws of the United States. *Normand Josef Enters. v. Conn. Nat'l Bank*, 230 Conn. 486, 517, 646 A.2d 1289, 1304-1305 (1994), *see also Nat'l Bank v. Commonwealth*, 76 U.S. (9 Wall.) 353, 362 (1869) (They [the banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer

of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law.) *See also McClellan v. Chipman*, 164 U.S. 347, 356-357, 17 S. Ct. 85, 87 (1896), *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 11, 127 S. Ct. 1559, 1567 (2007), *Epps v. JP Morgan Chase Bank, N.A.*, 675 F.3d 315, 324 (4th Cir. 2012), *Nat'l City Bank v. Cont'l Nat'l Bank & Tr. Co.*, 83 F.2d 134, 138 (10th Cir. 1936).

Connecticut General Statutes § 49-1 and § 49-15 govern foreclosure proceedings and remedies under Connecticut jurisdiction. Section 49-1, in relevant part, bars further action in the debt and § 49-15 proscribes the proper opening of judgments of strict foreclosure. No federal law established proscribes an equitable process or remedy, as established within the Connecticut General Statutes, thus foreclosure proceedings remain a question for the state courts, not courts within federal jurisdiction. In fact, this Court has recently recognized foreclosures as being the sole province of state law. *See Obduskey v. McCarthy & Holthus LLP*, 139 U.S. 1029, 1033-1035 (2019).

There are no conflicting Connecticut state laws that would furnish an appropriate appeal nor has O'Brien presented any Connecticut state laws that would supplement his argument.

In his Petition, O'Brien references the crux of his claim regarding the U.S. Bank Trust, N.A.'s standing in this case: a "dummied-up" assignment of mortgage. He also argues that the assignment is "factually impossible." O'Brien presented no evidence nor any legal

authority at trial to support this contention. U.S. Bank Trust, N.A. presented a certified copy of the mortgage and a certified copy of the mortgage assignment at trial. Pursuant to Conn. Gen. Stat. § 1-14, "[w]hen the term 'certified copy' is used in any statute relating to any recording agency, such term shall be construed to include a certified reproduction of the image or images of such books, records, papers or documents, which is proportional in size to the original . . . Any such reproduced record or any such certified copy may be admitted in evidence with the same effect as the original thereof, and shall be *prima facie* evidence of the facts set forth therein." Thus, U.S. Bank Trust, N.A.'s certified copy of the assignments at trial were sufficient evidence of the facts stated therein. O'Brien offered no evidence to rebut these facts. O'Brien's state court appeal, the motion for reconsideration, the Petition for Certification before the Connecticut Supreme Court and this Petition for Writ of Certiorari will not assist him because it will not overcome the fact that he did not present any evidence regarding a "dummied-up" assignment at trial.

The promissory note in this case is lost. In his Petition, O'Brien argues that the Plaintiff cannot rely on secondary evidence of the promissory note to establish standing. Defendant, as he did in the Connecticut Supreme Court, further argues that the lost note affidavit is inadmissible because it is "fraudulent." Defendant attempts to provide support for this claim with the contention that the lost note affidavit and other documents were inadmissible at trial because

the Plaintiff's witness did not have personally see the documents "produced." This claim is bereft of merit. "The defendant provides no authority, and we know of none, that precludes affiants from obtaining personal knowledge of underlying transactions by review of business records. Under Conn. Gen. Stat. § 52-180, to be competent to testify, the affiant need only have personal knowledge of the relevant business records." *American Home Mortgage Servicing v. Reilly*, 157 Conn. App. 127, 136, 117 A.3d 500, cert. denied, 317 Conn. 915, 117 A.3d 854 (2015) (finding that the plaintiff met its burden of demonstrating entitlement to enforce the debt by relying on a deposition transcript without any documentary evidence), *citing RMS Residential Properties, LLC v. Miller*, 303 Conn. 224, 235-236, 32 A.3d 307 (2011). Thus, there was no requirement that U.S. Bank's witness have first-hand personal knowledge of the events stated in the lost note affidavit over and above what is contained in the relevant business records.

O'Brien also resubmits the same claim he made in his Connecticut Appellate Court brief as well as his Petition for Certification to the Supreme Court of Connecticut regarding "Federal Court Justice Lawrence Kahn in New York." He states that since U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust was found to be without standing in that unspecified opinion, U.S. Bank Trust, N.A. cannot have standing in this case. "[W]e will not review a claim that is devoid of any legal analysis." *Bank of New York Mellon v. Horsey*, 182 Conn. App. 417, 439, 190 A.3d 105, cert.

denied, 330 Conn. 928, 194 A.3d 1195 (2018) ("The defendant's brief contains only bald citations to two out-of-state cases, presumably because he believes that those decisions support his claim. The defendant does not explain, however, how the cited case law is applicable to the specific facts of the present case, whether there is Connecticut authority on the question, or why this court should adopt the reasoning of the cited cases.") O'Brien offers no explanation as to why the Plaintiff cannot be the party with the rights to foreclose in this case. This defect was fatal to O'Brien's claims in the Trial court and likewise did not assist Defendant on appeal. "[T]he plaintiff submitted the note, mortgage, and assignment, which names the plaintiff as assignee of the note and mortgage, as attachments to its complaint. Given those pleadings, *the burden shifted to the defendant to prove the facts which limit or change the plaintiff's rights*." (Emphasis added.) *Deutsche Bank National Trust Co. v. Pardo*, 170 Conn. App. 642, 649, 155 A.3d 764, cert. denied, 325 Conn. 912, 159 A.3d 231 (2017). Here, O'Brien's bald assertions that since U.S. Bank Trust, N.A. as Trustee for LSF9 Master Participation Trust was without standing in a case in New York was without standing, it cannot have standing in this case. To the extent that O'Brien argues that VOLT XXVII Asset Backed Notes, Series 2014-NPL7 is the proper Plaintiff, O'Brien overlooks the fact that he presented *no* evidence that this party is the correct party to foreclose. He points to nothing in the record which can be construed as evidence; nor even any facts which would tend to support his statement. An unrelated New York case is not

evidence. Therefore, these arguments do not amount to proving facts with evidence which would limit or change O'Brien's rights and should not provide a basis for certiorari.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 3, 2021