

No. 21-1015

ORIGINAL

In The
Supreme Court of the United States

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

ANGELA CAO,

Petitioner,

v.

BSI FINANCIAL SERVICES, INCORPORATED;
CHRISTIANA TRUST, WILMINGTON SAVINGS
FUND SOCIETY, STANWICH MORTGAGE LOAN
TRUST SERIES 2012-10, STANWICH MORTGAGE
ACQUISITION COMPANY INCORPORATED,
CARRINGTON MORTGAGE SERVICES L.C.,
SELENE FINANCE L.P.; MTGLQ INVESTORS L.P.,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR REHEARING

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PETITION FOR REHEARING

Under Supreme Court Rule 44.2, Petitioner, Angela Cao seeks rehearing of the Court's order denying certiorari. Cao respectfully requests that the Court grant this rehearing and vacate its order in light of the substantial grounds presented herein that were not previously presented.

Cao appealed to the Fifth Circuit seeking an abuse-of-discretion review on the district court's order denying reconsideration and final judgment. It was asked to determine whether the district court failed to accord the magistrate deference while reviewing her uncontested factual findings for clear error and whether it resurrected defenses that were waived and barred by issue preclusion.

The Fifth Circuit affirmed upon its ruling that the district court properly set aside objected to findings under a de novo review without addressing abuse-of-discretion and ruled on an extinguished defense thus vacating a judgment that was not under appeal. The questions presented are: (1) whether the lower courts had authority to resurrect and consider waived defenses; (2) whether the Fifth Circuit was required to conduct an abuse-of-discretion review prior to affirming and; (3) whether the Fifth Circuit erred as a matter of law when it set aside the district court's findings and purportedly "correct" its elected legal standard; and (4) whether it vacated a judgment not under appeal.

BACKGROUND

This case is a consolidation of two actions involving Cao's home and mortgage. The first action is between Cao and BC&C, and the second action between Cao and MTGLQ&S (parties in privities). After none of the parties objected under clear notice of waiver on the factual findings and legal conclusions, judgment was entered in the first action (herein "2019 judgment"), denying BC&C summary judgment for breach of contract, upon the merits. This judgment determined that: (1) Cao was indisputably current on her payments as of December 29, 2010; (2) beginning January 17, 2011, BSI sent multiple demands for payment that included late fees that were excessively greater than allowed; (3) Cao's escrow was terminated in March 2011; (4) BSI violated the contract in May 2012 and; (5) Cao payments were rejected under demands to pay increasing fees and overdue balances. It concluded that contrary to movants' suggestion, evidence does *not* establish that: (1) Cao failed her contractual obligations; (2) defendants did not breach any contractual obligations; (3) Cao was not charged any unauthorized interest or fees. It determined that there is a fact issue as to which party, if any, breached first upon the defense of an alleged default.¹

The 2019 judgment was incorporated into Cao's complaint without dispute. BC&C and MTGLQ&S (collectively "defendants" below) moved for judgment on the pleadings for all claims. They alternatively

¹ Petition for a writ of certiorari, App. 68-97.

moved for summary judgment, based on the same facts and evidence, MTGLQ&S on multiple claims and BC&C solely on breach of contract. Cao responded and moved for summary judgment.

The magistrate filed a report on the pending motions enforcing the 2019 judgment and addressed the statute of limitations and the merits of Cao's claims.² In addressing Cao's tolling arguments, she found certain fact issues and held tolling inapplicable, recommending dismissal on certain claims she held to be time-barred. On breach of contract, she found as to the question of which party breached first, that if it was defendants, it occurred on January 17, 2011 when BSI demanded Cao to pay amounts that included late fees that were excessively larger than allowed.³ She held that Cao's claim began accruing at that time and recommended dismissal unless Cao, in a timely filed objection, could show how the claim was not time-barred. She addressed the merits of Cao's remaining claims, recommending dismissal on certain claims for failure to state a claim. For TDCA and FDCPA, she found that evidence showed that Cao was continuously demanded to pay overcharges without correction but held any violations prior to December 28, 2014, time-barred. She recommended trial to determine "a fact issue as to whether, within the applicable limitations period, BSI and Selene sent Plaintiff payment demands for amounts that were not actually owed." For

² *Angela Cao v. BSI Financial Services et al.*, CV H-17-321 (S.D. Tex. June 30, 2020) (Dkt. 160).

³ *Id.* at 35.

quiet title, TTLA and money had & received, she found that if the foreclosure, the proceeds of and title was obtained by demanding and presenting demands for overcharges, then it cannot be valid or lawful. She recommended retaining these claims to resolve the fact issue regarding overcharges within limitations.

All parties filed objections to the conclusions that did not favor their dispositive motions. Defendants objected that Cao failed to state a claim and alternatively “no evidence”. Cao’s objection and response argued that defendants waived their affirmative defenses when they generally asserted “no evidence” without any specification and explanation and when they failed to rebut her tolling arguments. As a precaution, Cao responded to the issues the magistrate found against her tolling arguments and argued that there is no genuine dispute to the material facts, which entitled her to summary judgment without limitations. Alternatively, she cited to the “Transaction History” on her motion that line itemized by date each demand and notice, to support claims within limitations.

The district court filed memorandum & opinion and simultaneously entered final judgment, overruling Cao’s objections, all recommendations favoring Cao, and granted judgment in favor of defendants, dismissing all claims with prejudice. It concluded that Cao did not demonstrate an issue of material fact for her breach of contract claim and that her argument that defendants breached first is irrelevant and not within limitations. It concluded that there was no evidence of: overcharges within limitations; misrepresentations; incorrect amounts demanded on the 2019 notice of

sale or that it was fraudulent; excess proceeds from foreclosure and; that the substitute trustee's deed was invalid.

I. CONCLUSION BASED ON RESURRECTED WAIVED DEFENSES

Its conclusions were grounded upon the modifications it made under a clear error review, to the January 2011 – February 2011 portion of the factual background. It set aside findings that those demands included late fees that were excessively larger than contractually allowed and found instead that Cao was not charged more late fees than permissible. It relied on a 2012 BSI letter that was submitted to support misrepresentations, to unbundle and change the representation of fees that was demanded in January and February 2011. Although not expressly stating it, it appears that the district court believed that its modifications and new finding would subsequently lead to an avalanche of findings to be set aside. Seemingly, it considered its modifications a “correction” of the overcharges on those demands, to set aside the magistrate's finding that defendants breached on January 17, 2011, hence, its conclusion that her argument that defendants breached first was irrelevant. Then consequently it must have deemed that Cao breached first in order to justify all the demands for increasing amounts of fees and overdue balances, in order to then conclude that there's no evidence that Cao was demanded overcharges within limitations. However, the 2019 judgment determined that these demands sent by BSI included excessive *late fees* and cannot be set

aside; it was waived under strict notice and barred by issue preclusion. Thus, the basis of the district court's conclusions lie upon a waived defense that it resurrected; it entered final judgment on a defense that Cao did not know existed or could exist.

II. ABUSE-OF-DISCRETION REVIEW

The Fifth Circuit's jurisdiction was invoked to conduct an abuse-of-discretion review to determine whether the district court failed to accord the magistrate deference while reviewing her uncontested factual findings for clear error.⁴ It set aside multiple facts and findings without mention or indication of clear error and looked only to a single document to support its findings. Its findings were implausible in light of the entire record and it raised and considered, *sua sponte*, waived defenses. In *Anderson v. Bessemer City*, this Court laid out these factors as clear indicators of abuse of discretion on a clear error review.⁵

The Fifth Circuit was asked to determine whether all attacks to the findings of excessive late fees on the January-February 2011 demands were barred by waiver and issue preclusion. Cao further asked it to determine whether the district court's findings and conclusions were still implausible despite its modifications. She demonstrated that her cure payment made

⁴ *Angela Cao v. BSI Financial Services et al.*, No. 21-20073 (April 26, 2021) (Brief for Plaintiff-Appellant at 14-22).

⁵ 470 U.S. 564 (1985).

her indisputably current as of December 29, 2010 and the only fee allowed in January 2011 is a single late fee of \$78.38, if applicable. Thus, regardless of the modifications, it still constitutes overcharges and shows that the magistrate's finding that defendants then breached is the only possible outcome. Additionally, the district court's "in chamber" calculations to justify the fees did not support clear error but instead conclusively showed that the magistrate's findings that Cao was continuously demanded overcharges without correction was the only outcome permitted by the record. The district court found that Cao paid a \$287.97 "transfer fee" on January 5, 2011, yet its calculations show that on January 17, 2011, Cao was again demanded to pay for the same \$287.97 "transfer fee." Its calculations for the February 16, 2011 demand also showed that the same \$287.97 "transfer fee" was carried over and demanded again.⁶ Thusly, Cao was continuously demanded for amounts she did not owe without correction. Similarly, findings it made upon its modifications to the February 16, 2011 demand did not consider that Cao's cure payment of \$17,479.19 included \$891.95 in attorney fees and regardless of the

⁶ App. 10, footnote 2. "\$287.97 amount was 'a fee transferred from previous server'" & "Cao paid these amounts on January 5, 2011." Compare to App. 19-20, calculations showing January 17, 2011 demand for late fee of \$366.35 unbundled as \$78.38 (late fee) + \$287.97 (transfer fee). App. 22, calculations showing February 16, 2011 demand of \$1,370.80 late fee unbundled and carrying over January fee of \$366.35 (includes the \$287.97 transfer fee).

representation, it still constituted another overcharge that was never corrected. Further, its calculations were based on a \$17,479.19 cure payment, yet it relied on an irrelevant quote for \$13,777.72 that did not yet include attorney fees to deny reconsideration while three sentences down on the same footnote, it cited to the correct cure payment “breakdown” of the \$17,479.19 that included attorney fees.⁷ It should be noted that BSI, the actual party that made the charges in January and February 2011, that sent those demands and the 2012 letter, found no need to object to the excessive late fees, twice over.

Nevertheless, its conclusions would still require additional amounts of previously determined material facts and findings to be set aside and substantial amounts of waived issues to be resurrected. In short, it must find that Cao defaulted *first* in June 2012 to conclude that there was no evidence of overcharges on the 2019 notices of sale to which the trustee’s deed was obtained and proceeds of over \$460,000 were kept. It made various remarks alluding to this, mainly in its footnotes, such as Cao’s payment in June 2012 was untimely and insufficient to cover escrow, that she was repeatedly late and “had late charges stemming back from ten years ago that she never paid,” and that Cao was “charged other fees related to her default” which

⁷ App. 10, fn. 2; App. 17-22. *Angela Cao v. BSI Financial Services et al.*, CV H-17-321 (S.D. Tex. October 15, 2020) (Dkt. 175-1 at 1-3) (Plaintiff’s Motion for Reconsideration & Relief from Judgment).

were permitted by her loan.⁸ It denied reconsideration despite showing that the 2019 judgment determined that BSI canceled Cao's escrow in March 2011 and that she was only required to make payments for principal and interest thereafter. That on June 2012, the Rule 11 Agreement controlled requiring her monthly payments to be applied to principal and interest and prohibited defendants from charging any amounts other than the monthly principal and interest for timely payments; and further shows that she made timely payment for June 2012.⁹ Additionally, it was determined that BSI breached in May 2012, hence, despite its modifications, the only possible outcome remains the same, that defendants breached first, were obligated to cure, and thus, any demands exceeding a single monthly installment constitute overcharges. Even in disregard to their obligation to cure, it was determined that Cao continued to make timely payments for June, July, August and September 2012, thus, the notices and trustee's deed under allegation of and amounts due for a June 2012 default clearly did not reflect these payments and constitute breaches, demands and presentment of demands for overcharges within limitations.¹⁰

⁸ App. 40, fn. 9; App. 44-5, fn. 10; App. 55, fn. 12.

⁹ App. 76-9. After Cao paid \$6,270.20, she was required to start making monthly payments of \$1,567.55, principal and interest beginning May 1, 2012. She made the May 2012 monthly payment early on April 6, 2012.

¹⁰ App. 79.

In sum, however not expressly, it vacated the 2019 judgment when none of the parties sought to appeal the judgment and without prior notice. It denied reconsideration despite acknowledging that it entered summary judgment for defendants, on matters that Cao had no prior notice of.¹¹

III. THE FIFTH CIRCUIT ERRED AS A MATTER OF LAW

Rather than conducting an abuse-of-discretion review on the deferential clear error standard, it seemingly sidestepped discretionary confines by ruling that the district court conducted a proper *de novo* review. Its ruling is notwithstanding the district court's finding, that none of the parties objected to any factual findings and its elected standard to review such findings for clear error. While not expressly stating that it was setting aside the district court's factual finding to purportedly "correct" its legal standard, it did so when it announced this ruling. However, the Fifth Circuit is bound to a clearly erroneous standard of review for the district court's factual finding, as commanded by Fed. R. Civ. P. 52(a) and well established precedent set by this Court in *Pullman-Standard v. Swint*.¹² In *Pullman*, this Court held that the court of appeal is obligated to accept a district court's finding unless it was clearly erroneous and was not relieved of its usual

¹¹ App. 5 & 11 "granted summary judgment for defendants" and acknowledging that Cao did not have prior notice of its "modifications."

¹² 456 U.S. 273 (1982).

requirement to remand for further proceedings. The Fifth Circuit erred as a matter of law when it set aside the district court's finding without indicating it was clearly erroneous and cannot purportedly correct its elected legal standard without such error. And had it actually found such error, it was not relieved of its requirement to remand to the district court for additional findings and/or to review under such purportedly correct standard. However, here, there can be no error in fact or law, none of the defendants objected to the representation of the "late fees" on the January-February 2011 demand nor did they object to such "late fees" being excessive. They did not do so prior to the entry of the 2019 judgment under clear notice of waiver and did not and cannot object to it the second time around.

Defendants even waived issue to the district court's finding that none of the parties objected to these findings when they restated that it was uncontested and set aside for clear error, supporting its decision by stating that it complied with longstanding Fifth Circuit standard. In *Wood v. Milyard*, this Court made clear that federal courts do not have authority "to bypass, override, or excuse" a deliberate waiver of a defense and to resurrect waived issues.¹³ In *Wood*, the court of appeals raised on its own motion, a statute of limitations defense to a habeas corpus petition when the State was twice informed by the district court of the timeliness defense and twice chose not to pursue

¹³ 566 U.S. 463 (2012).

it. The court of appeals affirmed without addressing the merits, the basis of the district court's denial of Wood's claims and held the petition time-barred. This Court held that the court of appeals abused its discretion in considering sua sponte a waived limitation defense. In *Wood*, this Court determined waiver by the State's conduct to not contest the timeliness of the petition, here, waiver is more clear-cut; defendants received clear notice of waiver and twice deliberately chose not to object to the representation of the "late fees" or that they were excessive. Nor did they raise the defense that Cao breached first in January 2011, a defense that they were notified on but deliberately waived, twice over. In sum, the district court resurrected and considered sua sponte waived defenses. In refusing to determine abuse-of-discretion and ruling that the district court properly conducted a de novo review, the Fifth Circuit bypassed the waived defenses resurrected by the district court, the fact that defendants waived such defenses and that they waived all dispute to the fact that they did not object and the clear error standard. Moreover, these issues were determined on the 2019 judgment, barred by issue preclusion and the principal of repose and reliance should be honored, especially when here, it concerns title to real property.

This now brings about the matter of the Fifth Circuit's affirming upon ruling that Cao defaulted; it only had jurisdiction over the order denying reconsideration and final judgment, denying Cao's claims upon grounds of time limitations and sufficiency of evidence.

Its authority over the 2019 judgment was limited to an abuse-of-discretion review which it did not do; rather it resurrected an extinguished defense, vacating the 2019 judgment without first establishing its jurisdiction to do so.¹⁴

IV. CONCLUSION

For the foregoing reasons, this Court should grant this petition for rehearing and vacate the order denying petition for writ of certiorari.

Respectfully submitted,

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¹⁴ *Plaut v. Spendthrift Farm, Inc.*, 541 U.S. 227 (1995).