21-1216

No.

IN THE

SUPREME COURT OF THE UNITED STATES

YAN PING XU

Petitioner,

v.

SUFFOLK COUNTY, SUFFOLK COUNTY SHERIFF'S OFFICE, ERROL D. TOULON, JR., CHRISTOPHER GUERCIO, STACEY MCGOVERN, PETER KIRWIN, SUE DESENA, BRIDGETTE SEDENFELDER, MCCOYD, PARKAS & RONAN LLP, BILL P. PARKAS, RAYMOND E. VAN ZWIENEN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner, Pro Se

QUESTIONS PRESENTED

In *Neitzke,* this Court held that a complaint "is frivolous where it lacks an arguable basis either in law or in fact." *Neitzke v. Williams,* 490 U.S. 319, 325 (1989). A claim lacks an arguable basis in law when it is "based on an indisputably meritless legal theory." *Id.* at 327. A claim is factually frivolous "[w]hen the facts alleged rise to the level of the irrational or the wholly incredible." *Denton v. Hernandez,* 112 S. Ct. 1728, 1733 (1992). *"Neitzke v. Williams, supra,* provided us with our first occasion to construe the meaning of 'frivolous' under § 1915(d)." *Id.* 28 U.S.C. § 1915(d) was redesignated as § 1915(e) in 1996. *See* § 1915 amendment notes in 1996.

In this case, petitioner contends that, for example,

1. The Rooker-Feldman doctrine, a narrow doctrine, is inapplicable to this independent action, and this case does not meet the party identity and time prerequisites for the application, and the claims deny a conclusion reached by the state court that is permissible;

2. Public defendants' unreasonable warrantless seizure of petitioner's home invaded her privacy by state court orders under color of state law in violation of the Fourth Amendment.

The question presented is:

Whether the appeal has been properly dismissed "because it 'lacks an arguable basis either in law or in fact' *Neitzke v. Williams,* 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e)."

LIST OF PARTIES

The names of all the parties appear in the caption of the case on the cover page.

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TABLE OF AUTHORITIES

Cases

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OPINIONS BELOW

The ruling of the Second Circuit for No. 20-2326 is unpublished. (App–B). The final order of E.D. of New York (JMA) for No. 19-cv-01362 is unpublished but available as 2020 WL 3975471. (App–C).

JURISDICTION

The mandate ruling of the Second Circuit was entered on 9/2/2021. (App-B). The order of denying petitioner's timely motion for reconsideration was entered on 11/19/2021. (App-A). This petition was timely filed. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1915 Proceedings in Forma Pauperis (e):

(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

28 U.S.C § 2106 Determination:

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Additionally, 42 U.S.C. § 1983, Amendment IV, NY Constitution Article XIII § 1, NY General Construction L. (GCN) § 28-a, and NY Real Property Actions and Proceedings (RPAP) § 749 are reproduced as App. D.

STATEMENT OF THE CASE

A. Background

The *Pro Se* Petitioner ("Xu") is a U.S. senior citizen of Chinese national origin, the successor trustee, and a designated beneficiary of her late husband William Van Zwienen's Trust. After her husband's demise, she has been the resident owner of the subject premises documented by the New York State.

On 3/8/2019, Xu brought this plenary action against defendants under 42 U.S.C. § 1983 asserting a violation of the warrant clause of the Fourth Amendment, the due process and equal protection clauses of the Fourteenth Amendment, and the fraud, in addition to the housing discrimination, in violation of 42 U.S.C. §§ 1981, 1982, 1985, 1986, 1988, Federal Fair House Act (FHA), any related Federal Constitution and laws, as well as N.Y.

Constitution and laws. On 3/12/2019, she filed a notice of lis penden[s] in the County Clerk Office.

Xu has claimed that she was wrongfully, unlawfully, and forcefully ejected from her full time primary marital residence by the public defendants (Suffolk County Sheriff Office, hereafter as "SCSO") on 12/14/2018, during the Christmas season, after her fifteen (15) years long marriage and twenty (20) years residing in the subject premises, because of private defendants' fraud and misrepresentations in the state courts. After the said ejectment, she was continuously housing discriminated against.

Xu seeks reinstatement of her residence *status quo* before 12/14/2018, possession of all tangible personal property located in the subject premises, in addition to an award of treble damages, punitive damages, compensatory damages, costs, and attorney's fees if any.

B. Relevant Procedure

E.D.N.Y. dismissed Xu's amended complaint *in toto* without prejudice for lack of subject matter jurisdiction, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(h)(3), and canceled the notice of lis pendens, on 7/14/2020. (App-C).

It also denied Xu's motion for reconsideration, including her motion [to] stay the cancellation of lis pendens pending appeal, on 3/26/2021. *See Xu v. Suffolk County,* 2021 WL 1163007.

On 9/2/2021, the Second Circuit dismissed the appeal, which was taken from App-C, by its simple conclusion without any specific explanation, while Xu's latest motion was pending. Simultaneously, it denied Xu's motion to stay the cancellation of lis

penden[s] pending appeal, and denied two motions that had been previously adjudicated. (App-B).

On 11/19/2021, the Second Circuit denied Xu's motion for panel reconsideration and reconsideration *en banc.* (App-A).

Additionally, Bill P. Parkas ("Parkas") for McCoyd, Parkas & Ronan LLP ("MRP") represented a non-domiciliary in New York, Raymond E. Van Zwienen ("Van Zwienen"), in the Surrogate probate proceeding since 5/2017. Parkas misled the Surrogate to go forward with the probate while the jurisdiction was incomplete.

While the probate was pending, Parkas again represented Van Zwienen, a U.S citizen of American national origin and the son of decedent's first marriage, to commence the ejectment proceeding for recovering the subject premises from Xu as the fraudulent nominated successor trustee in the decedent's passive (dry) trust, on 12/22/2017 in the Surrogate.

The Surrogate issued its default order in the ejectment proceeding after it did not respond to Xu's timely request to adjourn the court day. The Surrogate directed that the Sheriff eject Xu "within ten (10) days of the date of being served with a true copy of this order" if Xu failed to vacate the subject premises, on 2/16/2018. It also denied vacating its default order, on 4/5/2018.

The Surrogate rulings were appealed by Xu on 5/4/2018. On 2/9/2022, NY App. Div. dismissed the appeal from the decree in probate, and affirmed the 4/5/2018 order. *See, Mtr of Van Zwienen*, _AD3d_ (NY App. Div. 2 Dept. Doc. D68095, 2/9/2022).

REASONS FOR GRANTING THE WRIT

> "[T]he frivolousness determination is a discretionary one, we further hold that a § 1915(d) dismissal is properly reviewed for an abuse of that discretion." *Denton,* at 1734.
>
> "In reviewing for abuse of discretion dismissal of in [appeal] on ground of frivolousness, it is appropriate for [this Court] to consider, among other things, whether plaintiff was proceeding pro se; whether court inappropriately resolved genuine issues of disputed facts; whether court applied erroneous legal conclusion; whether court provided statement explaining dismissal that facilitates intelligent appellate review; and whether dismissal was with or without prejudice." *Id.* (internal citations omitted).

Xu's contentions are far from frivolous as the plain meaning given by this Court, which was cited at *supra* i.

See also *Matthews v. Huwe,* 269 U.S. 262, 265 (1925):

> "The petition was dismissed not because the court was really without jurisdiction, for it could have taken it, but because the question was regarded as frivolous, which is a different thing from finding that the petition was not in character one which the court could consider."

Accordingly, the Second Circuit's dismissal of Xu's appeal as "frivolous" and applying 28 U.S.C. §

1915(e) implies the inapplicability of Rooker-Feldman. Consequently, the Second Circuit admits that E.D.N.Y. really has subject-matter jurisdiction. Xu's appeal, therefore, is materially arguable, not frivolous. The Second Circuit abuses its discretion. Its ruling is contrary to its own ruling at first blush.

Regarding Xu's claims, the Second Circuit conflicts with and blatantly disregards this Court's precedents. Its ruling is irreconcilable with precedents. Xu's arguments also rely on Circuits precedents.

Pursuant to 28 U.S.C. § 2106, this Court's "supervisory power over the judgments of the lower federal courts is a broad one." *U. S. v. Munsingwear Inc.*, 340 U.S. 36, 40 (1950) (citations omitted). "On the Supreme Court rests the prime responsibility for the proper functioning of the federal judiciary. The grant of certiorari in cases involving federal jurisdiction, practice and procedure reflects that responsibility." *Supreme Court Practice* § 4.15 at 273, Gressman et al. (9 Ed. 2007). This court "has power not only to correct errors in the judgment under review but to make such disposition of the case as justice requires." *Villa v. Van Schaick,* 299 U.S. 152, 155 (1936).

Accordingly, the question presented herein falls in this Court's responsibility and power. It is important and recurring. Actually, *Xu* in E.D.N.Y. has been cited by several cases and the second resources in this short period of time. If it is permitted that the said ruling stands uncorrected, it would likely introduce confusion in the body of the law, lose the faith in the U.S. justice system, and contradict the public interest.

An example of Xu's refutations in detail follows.

Colorable Fourth Amendment Claim

Xu's appeal of the Fourth Amendment Claim "involves neither an 'indisputably meritless' legal theory nor 'clearly baseless' factual allegations." *Street v. Fair*, 918 F.2d 269, 272–273 (1st Cir. 1990). Indeed, Xu raises serious questions, both of law and fact. "'It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.'" *Coolidge v. NH*, 403 U.S.443, 454 (1971) (citation omitted).

Her contentions rely on this Court precedents, such as *Coolidge, supra; Lange v. California*, 141 S.Ct. 2011 (2021); *Welsh v. Wisconsin*, 466 U.S. 740 (1984); *Torres v. Madrid*, 141 S.Ct. 989 (2021); *Soldal v. Cook County*, 506 U.S. 56 (1992); *Payton v. New York*, 445 U.S. 573 (1980); *Carpenter v. United States*, 138 S.Ct. 2206 (2018); *Groh v. Ramirez*, 540 U.S. 551 (2004); *Malley v. Briggs*, 475 U.S. 335 (1986); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Tennessee v. Garner*, 471 U.S. 1 (1985); *Manuel v. City of Joliet*, 137 S.Ct. 911 (2017); and Circuits precedents, such as *Specht v. Jensen*, 832 F. 2d 1516 (10th Cir. 1987).

a. The Entitlement of Privacy

Xu has had the entitlement of privacy because, *inter alia*, the Fourth Amendment "draw[s] a firm line at the entrance to the house." *Lange*, 141 S.Ct. at 2018 (citation omitted). "[T]he 'home is entitled to special protection.'" *Id.* (citation omitted).

b. The Seizure of Home

"It is axiomatic that the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Welsh,* 466 U.S. at 748 (citation omitted). *Soldal* emphasized that "'at the very core' of the Fourth Amendment 'stands the right of a [person] to retreat into [her] own home.'" *Soldal,* 506 U.S. at 61 (citation omitted).

In this case, the deputy sheriffs physically entered Xu's home and changed the locks of her home. That suffices to constitute a "seizure" for purposes of the Fourth Amendment. *See Id.* (a "seizure" of property "occurs when '"there is some meaningful interference with an individual's possessory interests in that property."'); *Torres,* 141 S.Ct. at 995 (citation omitted) (A "seizure" of property under the Fourth Amendment means a "taking possession").

c. The Warrant Requirement

The Fourth Amendment's requirement of a warrant protects one's privacy interest in his/her home. This requirement of a warrant is judicially mandated for the seizure of a private residence. "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton,* 445 U.S. at 590.

Undeniably, there were no exigent circumstances, i.e. an emergency situation at that time. "[O]n the facts of this case, a warrantless [] seizure of the [home] cannot be justified under those exceptions." *Coolidge,* 403 U.S. at 453-482.

"In sum, a Fourth Amendment violation occurs when police engage in a warrantless [seizure] and no exception to the warrant requirement applies, or when police [seize] pursuant to a warrant not based on probable cause." *Specht,* 832 F.2d at 1522-23.

d. The Unreasonable Intrusion

"[T]he ultimate touchstone of the Fourth Amendment is 'reasonableness'." *Lange,* 141 S.Ct. at 2017 (citation omitted).

See Carpenter, 138 S.Ct. at 2221 (It was unreasonable for government to seize and search data by a court order without a warrant.); *Welsh,* 466 U.S. at 749 (quotation omitted) (a seizure is made without a warrant, it is "presumptively unreasonable."); *Specht,* 832 F.2d at 1522-23 (The Tenth Circuit held that police officers who conducted a search of plaintiff's home and office under a court order of possession and writ of assistance violated the Fourth Amendment). *Specht* explained that the presence of a court eviction order is irrelevant to the reasonableness inquiry. *Id.*

Even an officer possesses a warrant, it is still "incumbent on the officer executing a [seizure] warrant to ensure the [seizure] is lawfully authorized and lawfully conducted." *Groh,* 540 U.S. at 563. *See* also *Malley,* 475 U.S. at 345 (citation omitted) ("'[O]ur good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well trained officer would have known that the [seizure] was illegal despite the [Surrogate]'s authorization.'"). A mandate made by a court must be "pursuant to law" under New York GCN § 28-a.

Relying solely on the state court orders as "reasonable" intrusion while declining Xu's Fourth Amendment claim, therefore, is frivolous.

Further, *see New Jersey,* 469 U.S. at 341 (the reasonableness inquiry requires a "careful balancing of governmental and private interests"); *Tennessee,* 471 U.S. at 7–9 ("the totality of the circumstances justified [the] particular sort of.....seizure.") ("not only *when* a seizure is made, but also *how* it is carried out.") (emphasis in original).

In this case, there is in fact no legitimate governmental interest in seizing Xu's home at all. Entirely, private interests have been involved. Without a warrant, a seizure does not represent the People of the State.

SCSO, pursuant to New York RPAPL § 749(2), served the 72-hour eviction notice to Xu. The said notice, nevertheless, was absent in the Surrogate orders. It reveals that SCSO knew about the warrant requirement. SCSO, however, did not apply for the warrant prior to the seizure. It negligently carried out an order as though the Surrogate had issued a "warrant".

SCSO also knew that the purpose of ejectment is for returning the real property to the rightful owner, as reflected by its notices on the doors of the subject premises: "Only the landlord or his representative may enter or remain."

Furthermore, given the facts, such as:

- SCSO officers' oath at their taking their office under New York Constitution Article XIII § 1, and having a sworn duty to carry out its provisions;

- their obligations and capabilities to communicate with courts, as reflected by their emails to Xu; their reviewing Xu's file, including Xu's ownership and/or possession of said premises;
- the day of the ejectment prior to the day demanded;
- the incomplete service of the notice and documents to Xu;
- Xu's pending applications in state courts;
- and the stay recognized by the Surrogate, etc.,

Xu's unreasonable intrusion argument is not frivolous.

In short, "[t]he Fourth Amendment protects '[t]he right of the people [ ] against unreasonable .... seizures." *Manuel,* 137 S.Ct. at 917 (citation omitted). The Fourth Amendment must be more than mere words. It must work as a practical reality. *See Justice Stephen Breyer speech* at President announcing the Justice nomination (1994).

The Second Circuit blatantly ignores and conflicts with the precedents by abusively applying *Neitzke* and 28 U.S.C. § 1915(e) to dismiss Xu's appeal against the public interest.

CONCLUSION

The Petition for a Writ of Certiorari Should Be Granted

Dated: 2/16/2022

Respectfully submitted
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