No.

In the Supreme Court of the United States

Nationstar Mortgage LLC,
respondent
v.
Martin Dekom,
petitioner

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

MARTIN DEKOM
Petitioner

9050 Sunset Drive
Navarre, FL 32566
(516) 850-2717
Martin.Dekom@gmail.com

Questions Presented

A county court in New York invented a legal process which streamlines foreclosure by removing statutory requirements and motions. Can a court of its own interstitial rulemaking power supplant or replace the legislative scheme?

In New York, after a summons and complaint is served, a party cannot defend himself until he or the plaintiff files and pays for a Request for Judicial Intervention (RJI), regardless of the time set by the summons. Is this a permissible burden of Due Process?

Parties

The caption contains the names of the parties to the action in the New York Court of Appeals: Nationstar Mortgage LLC, respondent, and Martin Dekom, petitioner.

Decisions at issue

New York State Court of Appeals No. 2018-1028, *Nationstar v Dekom*:

> The Order Denying Appeal by the New York Court of Appeals dated April 30, 2020 with Notice of Entry on July 18, 2020, is Appendix A.

New York State Supreme Court, Appellate Division, Second Department Index Nos. 2015-02955, 2015-09970, 2015-09971, *Nationstar v Dekom*:

> The intermediate appellate order affirming the judgment, entered May 16, 2018 and noticed on May 18, 2018, and companion order denying reargument dated August 10, 2018, and notice thereof made August 20st, 2018, is Appendix B.

Nassau County Supreme Court No 2013-08566, *Nationstar v Dekom* (originally *Bank of America v. Dekom*):

> The trial court's initial Order, Nassau County Supreme Court dated December 2, 2014 with notice of entry January 12, 2015, and subsequent Order denying Show Cause dated April 20, 2015 with notice of entry on May 14, 2015, and its Order denying motion to dismiss, dated April 8, 2015 and noticed on June 26, 2015, are Appendix C.

PETITION FOR WRIT OF CERTIORARI

TABLE OF CONTENTS

AUTHORITIES

New York Statutes and rules

Jurisdiction

The order of the New York Court of Appeals was dated April 30, 2020, with Notice of Entry on July 18, 2020. This Petition For Writ of Certiorari is timely filed within 90 days of the latter. The jurisdiction of this Court is by 28 U.S.C. § 1257(a).

Constitutional Principles

Due Process, Equal Protection, and the right to petition courts for redress of grievances.

Preliminary statement

The issue is whether a local court can truncate or replace a statutory legal process. Also, if the New York "Request for Judicial Intervention" functionally voids the constitutional notice provided by a summons and complaint, and further burdens Due Process by fee shifting.

Statement of the case

The judicial foreclosure process in New York is the longest in the land by far, often taking years. The plaintiff must perform numerous steps in exacting detail, including a variety of statutory motions. The New York courts are notoriously backlogged, particularly in the population-dense downstate. In 2013, the Supreme Court of Long Island's Nassau County came up with a solution. It created it's own process, called "Foreclosure Inquest." As described in the State of New York Unified Court System's " 2014 Report of the Chief Administrator of the Courts" (Hon., Gail Prudenti, Chief Administrative Judge), the new process permits the plaintiff to petition for expedited rulings in exchange for waiving deficiency judgments.

As applied the new "Foreclosure Inquest" process relieves the plaintiff of the required detailed steps and statutory motions, as well as general requirements like service of papers. It is not created by legislation, has no written rules, and the defendant is deemed to be in default without any motion or application by the plaintiff. The defendant cannot move the court. This

is caused by operation of New York's "Request for Judicial Intervention" (RJI) process, and also by the strictures of "Foreclosure Inquest", both of which are challenged here.

A Request for Judicial Intervention (RJI) is a form unique to New York, filed in civil cases (22 CRR-NY 202.6). In other states, service of process of the summons and complaint begins a case. In New York, a case will sit in limbo until the filing of the RJI. The RJI is a request for the court to become involved, which makes it a "live" case, and assigns a judge. Until an RJI is filed, the court will not accept motions, orders to show cause, requests for court conferences, or any other papers. As a result, a defendant who is served a summons and complaint cannot defend himself until an RJI is filed, with payment. However, the time to answer the complaint as stated in the summons continues to run.

Petitioner Martin Dekom's experience with "Foreclosure Inquest" illustrates the RJI issue, and the effects of the elimination of the required statutory steps and motions. In 2013, Bank of America initiated a foreclosure action against Dekom. The law requires two preforeclosure notices, served. The bank mailed one. In July it filed a summons and complaint without an RJI. Dekom served a motion to dismiss. Bank of America did not oppose. At this same time it executed an assignment to respondent Nationstar Mortgage LLC, who also did not oppose. The Nassau County Clerk returned Dekom's motion, claiming he did not pay a motion fee, and did not file and pay for the RJI. There is no motion fee for self-represented parties in foreclosure, as they are *in forma pauperis* by operation of statute (a *pro se* defendant may proceed as a poor person, citing CPLR 3408(b), Nassau foreclosure judge Hon. Dana Winslow*). Nor was it incumbent on him as the defendant to file the plaintiff's RJI

* testimony submitted to the U.S. House Committee on Judiciary, December 2, 2010, "Foreclosed Justice: Causes and Effects of the Foreclosure Crisis," describing New York's protective statute.

paperwork, or pay its fee, which he could ill afford. Seven months later, in March 2014, Bank of America filed an RJI. The statutory settlement conference was held in July 2014, with Dekom and Nationstar's counsel attending. Dekom raised his motion to dismiss, which counsel acknowledged being served. It was ignored. A "Foreclosure Inquest" (hearing) was scheduled. Dekom wrote to the court about his motion, to no avail. He raised it at the hearing, again to no effect. Following the hearing he raised his motion to dismiss again as a motion to renew. It was adjudicated five months after final judgment. Unbeknownst to him, Dekom had been deemed to be in default, without any order entered or clerk notation.

The statutory foreclosure process, published and publicly available, requires a number of plaintiff motions, originating in both Civil Practice (CPLR) and Real Property (RPAPL) law. Necessary motions include: for default (CPLR 3215) or summary judgment (CPLR 3212), for order of reference (RPAPL 1321), to accept the referee report, for judgment of foreclosure and sale (RPAPL 1351). Ordinary foreclosure also requires the service and filing of two preforeclosure notices (RPAPL 1304), and the filing of a Certificate of Merit (CPLR 3012). Nationstar made no motions, no certificate of merit, and did not comply with the preforeclosure notice requirement- a fatal error. Absent a motion for default, Nationstar admitted on appeal years later that its default was obtained by an "alternative method" to the statutory process found in CPLR 3215.

The law also requires proof of the claim be admitted as evidence and service of all papers. These were also missing, the "exhibits" having been delivered to the judge ex parte. In December 2014, the court delivered a "Judgment of Foreclosure and Sale After Inquest." That moniker is a unique twist on the standard "Judgment of Foreclosure and Sale." Dekom timely appealed. He also moved by Order to Show Cause to vacate the default which had been unknown to him. The Show Cause was denied and Dekom appealed. The court also finally

denied Dekom's motion to renew his motion to dismiss, still outstanding five months after judgment. Dekom filed a timely appeal for that as well, in belt and suspenders fashion.

The three appeals were treated as one case by the intermediate appeals court, the Second Department, Appellate Division. In 2018 it denied the appeals without passing on the legitimacy of the novel "Foreclosure Inquest" process, and denied rearguement. Dekom timely appealed to New York's senior court, the New York State Court of Appeals. It denied Dekom's appeal in an order dated April 30, 2020 with Notice of Entry on July 18, 2020. Now petitioner Martin Dekom timely requests a Writ of Certiorari to review the judgment of the New York State Court of Appeals.

Reasons to grant the petition:

Institutional acceptance contrary to public policy commands action

There's a time honored principle, often traced to *Egerton v. Brownlow*, 4 HL Cas. 1, 196 (1853), that public policy prohibits contracts which tend to harm the public or defeat the public good. The same principle applies when private parties are provided unfair means of enforcing contracts, regardless of their merits, to the disadvantage of the public. Such is the case with the novel "Foreclosure Inquest" process, in which the balancing of interests incorporated into New York's civil practice is eschewed. The fact that the majority of foreclosure defendants are poor, minority, or self-represent makes such an arrangement unconscionably exploitative. Such a gross imbalance, contrary to the intent of statute, amounts to a judicial version of state capture.

Injustice alone may not be enough to prompt the highest court, but here the scope of it is compelling. According to New York's online "ecourts" system, there are currently 497 cases processed by or on the Nassau "Foreclosure Inquest" docket. There is an additional unknown

number of cases, probably larger, which are differently classified, but nevertheless have been or will be run through "foreclosure inquest" (petitioner's case is one).

Further, "Foreclosure Inquest" has gained institutional acceptance, such as with the favorable mention in the state court's "Report of the Chief Administrator of the Courts." Those who profit from its lopsided treatment have also given it vocal support. The Freddie Mac *Single-Family Seller/Servicer Guide* Bulletin 2014-9 (May 15, 2014) endorsed it, instructing servicers to "Expedite Freddie Mac Default Legal Matters with the New York Foreclosure Inquest Program as an alternative foreclosure process." And major law firms as well: the Buckley Sander (now Buckley LLC) website echoed the Freddie Mac statement, that servicers could now utilize "the New York *Foreclosure Inquest* Program as an alternative foreclosure process to accelerate foreclosure actions in New York." In theory the courts are immune to such endorsements, however it is sadly telling that both state appellate orders avoided ruling on the issue of the "Foreclosure Inquest" abiogenesis. That they ignored the elephant in the room is galling as it was squatting in a *courtroom*. Perhaps neither court had the will to upset the "Foreclosure Inquest" scheme after it had been endorsed by the New York State Court Chief Administrator. Nevertheless, the exploitation of the weak by the powerful, with the assistance of the state and to cheers from major banking and legal institutions, should deeply offend this Court, *United States v. Ross*, 456 U.S. 798 (1982) ("The Court derives satisfaction from the fact that its rule does not exalt the rights of the wealthy over the rights of the poor."). Foreclosure disproportionately impacts minorities by a significant margin. Some may debate how "systemic racism" manifests, but stripping away defendant rights and defenses in foreclosure is a textbook example. This kind of disparate treatment has animated public protests, as well as mob violence. If ever there were a time to right *new* wrongs, it would be now, with this case.

The New York Court of Appeals allows judicial "mission creep" to invade the legislature, to the detriment of its citizens

This cause centers on the use of "Foreclosure Inquest", a new legal process created by the Nassau County Supreme Court, a superior court of a New York county. It is the very nature of a judiciary, *any* judiciary, to interpret laws, not create them. This is true for New York, that the regulation of court practices and procedures is vested in the Legislature (NY Constitution, art VI, § 30; *Matter of A.G. Ship Maintenance Corp. v Lezak,* 69 NY2d 1 (1986)). There is nothing in New York's civil procedure, real property law, judiciary law, or general municipal laws which authorize a local court to fashion additional, individualized modifications upsetting the legislative scheme. Whether it is a "good idea" or not is irrelevant, as the idea must already exist in statute. For instance, in delineating the functions of the state's Chief Administrator of the Courts, Judiciary Law § 212 (2)(d) contains a mandate that the Chief Administrator "adopt rules and orders regulating practice in the courts *as authorized by statute.* This applies to a county Supreme Court as well, *Menashe v. Steven J. Baum, PC,* EDNY 2011 ("The sources of judicial rule making authority... do not afford carte blanche to courts in promulgating regulations and no court rule can enlarge or abridge rights conferred by statute."). The abilities of a court are not broad and implicit, but limited to those "conferred by the legislature," *Fink v. O'Neil,* 106 U.S. 272 (1882). See also *Dietz v. Bouldin,* 136 U.S. 1885 (2016) (courts are not free to discover new inherent powers that are contrary to civil practice, citing *Carlisle v. United States,* 517 U.S. 416 (1996)); *Shady Grove Orthopedic Associates v. Allstate Ins.,* 559 U.S. 393 (2010) (court-made rules can only govern the "manner and means" by which a litigant's rights are enforced, and cannot impair them, citing *Mississippi Publishing Corp v. Murphree,* 326 U.S. 438 (1946)).

At all levels, judicial "mission creep" is expanding the power of the courts, such as permitting clerks to make orders, or delegating adjudication to non-judges, all without legislative action. But where an inch is given, a mile may be taken, such as with Nassau Supreme's creation of "Foreclosure Inquest" by some unknown fiat. It was justified by the tsunami of foreclosure actions, and then quickly endorsed by those whose profits were impinged by the clogging of the docket. However there is no clause in the Constitution permitting the usurpation of purely legislative authority for either profit or convenience. This Court should grant the Writ and review the *ultra vires* creation of "Foreclosure Inquest" by the Nassau Supreme Court.

The new "Foreclosure Inquest" process, even if valid, is plainly Unconstitutional

The shakedown cruise of a new legal process is through the results in court tests. However "Foreclosure Inquest" has escaped such scrutiny in part because the majority of foreclosure defendants simply don't show. Here, those that do appear are treated as though they didn't. And, for the few who challenge the process on appeal, the appellate courts have responded with a deafening silence, as if Nassau County is their crazy uncle in the attic. It's worse than crazy; "Foreclosure Inquest", even if the court's fiat creating it is valid, is patently unconstitutional, *Dolan v City of Tigard* 512 US 374 (1994) (denominating a governmental measure as a regulation "does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights.").

By any measure, the "Foreclosure Inquest" does not provide constitutional notice of its restrictions and has no jurisdiction. There is no record of any promulgation of rules governing "Foreclosure Inquest." The online Nassau County Supreme Court foreclosure rules (https://www.nycourts.gov/COURTS/10JD/nassau/foreclosure.shtml) do not mention

"Foreclosure Inquest." Once promulgated, the publication of a new law provides Due Process notice to the public.; "Foreclosure Inquest" lacks any such notice.

Further, "Foreclosure Inquest" apparently is limited to mortgage servicers, though there is no known statute conferring or delineating its jurisdiction. The lack of promulgation, publication, and jurisdiction make it, literally, a fake court. Such a court has no jurisdiction, *Heiser v. Woodruff,* 327 U.S. 726 (1946). Claims derived from irregular foreclosure proceedings are void, *Wolfe v. Lewis,* 60 US 280 (1857). Nor can any court, including "Foreclosure Inquest," authorize its own existence, *Wayne Mutual v McDonauch,* 204 U.S. 8 (1907) ("A court cannot confer jurisdiction on its self where none existed and cannot make a void proceeding valid."). Any judgment it issues is a nullity, *Lubben v Selective Service System,* 453 F.2d 645 1st Cir. (1972). At best "Foreclosure Inquest" is governed by an informal set of rules, which of itself is unenforceable, *Homestead Funding Corp. v. State Banking Dept.* 95 AD3d 1410 (2012).

Ordinary foreclosure Due Process in New York requires the cited motions which "Foreclosure Inquest" wholly omits. Obtaining a default absent a motion has been described by Nationstar as an "alternative" to the statute. However that which lies outside of statute is not legal process. This includes that Dekom was not permitted to see the evidence proffered against him, nor was it made part of the trial record. He further was specifically prohibited from challenging the standing of the plaintiff, which is ordinarily subject to attack at any time. This kind of deprivation of the opportunity to raise defenses voids a judgment for want of procedural Due Process, *Griffen v. Griffen,* 327 U.S. 220 (1946). Dekom's motion to dismiss, which attacked jurisdiction, was not adjudicated until five months after proceeding, making it meaningless. This is fatal, *Mathews v Eldridge,* 424 U.S. 319 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a

meaningful manner"). Dekom was prohibited from interposing an Answer, *id.*,, a right rooted in Common Law. While it is not written into statute explicitly, the law requires that substance govern over technicality in *pro se* cases, *Haines v Kerner*, 404 U.S. 519 (1972). That standard has also been streamlined out in "Foreclosure Inquest."The raison d'etre of "Foreclosure Inquest" is to do away with Due Process, as that speeds up the process significantly.

"Foreclosure Inquest" violates the Equal Protection Clause, as it denies a defendant the ability to defend himself in the way "ordinary" foreclosure defendants can, as provided by statute, and the Constitution. Similarly situated defendants are able to move the court, answer, and argue as they see fit when faced with the statutory motions required in ordinary foreclosure. The fact that "Foreclosure Inquest" is merely faster than the ordinary process does not justify the egregious cost of dispensing with statutory and fundamental rights.

In the remote chance that "Foreclosure Inquest" had been lawfully promulgated and its novel rules published, its bulldozing of Due Process, blatant Equal Protection violation along with the right to petition the courts, make it unconstitutional. When fundamental rights are at stake, this Court is charged to its protective zenith, meriting grant of the Writ petition.

New York's "Request for Judicial Intervention" is unconstitutional as it voids the summons and impermissibly shifts costs

New York requires the filing of an RJI to "activate" a case, whereas 49 other state accomplish the same thing by the filing of a summons and complaint. The instant action began with an incomplete filing in June 2013 by Bank of America. It filed a summons and complaint but did not include the RJI, thereby placing the case in "limbo". This is a common practice known as "shadow docketing." The effect of the "shadow docket" is that the time limit as described in the summons begins to run, but the defendant cannot defend until an RJI is filed. It puts the

defendant in the position of having to file the plaintiff's paperwork and pay the plaintiff's fee. The defendant is *paying* to be sued (presupposing the Clerk will accept a defendant-filed RJI). Shifting the cost of the suit onto the defendant prior to judgment is a facial violation of Due Process. It has the double-edge of working against those who are already poor, and thus cannot defend because they lack the funds to pay the plaintiff's RJI fee.

A plaintiff's failure to file an RJI is technically a prohibited practice, but as it has no penalty whatsoever, it remains common and acceptable, *Cole v. Baum, P.C.*, No. 11-3779, Slip Op. (EDNY July 11, 2013)(no penalty permitted as statute provides for none). So while the summons opens a 20 day window to defend, the RJI nails it shut: only after the filing of an RJI can a defendant mount defenses, regardless of the summons. A summons prescribes the number of days one has to respond before risking default. However if a person is thus summoned to defend himself, but he is legally prohibited from defending because there is no RJI, then he is not truly summoned. An ineffective summons is not constitutional "notice" for Due Process analysis. The RJI renders the summons ineffective, impermissibly burdening Due Process. Indeed, the RJI accomplishes nothing that cannot be equally triggered by the filing of a summons (as shown by the rest of the United States). Such uniqueness shows that inserting this superfluous step into the process only serves the invidious purpose of disadvantaging defendants for the benefit of creditors and the legal industry.

The RJI is part of all civil cases, which encompasses tens of thousands of debt collection and foreclosure actions in New York. It is incalculable how many people have been rooked by the RJI, however the number is so large as to justify the attention of this Court. For these reasons it should grant the Writ petition.

Conclusion

This petition for a Writ should be granted as it reins in judicial usurpation of legislative powers. There may be broad sympathy for courts burdened with backlog, however the answer does not lie in eliminating the rights of the less favored. As Hon. Jack Weinstein stated, "Equal access to the judicial process is the *sine qua non* of a just society." This means that all litigants enter through the same door to the same roomful of rules, without diverting any to the "See the Egress" courtroom. "Equal justice before law" is foundational to all good government, which operates best when the balance of powers is properly maintained. Nor should this Court countenance using the poor as a blood sacrifice to lenders, debt collectors, or their lawyers, by fraudulent legal process ("Foreclosure Inquest"), or state trickery (RJI). Lastly, this case is an ideal vehicle to prove wrong those who sneer at Due Process and opt for violence against the judiciary, both in its structures (Portland) and in its person (Salas family). While it is not the purpose of this Court to inspire an anxious America, it would be quite a beacon to show that "the system" in facts works, even for the little people. Petitioner prays for this in respectfully requesting the Court grant his petition for certiorari review of the New York State Court of Appeals order, to the effect that a court cannot cannot upset the legislative scheme through its own interstitial power, that no body has the authority to brook the United State Constitution, and that New York's "Request for Judicial Intervention" be found constitutionally infirm.

I, Martin Dekom, petitioner, state true under penalty of perjury.

Respectfully submitted.

22 July 2020

Martin Dekom, petitioner
9050 Sunset Dr
Navarre, FL 32566
516 850-2717 Martin.dekom@gmail.com

Certified Wordcount: 3902