No. 20-

IN THE

Supreme Court of the United States

BERYL OTIENO-NGOJE

v. Petitioner,

WILMINGTON FUNDS SOCIETY

Respondent

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

Wilmington Funds Society v. Beryl Otieno-Ngoje, 20-1459 (3rd. Cir. Jan.25, 2022). (App. A)

Wilmington Funds Society v. Beryl Otieno-Ngoje, Case No. 2:16-cv-05631, United States District Court, Eastern District of Newark (February 14, 2020 . (App. B)

United States v. Beryl Otieno-Ngoje
Case No. XYZ, Superior Court, New Jersey

Beryl Otieno-Ngoje
123 Hollywood Ave
Hillside, N.J. 07205
(908) 937-5310

Pro-se Date: April 25, 2022

QUESTION(S) PRESENTED

The question presented is the same as that filed and maintained before the lower courts (apps) as;

A). To what extent, if any, does the amount of the District Court's Monetary Judgment have to be modified as a result of the Wilmington Savings Fund Society (WSFS) foreclosure on, and subsequent sale of the real property at issue for the full value of their lien (*offset value).*

PARTIES TO THE PROCEEDINGS ARE:

(1). Beryl Otieno-Ngoje, the petitioner caption below;

(2). Wilmington Savings Fund Society, the respondent

RELATED CASES

(i). Wilmington Fund Society v. Beryl Otieno-Ngoje, No. 2:16-05631, United States District Court, for the District of New Jersey. Order and Judgment entered February 14, 2020 and Feb. 26, 2020

(ii). United States v. Beryl Otieno-Ngoje, No. 17-11-3154, New Jersey Superior Court. Withdrawal and Dismissal on 09/10/2018.

(iii). Wilmington Saving Fund Society v. Beryl Otieno-Ngoje, No.20-1459, United States Courts of Appeal for the Third Circuit. Judgment and Opinion entered on September 27, 2021 and Rehearing and en banc denial, Jan.25, 2022.

TABLE OF CONTENTS

Appendix A
Order denying rehearing, Beryl v. Wilmington Savings Fund Society,
No. 20-1459 (3rd. Cir. 2021)

Appendix B
Summary Order, Beryl v. Wilmington Savings Fund Society,
Unpublished Order; Unreported (3d. Cir. 2021)

Appendix C
Memorandum and Order, Wilmington v. Beryl
District Court, Newark, N.J. Unpublished, Un reported
(No. 2:16-0563, 2020)

Appendix D.
Transcript of Proceedings, Wilmington v. Beryl Otieno- Ngoje
United States Superior Court, New Jersey.
(Supp. Court No. 17-11-3154, 2018).

ARGUMENT.....

I. Straying from the common law goes against this court's precedents and does the law a disservice
   A. Conflicts
   B. The Eighth, Tenth and the Supreme and all other Circuits court Law approaches are consistent with the MVRA statute and the case at hand.
   C. The split in the third Circuit court foretells the instability

II. There is no basis for imposing proof of innocence requirement in §1983 case arising out of favorable terminated State Court proceedings .....

III. Summary Judgment conflicts with this courts precedence governing the Innocence Requirement governing constitutional claims.
   i. Termination of criminal charges in favor of the accused.

   A. Requiring defendant to prove their innocence on their terminated terminated cases
   B. Using defendant favorable terminated criminal foreclosed cases to retry them in a civil case is a double jeopardy.

TABLE OF AUTHORITIES

CASES Page(s)

Constitutional Provisions

STATUTES

No. 20--_____

IN THE

Supreme Court of the United States

BERYL OTIENO-NGOJE

Petitioner,

V.

WILMINGTON SAVINGS FUNDS SOCIETY

Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Beryl Otieno- Ngoje respectfully requests that a writ of certiorari be issued to review the Judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of Appeals for the Third Circuit is unreported. The District Court had no trial, its Summary Judgment ruling is unpublished and unreported.

JURISDICTION

The Third Circuit entered an affirmation with the lower court opinion on September 27, 2021 and denied rehearing and en banc on January 25, 2022. The petition for a Writ was filed on April 25, 2022.This court has jurisdiction pursuant 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutory provision involved is 18 U.S.C. §3663A(b)(1) is set forth in the Appendix to this petition.

A. STATEMENT OF THE CASE

The case presents an important unique but frequent issue affecting many minorities, veteran families and the public, and may often recur if not resolved by this court. The dispute arose concerning the calculation of the *"offset value."* and determination of the ownership of Liberty Mutual Insurance proceeds *(money)* paid to Beryl following an electrical fire in her house. The issue being the real ownership, the error being unreasonableness of the calculation of the award

and to what extent should it be modified as a result of the Wilmington Savings Fund Society (WSFS) foreclosure on, and subsequent sale of the real property at issue for the full value of their lien (*offset value).* Petitioner Beryl was the insured, the beneficiary and the proceeds checks were written in her name and hand delivered to her by the Public Adjuster. The funds were awarded to a non party Wilmington Savings Fund Society by the District Court and, given that Wilmington had already recouped the full amount of the cash lent from a "sale to a third party", with no diminution in the market value of their collateral, thus restitution is unwarranted.

There are conflicts, splits and disagreement on federal circuit courts concerning the issue of award after a fire, followed by a foreclosure and a sale of the damaged property "as is" for the same amount of the lien. Three circuits hold that the value of the real property upon foreclosure or surrender is the proper amount to deduct from the total loss. Five others hold that the amount recovered by the lender at a subsequent sale of property is the appropriate amount to deduct. This case presents a strong vehicle for resolution of the question. This Court's review is warranted.

The actual applicable precedential stare-decisis in the case at bar is "*Crook v. Hartford",* but given that the respondent framed it as a mortgage issue while it was not, and also involves a monetary award, Beryl will use the MVRA, Circuits and Supreme Court's applicable cases:

a). *Crook v. Hartford Fire Ins. Co. 178 S.E.254 (S.C.1935), 13968*

b). *Robers v. United States of America; (698 F. 3d 937 (CA7 2012).*

Crook v. Hartford Fire Insurance

"In determining the insurance contract, its nature must be borne in mind. Joyce on Insurance (2d. Ed.), § 23, as follows: "It is well settled that insurance is a personal contract, whatever the subject-matter of the insurance may be, and it's a contract by which the insurer undertakes to indemnify or pay money to the insured in the manner and subject to the conditions agreed upon. This obligation does not run with the property whether it be real estate or personalty, neither does it pass with the title unless assigned with the consent of the insurer, or unless by extraordinary or special and express stipulation of the parties it is made to run with the subject-matter. The distinction which underlies this construction is that the thing is not insured but the right appartein to the person since the contract is not in its nature an incident to the property.

In speaking of the nature of an insurance contract, The Supreme Court in *Annely v. DeSaussure, 26 S.C. 497, page 505, 2 S.E., 490, 494, 4 Am. St. Rep. 725,* said: "Insurance is not an incident to the insured, but indemnity or compensation to the person insuring for the loss which she sustained. At the present day, a policy of insurance is invariably treated as a contract to indemnify the party insured and not as a mere undertaking to be answerable to the extent of whatever injury may be sustained by the subject-matter insured. *Wilson v. Hill*, 3 Metc. [Mass.], 66; *Carpenter v. Insurance Company*, 16 Pet., 496 [10 L.Ed., 1044].

In *Annely v. DeSaussure, supra*, the Court held that an insurance policy taken out by a tenant in common did not inure to the benefit of the co-tenants. "Wilmington Funds are akin to a passerby who witnesses a bus accident and quickly jumps into the bus claiming to be an injured passenger in the bus inorder to have grounds to sue to be compensated".

In Swearingen v. Insurance Company, 52 S.C. 309, 315, 29 S.E., 722, 723, the Court said: "While a policy of insurance is purely a personal contract between the insurer and the assured, and hence

a mortgagee of the premises insured, merely as such, has no interest, either in law or in equity, in a policy of insurance taken out by the mortgagor in her own name, and for her own benefit. In *Steinmeyer v. Steinmeyer*, 64.S.C. 413, 42 S.E., 184, 186, 59 L.R.A., 319, 92 Am. St. Rep., 809, "The authorities generally agree that a contract of fire insurance is a personal contract between the insurer and insured, by which the former undertakes to indemnify the latter for the loss he sustains by fire. Being a personal contract, it does not run with the buildings said to be insured, is not an incident to the thing insured." *The Court said, page 421 of 64 S.C. 42 S.E., 184, 186: "If, therefore, Carrie Steinmeyer had an insurable interest, and her loss with reference to that interest has been estimated to be "the fund in dispute", and if the contract for which she alone paid the premium is one of personal indemnity, upon what principle of law, justice, or public policy can that which is hers be given to the creditors of another who has already collected from their debtor?* It is not doubted that the creditors of Eliza Steinmeyer had the right to resort to the insured property, or to that into which the insured property had been converted, having the right to follow the property of their debtor; but this gives them no right to the insurance money, which does not represent their debtor's property, but represents the amount of personal indemnity going to Carrie Steinmeyer for her loss" or as in this case, to petitioner Beryl.

The following language of the Court in the said case is applicable to the case at bar: "Can it be said that the insured shall take nothing as the fruit of her contract with Liberty Mutual, for which she alone paid the consideration?" better yet, is it right to say that Beryl should be punitively sanctioned, jailed and bankrupted for buying, maintaining and paying the policy consideration over seven years?

While the rule announced in *Clyburn v. Reynolds*, and *Green v. Green, supra*, is generally known as the minority rule and is regarded in most jurisdictions as at variance with the universally

accepted doctrine that a contract of insurance is a personal contract and inures to the benefit of the party with whom it is made and the rights of the parties must be determined as of the time of the fire. Not nine months later.

The case of *Stockton National Bank v. Home Insurance Company of New York*, 106 Kan., 789, 189 P., 913, 11 A.L.R., 1304, is analogous. The syllabus is as follows:

Where property is insured by the mortgagor for her own benefit with a loss-payable clause in favor of the mortgagee, and the mortgagor defaults and the property is sold under foreclosure proceedings, and during the redemption period the property is destroyed by fire, it is held that the purchaser of the property at the foreclosure sale cannot maintain an action against the insurance company to recover the insurance, and that he has "no claim to the proceeds" of such insurance on the theory of assignment, or subrogation, or otherwise. Likewise, Wilmington has no claims to Beryl's LMI proceeds; they purchased post foreclosure and sheriff sale in Sept., 2016.

A purchaser at a sale under a mortgage foreclosure has, during the redemption period, an insurable interest in the property." The Court in that case used the following language: "The purchaser at the sheriff's sale, although that sale was conditional and the property was subject to redemption, had an insurable interest which he himself might have protected by "insurance"; but that interest was not covered by the policy issued for the benefit of the mortgagor and the original mortgagee.

Also, in the A.L.R. Annotation to the said case, we find the following (page 1309 of 11 A.L.R.): "If the policy does not provide for payment of the loss, if any, to the mortgagee, and there is no agreement between the parties with respect to insurance, '(*as in this case*)' there is authority,

which appears sound, to the effect that the mortgagor who has taken out insurance to protect herself is entitled to the proceeds arising under the policy for a loss by fire occurring before the foreclosure and during the period of redemption, her insurable interest not ceasing at the time of the sale, nor does it give the purchaser a right to convert her proceeds to become theirs. Also, see, *6 L.R.A. (N.S.), 448, Note."*

BACKGROUND

The court should interpret the insurance policy and insurable interest according to terms of the contract and reasonable expectations when the damage occurred.

New Jersey law requires this Court to determine coverage according to the financial interests in the property on the date of the covered event. Beryl's financial interest in the property must be measured as it existed on the date of the covered incident. The value of her policy shall not be reduced by the value of any subsequent event. (*citing Miller v. N.J. Ins. Underwriting Ass'n, 82 N.J. 594 (1980)*). Wilmington has failed to show this insurable interest because their purchase/ assignment was done after foreclosure and sheriff sale- That was, Nine months after the fire. The proceeds were Beryl's pecuniary benefits from the Deed she insured and paid for over seven years. Wilmington was not covered by Liberty Mutual's policy, neither have they stated why Beryl's indemnification proceeds from Liberty Mutual bearing her name, requiring her signature and where she was the sole beneficiary should be used to pay somebody else' debt, despite the debt having been cleared and the lender made whole, thus no harm, no injury, no restitution required. The Court must deny and reverse the motion for summary judgment for the excessive award given to Wilmington. Beryl was unaware of any illegality.

FACTUAL BACKGROUND

Beryl purchased, lived and owned the Deed of the subject property located in Orange, N.J upon which her Insurance carrier Liberty Mutual issued a Homeowner's Policy running from the year 2011 through 2017. The property was purchased by Beryl and Auslene Simon in 2008 through GFI mortgage for $275,400 based on *"true" representation and submission of documents, income verifications, pay stubs, assets and tax returns. There was "No mortgage fraud or wire fraud or deceit"; Beryl did not mislead any lender, insurers; misrepresent or commit any criminal Act, neither has she pled guilty or been convicted of any crime*. The mortgage was closed in Auslene Simon's name only. Beryl paid a consideration of $10,000 down payment and $5,000 closing cost to attorney Stephanie Hand through a bankers check from her account Upon closing, the property was declared uninhabitable, Beryl spent between $80,000- $100,000 out of pocket to make it habitable. In 2009, Auslene Simon executed a Deed transfer to Beryl through attorney Hand Little. The same year, the mortgage was sold to Wells Fargo and in 2012 Wells Fargo sold to the U.S. Bank National Trust Assoc., with Rushmore as their servicer. When Wells Fargo exited, their insurance with Liberty Mutual automatically terminated upon that sale. Wells Fargo's insurance was none transferable and Wilmington had no ownership interest in it when they purchased post foreclosure and sheriff sale in Sept. 2016, thus had no right to claim a non transferable policy four years after its termination. Wilmington's action of claiming a relationship with Wells Fargo was a deliberate act of fraud and a farce. The District Court based their decision that Wells Fargo was the mortgagee at the time of the fire, who in turn transferred the mortgage and their Ins. with Liberty Mutual to Wilmington, while Wells Fargo had actually exited 4 years prior to the fire in 2012 (*app.493a*);The case at bar was not a "*mortgage issue or*

fraud"; it was the determination of the Liberty Mutual insurance proceeds ownership paid to Beryl following an electrical fire in her property.

While the respondent Wilmington Savings Fund Society is a Corporation who came after the fire, purchased the property in its damaged condition post foreclosure and sheriff sale and shortly sold it to a third party "as is" for $275,000- full amount of their lien, with no diminution, then filed a suit against Beryl for her Liberty Mutual insurance proceeds on the ground that payments were made when they were present, yet they were not. Loss is fixed at the time of the casualty, not any time after. Wilmington were not the mortgagee nor Liberty Mutual policy beneficiary before, during or after the fire. The Property was a post loss foreclosure; U.S Bank National Trust Assoc. and their servicer Carrington Mortgage Services took the property in place of their debt and sold it to Wilmington in Sept - Nov. 2016, almost a year after the fire. If a third party purchases a property at a foreclosure sale, the mortgagee's insurable interest in the property would terminate, since title would pass free of the mortgagee's security interest. *See Sears, Roebuck & Co. v. Camp, 124 N.J. Eq. 403, 410 (E & A 1938).*

Fire

The property caught fire on Nov. 30, 2015. The loss was determined to be an occurrence and the damage fell within Liberty Mutual's coverage. There were two active Insurance Policies on the property covering two different entities at that time, which is not illegal. The first was a Fire Hazard Policy by Great American Ins. Group that expressly covered the mortgage with Rushmore as the mortgage servicer in the amount of $272,000. The other was a Home Owner's

Policy by Liberty Mutual Ins. issued to Beryl, covering the Deed and her as the insured beneficiary, with loss payable clause as interest appears (ISOAO).

After the fire, both Beryl and Rushmore made a claim with their respective insurers. Adjuster's from both companies were sent and met at the property.

Rushmore

A month and a half after the fire and submitting their claim, Rushmore informed Beryl that they had sold/assigned the property and their insurance with Great American Ins. to a new servicer-Carrington. The mortgagee remained U.S. Bank National Trust Assoc. (not Wilmington) until foreclosure on July 26, 2016 (464a). Carrington continued with the coverage assigned to them, but were ineligible to claim for the fire that happened prior to their arrival. How much more would Wilmington claim from a policy that was in no way related to them. Rushmore was the mortgagee at the time of the fire and their insurer Great American Ins Group was obligated to pay them. I bet you, they ate their lunch and transferred the property to Carrington.

Carrington

In March, 2016, Beryl's attorney(s) communicated with Carrington alerting them that the insurance proceeds were imminent and that she was ready with the contractor to repair the property with the paid Insurance proceeds and if they could give her a modification. On March 23, 2016, Carrigton responded that Beryl was "Not Their Client" and wouldn't speak with her or her attorneys regarding the mortgage, so Beryl signed her check . Seven days later, on March 30, 2016 Carrington secretly called Liberty Mutual and requested for their names to be added onto Beryl's check proceeds ("not policy"). *That is how Carrington deceitfully came to be on Beryl's*

Liberty Mutual proceeds checks; they were not on the Liberty Mutual policy nor were they a beneficiary. Wilmington intentionally played fraud on Beryl and the District Court; they performed a coup, conversion leading to the determinations and procurement of a perverse decree of a Summary Judgment from a friendly court.

Fraud was committed by Carrington's single phone call to LMI to add their names on Beryl's check (not policy) where they were not the beneficiaries. This court must nullify the order Wilmington obtained by playing fraud upon the judicial system; they misled the court by recycling the claim of fraud which had been dismissed in the Superior court, thus prejudiced Beryl. This court has the power to recall the District Court's order rather than foreclosing the case with Summary Judgment wrangled through misrepresentation of such a dimension that would affect Beryl and the basis of the claim. If the Superior Criminal Court never saw fraud, it is hard to see how the District Court's Judge in a civil court could. Beryl had no idea that signing her check would be considered a fraud. Wilmington have not persuaded any court how their claim on the LMI proceeds on a policy they were not part of is tantamount fraud. The district court was wrong on fraud, vague and evasive in its nature. Fraud requires the prosecutor to meet a certain threshold of prima facie evidence which is beyond rumors and hearsay and the superior court found none. The principle of finality of litigation cannot be pressed to the extent of such an absurdity that it becomes the engine of fraud and court's abuse in the hands of litigants, where property grabbers and unscrupulous entities such as Wilmington find the court process a convenient lever to retain the illegal gains from unsuspecting opponents on the basis of falsehood. The court should not hesitate to say that a person whose case is based on falsehood has no right to approach the court and should be summarily thrown out at any stage of litigation. Beryl should not be bound by an adjudication that was obtained by fraud; the order should be

vitiated. The court of law is meant to impart justice between the parties, not nepotism; one who comes to court must come with clean hands, *Lazarus Estate Ltd. v. Beasley (QB p.722)*. This case was riddled with proven lies, collusion and corruption from Wilmington's attorney (692a-693a)

Wilmington

Nine months after the fire, foreclosure and sheriff sale, on Sept. 15, 2016, Wilmington purchased the fire damaged property (Pet. app 546a) retained Carrington as their servicer and launched a court complaint against Beryl the next day on Sept. 16, 2016. In Nov. 2017, they acquired title to the property and sold it a month later to a third party "as is" for the same amount of their lien- $275,000, thus the value of the property when it was returned was equal to the amount of the money lent/ offset value. When a mortgagee acquires a property after a loss, its recovery is limited to the amount of deficiency after the acquisition. *Power Building and Loan Assoc. v. Ajax Fire Ins. Co., 110 N.J.L. 256, 258, 164 A. 410 (E. & A. 1933); See also 495 Corp. v. N.J. Ins. Underwriting Ass'n., 86 N.J. 159, 430 A. 2d 203 (1981)*.

On Dec. 28, 2021, the property was resold again for $360,000. Wilimington never made any losses, it was profit upon profits while accusing Beryl of fraud and unjust enrichment. Respondent sold a false narrative of fraud inorder to serve its own commercial purposes and interest and, the district court enabled them to procure judgment on premises of falsehood on "abstract fraud", a claim they knew had no basis in fact and false to their knowledge. Wilmington falsely imputed Wells Fargo who exited four years prior to the fire as their assignor; an applicant who holds a writ of the court with soiled hands and dishonesty should not be permitted to bear

fruit and benefit themselves; in such circumstances the court should not perpetuate Wilmington's fraud, thus must vitiate that judgment (465a, 470a, 493).

B. Superior Court Proceedings

Wilmington made a parallel prosecution in both district civil and the superior criminal court due to malice, preclusion effect in order to secure a criminal conviction; unfair advantage and get an upper hand for later declaration of judgment in civil actions at the Federal Court. The issue was fully litigated, the prosecutor, the Judge and public defender did not determine commission of fraud, conversion or unjust enrichment. On Sept.10, 2018, the court terminated the case without a guilty plea or conviction. The Judge stated no pleading was required and no restitution was ordered. There was a penalty of $75 plus $50.00 Court charges =$125 (pet. 688a- 689a). The dismissal of the charges was sufficient to show favorable termination. *Luke v. Gulley, 975 F. 3d 1140, 1144 (11th. Cir. 2020).* The Eleventh Circuit held that a favorable termination occurs so long as the criminal prosecution ends without conviction. *Laskar v. Hurd, 972 F. 3d 1278, 1282 (2020).* In *Thomson v. Clark,* the Supreme Court held that a fourth amendment Act under §1983 does not require Beryl to show that her criminal prosecution ended with some affirmative action of innocence; Beryl needed only to show that the criminal prosecution ended without conviction, thus satisfying that requirement. Favorable termination requirement is to avoid parallel litigation in civil and criminal proceedings over the same issue and also prevents suits from being improperly used as collateral attack on civil proceedings as was in this case. *McDonough v. Smith, 558 U.S.C. (2019).*

Victims of false charges, many of whom are minorities such as Beryl, receive few, if any, opportunities to affirmatively demonstrate their innocence, particularly when those false charges

are rightfully dismissed, they still face additional hurdles in litigating their innocence due to structural barriers and racial biases in the criminal legal system. It creates an absurd result.

C. DISTRICT COURT

The District Court was assigned the case in Sept. 2016. Five weeks later, the court granted Wilmington economic preliminary injunction, froze Beryl's account and ordered the disputed insurance proceeds at issue in the amount of $163,000 to be kept in Wilmington's account, "*never to be mentioned again*". Beryl raised the issues, but was ignored. The money frozen was part of the insurance proceeds that was paid by Liberty Mutual which Beryl used as "a retainer" to bid on a property at the Essex County Court Sheriff Sales in order to replace what she lost in the fire. The Court preempted the proceeds to be given to Wilmington without determination of the rightful ownership in the civil court. Wilmington falsely framing the case as fraud was a manipulative discourse construction that facilitated robbing Beryl, they thrived on fear mongering, using a generational play book of depicting minorities as fraud because it works despite the pain. The Superior court never saw fraud which the district court superimposed for whatever reasons.

SUMMARY JUDGMENT

In February, 2020 the district court decided the case on a summary judgment awarding Wilmington $340,000. There was no trial, oral argument, no jury. The basis of the court's summary judgment was a non-existent fraud which had been adjudicated and favorably dismissed by the Superior Court. Charging Beryl with fraud over the same dismissed charges was a collateral attack with malicious intent. Summary Judgment was used as a loophole to deprive Beryl a fair trial; treat her case as a nullity; render a quick verdict and dispose of her case

on the basis of no genuine issue of material facts, though there were plenty. Applying a less restrictive federal standard in making a ruling with the intent to dispose of a case infringes upon the jury's sacred role in deciding lawsuits. Summary Judgment is not a substitute for the trial of a disputed fact of fraud; the court engaged in weighing evidence, a role reserved for the jury.

Termination of Parallel Criminal proceedings is a well developed common law over centuries, consistent with this court's understanding that prevents plaintiffs from attacking criminal proceedings that have vindicated the defendant's accusations. *Laksar v. Hurd, 972. F. 3d 1278, 1286 (11 th. Cir. 2020)*. Favorable termination rules require an end to the prosecution, not used as an attack on the invalidated conviction through a civil suit. Under the Fifth and Sixth Amendments, any fact that increases the penalty for a crime must be found by a jury beyond a reasonable doubt. Fraud is a criminal offense that warranted jury trial and must be proven beyond a reasonable doubt. The District court denied Beryl her constitutional right to a fair trial. *ricciuti v. New York City Transit Auth., 124 F. 3d 123, 130 (2d. Cir.1997)*. Section §1983 is important in the fourth Amendment context, where no other remedy suffices to protect the enjoyment of the personal property. *Allen v. McCurry, 449 U.S. 90, 98 (1980)*. As Justice Gorsuch puts; if a jury must find facts supporting a punishment under the Occasional Clause beyond a reasonable doubt, how many Judges impose a punishment without equal certainty about the law's application to those facts? The decision of fraud was in conflict with the United States Supreme Court decision on *Thompson v. Clark No. 20-659*. When a false accusation has been dismissed, section § 1983 is the only remedy for indication of affirmative dismissal. Beryl never stole anything from anybody, district court imposing and retrying a dismissed fraud case is suspect, amounting to fresh charges with an intent to short circuit the due process leading to

perverse result. When the term fraud is used, the act must follow. Article 50(2)(b) of the constitution requires charges against the accused person to contain sufficient material to enable the accused to answer the charge and there was none. Misrepresentations and false narratives of fraud resulted in rendition of a judgment which would not have been given if the whole conduct of the case had been fair, full and transparent in an actual trial before an impartial jury of Beryl's peers, not a Summary Judgment dictated by the opponent. *See Savickas, supra,193 Ill.2d at 385; Tradewind Ins. Co. v. Stout, supra, 85 Haw. at 188.* Besides, the higher burden of proof satisfied in the criminal case already encompasses the standard of proof in the civil case. See also *New Hampshire Ins. Co. v. Vardaman, 838 F.Supp. 1132, 1134 (N.D.Miss. 1993*). Misdemeanor convictions are frowned upon when used as conclusive evidence that an issue is established due to the relatively trivial nature in order to rob an opponent of their rightful pecuniary benefits. Wilmington and the district court should be stopped from contesting the Superior Court's outcome in a subsequent civil action in pursuit of alternative reality in order to gain an unfair advantage for asset forfeiture, windfall and unjust enrichment. Courts of law are meant to impart justice, not nepotism, neither should the system be built to protect corporate banks from wrongdoing because nobody investigates them and nobody thinks they can be thieves using high priced attorneys to rob unsuspecting public. Even the appellate Court questioned the District Court's determination of this case as a fraud and of what nature without specificity (3d. Cir. Op1). The District Court was a civil court to determine who the proceeds payments and insurable interest belonged to; injecting a dismissed case was a constitutional error. Tort issue should be resolved by a jury rather than a Summary Judgment. The foreclosure of the case with no trial but still maintaining fraud was a cover up to musk the intention of robbing Beryl of her proceeds and removes critical checks, accountability, constitutional rights violations and precluding judicial

oversight on a biased ruling. This is a reality likely to be replicated unabated if not kept in check by this court. The case sends a horrible message to minorities who buy Ins. to protect themselves by making the victim look like a criminal and criminals look like victims. Double conviction creates harm, racial inequalities and imbalance in the justice system. Beryl never committed fraud, never plead guilty or waivered in her innocence and was not convicted. The purpose of section §1983 was to act as guardians of the people's federal rights and to protect them from unconstitutional actions, whether for legislative or judicial function under the color of the law. *Ex Parte Virginia, 100 U.S.339, 346 (1879).* Relying on *Lanning v. City of Glens Falls, 908 F. 3d 19, 26 (2d Cir. 2018).*The district court's ruling challenges the integrity of the Superior court's outcome. Review is in order.

Once state court issues a judgment, federal courts must avoid entertaining cases brought by state court losers complaining of injuries brought by the judgment rendered proceeding and inviting the district court 's review and rejections of those judgments. *Exxon Mobil Corp v. Saudi Basic Indis Corp., 544 U.S. 280, 284 (2005).* Wilmington, having been defeated in state court... asked the federal court to declare " the adverse state court judgment Null and Void, those challenges should be rejected. The moral compass of our legal system should not be diluted by criminalizing the innocent and condemning them in order to grab their insurance proceeds because they are deemed ignorant. A huge number of criminal proceedings like this one occur in the U.S. each day, either because the system turn ablind eye, is complicit, accomplice, look the other way, don't wanna know, not my problem or lack of little knowledge for minorities to put a legal fight where they believe they are being robbed. Both the district court and the Appellate court failed to adequately address the questions presented thus leaving Beryl in peril; those decisions cannot stand the reasonable doubt standard. The principle that there is presumption of

innocence in favor of the accused is the undoubted law and its enforcement lies at the foundation of our criminal law. *Coffin v. United States, 156 U.S.432, 453 (1895).*

ERRORS:

1). The court's failure in articulating and calculating the loss and its methodology is a factual question that should be reviewed for an error. *United States v. Griffith, 584 F.3d1004, 1011 (10th. Cir. 2009).*

MVRA provision of the Mandatory Victims Restitution Act of 1996 (18 U.S.C. § 3663A(b)(1)(B)(ii) requires that the court must reduce the award by the value of any property minus the value (as of the date the property is returned) the bank received when it sold the houses that were collateral for the loans as of the date of the sentencing). Its overriding purpose is: (a). To compensate the victims for their losses. *United States v. Pescatore, 637 F. 3d 128, 138 (2d. Cir. 2011)*; (b) to make victims whole, fully compensate and restore them to their original state of well being. *United States v. Boccagna 450 F. 3d. 107, 115 (2d. Cir. 2006)* (quoting United *States v. Simmonds, 235 F. 3d 826, 831(3d. Cir. 2000);* (c). The restitution of the award is based on the actual sale amount by the time of the sentencing or the total loss to the victims if the sale has not been made by the time of the sentencing.

(i) Restitution is determined or reduced by the eventual cash proceeds recouped once the collateral real estate securing the debt is sold; an offsetting amount based on eventual resale price (as of the date the property is returned).

(ii). MVRA states that the offset value is the "value, (as of the date the property is returned) or any part of the property that is returned".

(iii). The district court may not order an award/ restitution in an amount that exceeds the alleged loss/ lien. Such a restitution order would amount to an illegal sentence.

(iv). If the real estate value increases, thereby allowing the creditor to resell the house at a higher than or equal amount owed, the bank would not be entitled to restitution. Similarly, if the increased sale price merely reduces the bank's loss, it would be an error for the District court to order restitution based on the lower market value because MVRA ensures that the banks/ mortgagee/ lien holders recover the full amount of their losses, " but nothing more". *United States v. Newman, 144 F.3d 531, 542 (7th. Cir. 1998); United States v. Smith, 156 F.3d 1046, 1057 (10th. Cir. 1998*).

Two years prior to the District Court's Summary Judgment in 2020, the respondent made a subsequent sale ($275,000) of the real estate collateral to a third party for the same amount of the lien; failed to update the court upon the sale, but Beryl did. They recouped what they lent out and got their money back (made whole). No diminution. The sale should have brought the case to its natural end because the lender had recouped their money back, but the Judge chose to continue, giving them more than 100% over the offset value (obscene). The third circuit holding, affirming the district court's order of the excessive award of $340,000 was an error inconsistent with the goal of MVRA and restitution concept of not awarding an amount that exceeds the alleged loss/ lien. Such a restitution order would amount to an illegal sentence and the imposition of illegal sentences constitutes plain error and abuse of discretion. The Circuit's affirmation conflicted and was out of step with the Supreme Court's, other Circuit courts prior precedence and decisions i.e. Himler and Robers, thus constituting a legal error on an issue of *National Importance; a federal question* that deserves resolution by this court. If not resolved, frequent recurrence of a constitutional claim would continue. For the maintenance of uniformity among

the lower courts, this court should grant Certiorari as a vehicle to resolve it. *United States v. Story, 635 F. 3d 1241, 1249 (10th Cir. 2011).*

REASONS FOR GRANTING

1). This court had already granted Certiorari in a similar case of *Robers v. United States. 698 F. 3d 937 (CA7 2012),* therefore, it's time and attention to review this case will be short.

This case presents the same questions, analysis and facts made and maintained in Robers in which the Supreme Court made a disposition with the proper decision. Beryl's arguments may differ, but the relevant statutes, texts, conflicting arguments and principles of miscalculating the award are similar and maintained, thus same as the texts that control the case at bar, therefore, Robers and Crook's inference and interpretation would be useful precedential vehicle to address the issues where there are similarities, or an enlargement can be applied at this court's discretion. See, e.g., *Rotkiske v. Klemm, 140 S. Ct. 355, 360-61 (2019).* Absent provision(s), a fundamental principle of statutory interpretation of the United States Supreme Court's analysis of MVRA, which states that the award is reduced by "the value (as of the date the property is returned) of any part of the property that is returned " is applicable and can be applied. *18 U.S.C. § 3663A(b)(1)(B)(ii).*

2). Failure to Answer the Question Presented

The Third Circuit panel did not address the question presented to them and maintained; which was: As to what extent, if any, does the amount of the District Court's Monetary Judgment have to be modified as a result of the Wilmington Savings Fund Society (WSFS) foreclosure on, and subsequent sale of the real property at issue for the full value of their lien (offset value)."

Wilmington was excessively awarded more than the offset value, thus resulting in double recovery and unjust enrichment. *Holley, 23 F.3d. at 902 (citing United States v. Smith, 944 F. 2d. 218 (9th. Cir. 1991)*. Even after being provided with the supplemental document they requested, the circuit still did not address that issue, thus satisfying this court's certiorari criteria.

3). "ALTHOUGH"

The Third Circuit in their opinion stated that, " Although Wilmington was not assigned" the property until after the fire they would still be considered the mortgagee for the 'purposes' of determining their interest, which was not there by the virtue of their time of arrival on the scene. The panel's view was wrong and so was their statement. Besides, the mortgage was not the issue, it was calculation and determination of ownership, but even if we assumed WSFS were assigned their predecessors Insurance with Great American Insurance Group they would still not be eligible to collect from them or any other policy because they were not the mortgagee at the time of the fire, thus had no insurable interest, having arrived after the injury; obviously injury is fixed at the time of the casualty, not any time after. The court's analysis of the issue applied to justify their decision of "although and for the puposes" was a deliberate excuse to justify awarding WSFS what didn't belong to them. Their arguments had several profound flaws beyond the obvious facts that their decision was not made on the basis of legal constitutional principles, derived statutes, case laws, nor prior holding on any similarly stated case, and had no precedence, thus were at variance with MVRA statute stating the court may not order an amount exceeding the money lent/ lien. The court's claim of uncertain scope defies practical reality and is almost certain to lead to confusion and harm to our judicial system. The implications of their

holding is an abdication of responsibility and shifting the entire responsibility on to another court. This court should grant Certiorari as a vehicle to resolve it. .

RULE OF LENITY

The panel in their decision applied the Rule of lenity against the petitioner whom they should have protected incase of ambiguity.The Rule of lenity- applies only if, after using their tool of statutory construction they are left with grievous ambiguity or uncertainty in the statute, however, the panel in their haste created an ambiguity where there was none. Their decision was not based on statute nor law to justify their verdict, they adopted an arbitrary reasoning and inadequate conclusion of "for the purpose and fraud" which did not address the question presented. *Holley, 23 F.3d. at 902 (citing United States v. Smith, 944 F. 2d. 218 (9th Cir. 1991).* The appellate division affirmed that WSFS were not assigned the mortgage until after the fire, regardless, awarded them over and above the offset value; as if Beryl-the insured, didn't have an interest. Their analysis was incompatible with the gravamen of the MVRA statute and other circuit courts.

5. SPLIT WITHIN THE THIRD CIRCUIT

In Nov. 2021, Beryl requested hearing and rehearing en banc before the Circuit, the request was denied on Jan. 25, 2022 with a split decision. Despite the Rule of Orderliness and Camaraderie that forbids some of the panel members from overruling a prior panel, on request for en banc, Hon. Judge Cowen dissent and voted to grant a hearing, while the other members denied. Honorable Judge Cowen lived upto the true origin and creed enshrined in the constitution. He believed a compelling basis for granting existed." *Karlo v. Pittsburgh Glass Works, LLC, 849*

F.3d 61, 75 n.7 (3d Cir. 2017). The split explains why the majority is mistaken; intervention for review is warranted.This court is a clean vehicle to resolve the split. Granting Certiorari is in order.

6). Federal Court's Conflict

The federal courts of appeal are in conflict as to whether the lender's acquisition of title through foreclosure or surrender constitutes a return of "any part" of the lost property when calculating restitution. The Third, Eighth, the Tenth Circuits and the Supreme Court have held that it is proper to base the offset value on the eventual amount recouped by the victim following sale of the collateral real estate. *"Petitioner Beryl is in agreement with them".* In the *United States v. Himler, 355. F. 3d 735 (3d Cir. 2004),* the same Third Circuit held that the offset value is determined based on the cash proceeds recouped following resale of the collateral real estate (return to the victims. Id. at 745), this was similarly held in the *United States v. Statman, 604 F. 3d 529 (8th Cir. 2010)*; United States v. James, 564 F. 3d 1237 (10th. Cir. 2009) and the Supreme Court Precedential case on *Robers v. United States of America; (698 F. 3d 937 (CA7 2012).* The Tenth Circuit affirmed that the calculation for offsetting restitution could be based only upon the amount of money successor lenders recouped by reselling the houses in foreclosure. The Seventh Circuit is in agreement. *Robers, 698 F.3d at 943.* The third and Eighth Circuits have concluded the same 3663A(b)(1)(B)(ii), that the court reduce the restitution award by the returned property's value "as of the date the property is returned,".

Answer:

WHEREAS, the Third Circuit's decision on "the case at bar" is not only inconsistent with their previous opinion on *Robers v. United States of America (698 F. 3d 937 (CA7 2012)* in which the

court held that the offset value is determined based on the cash proceeds recouped following resale of the collateral real estate (return to the victims) but was also in conflict with that of the Eighth, the Tenth Circuit on the same important matter. Third Circuit was in conflict with itself and also with all the other Circuits and the Supreme Court by affirming the "*excessive award far greater than the offset value*" to the lender whose debt had been satisfied by the sale of the collateral real estate to a third party. It did not abide by its past decision on *Himler, 355 F.3d at 745* and Robbers.698 F.3d at 943 (7th. Cir. 2012). They are also in conflict with the Rule of MVRA.

Even the other Circuit Courts (2nd, 5th, 7th & 9th) who conflicted with the Third Circuit on Robers, in reaching their conclusion under the plain language of the MVRA agreed that restitution is determined or reduced by the eventual cash proceeds recouped once the collateral real estate securing the debt is sold as of the date the property is returned. The majority rule in the Third Circuit was wrong. ALL the other Circuits with the exception of the third in the case at bar maintained that a victim lender cannot be awarded in excess of the offset value (money lent/ lien), and also, a lender is not allowed to recover more than once, otherwise it would be termed as double recovery, unjust enrichment and a windfall akin to hitting the lottery . Therefore, the third Circuit's decision on the case at bar presents a reversible legal error in judgment which requires this court's intervention. An outcome should not depend on the court Beryl found herself in, puting the Supreme Court in the unique position to enforce consistency by resolving it through a decision applicable to all of the courts below it; decisions like this, if not corrected are likely to recur and affect a large number of unsuspecting minorities and veteran families such as Beryls' to whom the legal system is skewed and suffer from legal abuse, limited resources, economic scarcity, knowledge and ability to fight a long drawn out legal battle against well

funded corporate greed and corruption. Conflict is such an important factor because it undermines uniformity of federal law, granting Certiorari is the clean vehicle to restore uniformity and resolve recurring conflict in the Circuits.

BREAKDOWN:

The property was purchased for (GFI- lent)	275,400	(app.100)
WSFS sold property to 3rd party "as is", and received	275,000	(app.377a)
Court's Awarded Beryl's LMI proceeds to WSFS	340,544	(app.XYZ)
TOTAL	715,544	
In addition, the District Court placed in WSFS escrow	163,000 Plus	(app.XYZ)
51/2 year interest ($163,000 X 41.98 X 2007 dys)	**84, 253**	
This would enable them to have a TOTAL	$962,797	

The district court and the third circuit awarding Wilmington with Beryl's LMI proceeds was not only unwarranted but constituted an error in law.

HARM

Beryl did not cause the electrical fire. Wilmington sustained no loss resulting from the destruction of the dwelling; neither did they establish that Beryl was the approximate cause of their injury, if any, and that the fire would not have occurred without petitioner's action. Wilmington knowingly purchased a fire damaged property, had an option to purchase their Insurance to protect their interest, but chose not to. Their purchase post foreclosure, occupies no special position than an outside bider. See *Phifer Gossett v. Belue et al.*,108 S.C.61, 93 S.E.,388.

They sold the collateral with no diminution, significant delay or loss. The key question before this Court, then, is whether Wilmington established a loss causation "a degree of risk" that is "sufficient to meet the concreteness requirement of harm or injury." *The answer is No.* There was no proximate cause attributable to Beryl; Harm has to be proven and there was none. *Muskrat v. United States, 219 U. S. 346, 361–362 (1911).See. Spokeo, 578 U. S., at 343.* Carrington stated they did not want the property to be repaired, instead they wanted the insurance money in exchange for the burnt property. (See. 3d. Cir. doct. 16 at 6). So, how does the court end up justifying awarding them both the house and Beryl's Ins. proceeds at the same time; it should be one or the other, not both. The court turned a blind eye on Beryl's interest in favor of a Corporation's, tantamount to endorsing theft and corruption. Beryl is entitled to her indemnification proceeds. *See Crook v. Hartford Ins. 178 S.E.254 (S.C.1935).*

4. ARTICLE III STANDING

Wilmington does not have evidence on record establishing a harm, their claim does not suffice for Article III standing. *See. Lujan v. Defenders of Wildlife, 504 U. S. 555, 561 (1992). As Judge Katsas has rightly stated, "*we cannot treat an injury as 'concrete' for Article III purposes based only on plaintiffs' say-so". Harm has to be proven. *Trichell v. Midland Credit Mgmt., Inc., 964 F. 3d 990, 999, n. 2* (CA11 2020). Wilmington suffered no concrete injury in fact, that is "real, and not abstract". *Raines v. Byrd, 521 U. S. 811, 819–820.* As Judge Barrett "succinctly" summarized- Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold defendants accountable for legal infractions. (*Casillas, 926 F. 3d, at 332*); neither does it give federal courts the power to order relief to any

uninjured plaintiff. *Tyson Foods, Inc. v. Bouaphakeo, 577 U. S. 442, 466 (2016).* Plaintiffs must demonstrate standing for each claim that they press and for each form of their claims.

In *Transunion LLc. v. Sergio Ramirez*, Justice Kavanaugh in his opinion stated that to have Article III standing to sue in federal court, plaintiffs must demonstrate, amongst other things, that they suffered a concrete harm. No concrete harm, no standing. *Spokeo, Inc. v. Robins, 578 U.S. 330, 340-41 (2016*). The mere filing of a complaint in federal court does not make a case and does not extend the judicial power to every violation of the constitution" or federal law "which may possibly take place." *Cohens v. Virginia, 6 Wheat. 264, 405 (1821)*, neither the mere violation of a personal legal right is not—and never can be—an injury sufficient to establish standing. What matters for the Court is only that the "injury in fact be 'concrete.' " *Sierra v. Hallandale Beach, 996 F. 3d 1110, 1117 (CA11 2021).* Under Article III, federal courts do not adjudicate hypothetical or abstract disputes. *Roberts C.J.*; rather, they may resolve only "a real controversy with real impact on real persons."

Wilmington had no "personal stake"Under Article III. To have a personal stake, they must be able to answer justice Scalia's question: *"'What's it to you?"'*And to answer that question in a way sufficient to establish standing, they must show (i) that they suffered an injury that in-fact is concrete, particularized, and actual or imminent; (ii) the injury was likely caused by Beryl and (iii) the injury would likely be redressed by judicial relief. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-561 (1992).

C. No More Remedy

Petitioner Beryl has no more efficacious remedy and alternatives available in law for her to mitigate her issues, thus a writ is maintainable. This court is in a unique position as an arbiter of

law to resolve her issues. Beryl seeks her fundamental rights, the principle of natural justice and removal of the vires act of attachment, liens and levies on her properties (finances) from the lower court. See. *Whirlpool Corp. v. Registrar of tradeMarks (1988)*, she also needs the return of the $163,000 (the money that was confiscated from her account and placed in WSFS escrow account) plus interest of $84,253 accrued over 5 ½ years = $247,253. Beryl requests the court to accept the case and grant certiorari.

D. The Issue Is Important

The question presented concerts as a recurring federal issue of national importance. The Third Circuit affirmation of the District Court's "excessive awards' 'has no basis in law, they stand alone and are in conflict with all the other Circuits who have handled similar cases, including the Supreme Court who are Precedential on Robers.

Even though the Circuits are divided over the issue of when a property is returned when a lender acquires title to collateral real estate used to secure a failed mortgage, it's remarkable that even conflicting circuits are in consensus when it comes to excessive awards and restitution determination based on the offset value. Restitution exceeding the loss would be tantamount to abuse of discretion.This case is a suitable vehicle for review. Certiorari is in order.

The Decision Below is Wrong.

MVRA statute §3663A Rule, that governs the federal criminal restitution does not authorize the district court's excessive award because the value should be measured by what the financial institution received in a sale as of that date it was returned.

In applying MVRA rule above, the Solicitor General in Robers v. United States, 698 F. 3d. 937, 943 (7th. Cir. 2012 adopted the standard consistent with the majority of the Circuit courts that

the defendant pays the exact amount necessary to compensate lenders completely. Opp. 10–11, 13; because the MVRA purpose is to assure that victims of crime receive full restitution; *Hugely v. United States, 495 U.S. 411, 416 (1990)* meaning restoring someone to a position he occupied before a particular event- to make victims whole. 18 USC. 3663A (b) (1) (B) (i) the amount of the offset should instead be based on the value of the property at the time it was returned. The principle of natural justice and procedural fairness require a person to receive a fair unbiased hearing before a decision that will negatively affect them is made. *Baker v. Canada 2S.C.R.817 (1999)*. Framing the issue as fraud was a manipulative discourse construction that facilitated robbing Beryl effortlessly with ease. People forget that Corporates can be thieves too. This is a prime example. The court should grant this petition to correct the third Circuit error on an issue that might be recurring if no intervention is done.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

Respectfully submitted,

Beryl Otieno- Ngoje (Pro-Se)

123 Hollywood Ave

Hillside, New Jersey

(908) 937-5310

Jngoje@aol.com

April 25, 2022

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1459

WILMINGTON SAVINGS FUND SOCIETY FSB

v.

BERYL OTIENO-NGOJE,
Appellant

(D.C. Civ. No. 2-16-cv-05631)

SUR PETITION FOR REHEARING

Present: CHAGARES, Chief Judge, McKEE, JORDAN, HARDIMAN, GREENAWAY, JR., SHWARTZ, KRAUSE, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, and COWEN*, Circuit Judges

The petition for rehearing filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

---

* Judge Cowen's vote is limited to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ *Peter J. Phipps*
Circuit Judge

Dated: January 25, 2022
ARR/cc: BON; SMF

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1459

WILMINGTON SAVINGS FUND SOCIETY FSB

v.

BERYL OTIENO-NGOJE,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2:16-cv-05631)
District Judge: Honorable William J. Martini

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 1, 2021

Before: CHAGARES, PHIPPS and COWEN, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on June 1, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 26, 2020, be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: September 27, 2021

Certified as a true copy and issued in lieu
of a formal mandate on 02/02/2022

Teste: Patricia S. Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

February 2, 2022

Mr. William T. Walsh
United States District Court for the District of New Jersey
Martin Luther King Jr. Federal Building & United States Courthouse
50 Walnut Street
PO Box 999
Newark, NJ 07102

RE: Wilmington Savings Fund Soc. v. Beryl Otieno-Ngoje
Case Number: 20-1459
District Court Case Number: 2-16-cv-05631
Dear Mr. Walsh:

Enclosed herewith is the certified judgment together with copy of the opinion or certified copy of the order in the above-captioned case(s). The certified judgment or order is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment or order is also enclosed showing costs taxed, if any.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ *Aina*, Legal Assistant
Direct Dial: 267-299-4957

cc:

Sandhya M. Feltes
Beryl Otieno-Ngoje

APPENDIX B

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1459

WILMINGTON SAVINGS FUND SOCIETY FSB

v.

BERYL OTIENO-NGOJE,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2:16-cv-05631)
District Judge: Honorable William J. Martini

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 1, 2021

Before: CHAGARES, PHIPPS and COWEN, Circuit Judges

(Opinion filed: September 27, 2021)

OPINION*

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

PER CURIAM

Beryl Otieno-Ngoje appeals pro se from the District Court's grant of summary judgment against her in this civil action brought by Wilmington Savings Fund Society ("WSFS"). For the reasons that follow, we will affirm that judgment.

I.

In 2008, Otieno-Ngoje agreed to purchase, "as is," a residential property located in Orange, New Jersey (hereinafter "the Property"). Her credit apparently was poor, so the mortgagee, GFI Mortgage, Inc. ("GFI"), told her that she needed a co-borrower. Auslene Simon, an acquaintance of Otieno-Ngoje, agreed to co-sign the mortgage. However, at closing, GFI stated that, to secure a good interest rate, the mortgage had to be signed by Simon only. Otieno-Ngoje and Simon assented to this arrangement.

The mortgage, which was for 30 years and $275,400, included a provision stating that, in the event of a loss, "any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened." (WSFS's App. at 171.) This provision further stated that, "[i]f the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower." (Id. at 172.) The

mortgage made clear that its provisions benefitted not only the lender, but also the lender's "successors and assigns." (Id. at 174.)

From the outset, Simon and Otieno-Ngoje had a verbal understanding that the latter would reside on the Property and make the mortgage payments. But the Property was initially uninhabitable. Nevertheless, for the first year or so, Otieno-Ngoje made the mortgage payments. In 2009, Simon and Otieno-Ngoje executed a quitclaim deed that transferred Simon's interest in the Property to Otieno-Ngoje for $1. That same year, the amount of the monthly mortgage payment increased dramatically, apparently because the homeowner's insurance carrier had withdrawn coverage in view of the fact that the Property was vacant. Otieno-Ngoje attempted to obtain a loan modification, but her efforts were unsuccessful. It appears that, after 2009, she did not make any more mortgage payments.

In 2011, Otieno-Ngoje and her family moved into the Property. That year, she obtained a homeowner's insurance policy from Liberty Mutual (hereinafter "the Policy"). The Policy listed the Property's mortgagee as "Wells Fargo Bank NA . . . ISAOA [(i.e., its successors and/or assigns)]," (WSFS's App. at 198),[1] and the Policy included a mortgage clause. That clause stated, in pertinent part, that "[i]f a mortgagee is named in

[1] By that point, the mortgage had been assigned to Wells Fargo.

this policy, any loss payable . . . *will be paid to the mortgagee and you, as interests appear*." (Id. at 210 (emphasis added).)

In late 2015, at which time the Policy was still in effect, the house on the Property was badly damaged in a fire. At that time, the amount due on the mortgage was well over $400,000, because the monthly mortgage payments were not being made. Otieno-Ngoje subsequently submitted a claim under the Policy. Liberty Mutual approved the claim and, between May and July 2016, issued two checks totaling $340,544.65.[2] Both checks were made jointly payable to the public adjuster, Otieno-Ngoje, and "Carrington" (which is short for Carrington Mortgage Services). Carrington was the mortgagee's agent and the servicer of the mortgage. By that point, the mortgage on the Property had been assigned multiple times, and the interest was presently owned by WSFS, a Delaware federal savings bank to whom the mortgage had been assigned a few months earlier.

Liberty Mutual sent the two checks to the public adjuster, who signed them and gave them to Otieno-Ngoje. When Otieno-Ngoje received the first check, she signed her name, forged Carrington's signature, and then deposited the check into her bank account.

[2] At the time of the fire, there was a second insurance policy on the Property. That policy, which the mortgagee had obtained through a different insurance carrier (Great American Insurance Group ("GAIG")), had coverage totaling about $272,000; however, because Liberty Mutual's $340,544.65 payment exceeded that coverage amount, no disbursement was made under the GAIG policy.

The second check arrived while Otieno-Ngoje was abroad, so she directed her daughter to deposit that check electronically.

Thereafter, WSFS filed a complaint against Otieno-Ngoje in the District Court, invoking that court's diversity jurisdiction under 28 U.S.C. § 1332. WSFS asserted claims for conversion, fraud, and unjust enrichment under New Jersey state law, and it sought to recover all of the insurance proceeds that had been disbursed by Liberty Mutual. The parties eventually filed cross-motions for summary judgment. In February 2020, the District Court granted WSFS's motion, denied Otieno-Ngoje's cross-motion, and entered judgment in favor of WSFS. In doing so, the District Court concluded that each of WSFS's three legal claims had merit, and that WSFS was entitled to all $340,544.65 of the insurance proceeds. This timely appeal followed.

II.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, and our review over the District Court's summary-judgment decision is plenary, see Barna v. Bd. of Sch. Dirs. of Panther Valley Sch. Dist., 877 F.3d 136, 141 (3d Cir. 2017). Summary judgment is appropriate when the movant "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Although the non-movant's evidence "is to be believed, and all justifiable inferences are to be drawn in h[er] favor in determining whether a genuine factual question exists," summary judgment should be granted "unless there is sufficient

evidence for a jury to reasonably find for the nonmovant." Barefoot Architect, Inc. v. Bunge, 632 F.3d 822, 826 (3d Cir. 2011) (internal quotation marks omitted).

III.

As mentioned above, the Policy stated that any loss payable would be paid to the mortgagee and the policy holder, "as interests appear." (WSFS's App. at 210.) Although WSFS was not assigned the mortgage on the Property until after the fire, WSFS is considered the "mortgagee" for purposes of determining the "interests" under the Policy. This is because the Policy listed the mortgagee as Wells Fargo *and* its successors and/or assigns, and because the "assignee of a mortgage succeeds to the rights and privileges . . . of the assignor." Gerrold v. Penn Title Ins. Co., 637 A.2d 1293, 1295 (N.J. Super. Ct. App. Div. 1994).

To determine the respective interests of WSFS and Otieno-Ngoje, we return to the mortgage's property-insurance provision. Recall that this provision stated that insurance proceeds were to be used to either repair/restore the Property (if economically feasible) or pay down the mortgage balance. There is no indication that using the $340,544.65 in insurance proceeds to repair or restore the Property would have been economically feasible.[3] Furthermore, although the mortgage stated that excess insurance proceeds

[3] Otieno-Ngoje testified at her deposition that she obtained estimates from three contractors to repair the Property, and that "[t]hey were all above [$]600,000." (WSFS's App. at 136.)

would be distributed to the borrower, that situation did not present itself here because the insurance proceeds were less than the mortgage balance. Accordingly, when Otieno-Ngoje received the two Liberty Mutual checks, she should have just signed them and turned them over to WSFS's agent, Carrington. Instead, she chose to forge Carrington's signature and deposit the checks into her own account. For substantially the reasons provided by the District Court, we agree with the District Court that Otieno-Ngoje is liable to WSFS for committing the tort of conversion. (See Dist. Ct. Op. entered Feb. 14, 2020, at 4-6.)[4]

IV.

We have considered Otieno-Ngoje's various arguments and find none of them persuasive. Accordingly, and in view of the above, we will affirm the District Court's February 26, 2020 judgment entered against her. To the extent that she requests any other relief from this Court, those requests are denied.

[4] Although the District Court determined that Otieno-Ngoje was also liable under WSFS's other two causes of action — fraud and unjust enrichment — we need not rule on those to decide this appeal. After all, the District Court did not conclude, and the parties do not argue here, that the amount of damages for one cause of action is different than the amount for the other two.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1459

WILMINGTON SAVINGS FUND SOCIETY FSB

v.

BERYL OTIENO-NGOJE,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2:16-cv-05631)
District Judge: Honorable William J. Martini

Submitted Pursuant to Third Circuit LAR 34.1(a)
June 1, 2021

Before: CHAGARES, PHIPPS and COWEN, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on June 1, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered February 26, 2020, be and the same is hereby affirmed. Costs taxed against Appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: September 27, 2021

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
21400 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, PA 19106-1790
Website: www.ca3.uscourts.gov

TELEPHONE
215-597-2995

September 27, 2021

Sandhya M. Feltes
Kaplin Stewart Meloff Reiter & Stein
910 Harvest Drive
P.O. Box 3037
Blue Bell, PA 19422

Beryl Otieno-Ngoje
123 Hollywood Avenue
Hillside, NJ 07205

RE: Wilmington Savings Fund Soc. v. Beryl Otieno-Ngoje
Case Number: 20-1459
District Court Case Number: 2-16-cv-05631

ENTRY OF JUDGMENT

Today, **September 27, 2021** the Court entered its judgment in the above-captioned matter pursuant to Fed. R. App. P. 36.

If you wish to seek review of the Court's decision, you may file a petition for rehearing. The procedures for filing a petition for rehearing are set forth in Fed. R. App. P. 35 and 40, 3rd Cir. LAR 35 and 40, and summarized below.

Time for Filing:
14 days after entry of judgment.
45 days after entry of judgment in a civil case if the United States is a party.

Form Limits:
3900 words if produced by a computer, with a certificate of compliance pursuant to Fed. R. App. P. 32(g).
15 pages if hand or type written.

Attachments:
A copy of the panel's opinion and judgment only.
Certificate of service.
Certificate of compliance if petition is produced by a computer.
No other attachments are permitted without first obtaining leave from the Court.

Unless the petition specifies that the petition seeks only panel rehearing, the petition will be construed as requesting both panel and en banc rehearing. Pursuant to Fed. R. App. P. 35(b)(3), if separate petitions for panel rehearing and rehearing en banc are submitted, they will be treated as a single document and will be subject to the form limits as set forth in Fed. R. App. P. 35(b)(2). If only panel rehearing is sought, the Court's rules do not provide for the subsequent filing of a petition for rehearing en banc in the event that the petition seeking only panel rehearing is denied.

A party who is entitled to costs pursuant to Fed.R.App.P. 39 must file an itemized and verified bill of costs within 14 days from the entry of judgment. The bill of costs must be submitted on the proper form which is available on the court's website.

A mandate will be issued at the appropriate time in accordance with the Fed. R. App. P. 41.

Please consult the Rules of the Supreme Court of the United States regarding the timing and requirements for filing a petition for writ of certiorari.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: s/ *Aina*, Legal Assistant
Direct Dial: 267-299-4957

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILMINGTON SAVINGS FUND SOCIETY, FSB as Trustee of Stanwich Mortgage Loan Trust A, **Plaintiff,** **v.** **BERYL OTIENO-NGOJE,** **Defendant.**	Civ. No.: 2:16-05631 (WJM) **OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

Plaintiff Wilmington Savings Fund Society ("Wilmington") brings this action against Defendant Beryl Otieno-Ngoje, alleging counts of conversion, unjust enrichment, and fraud, in connection with Defendant's purported illegal appropriation of insurance proceeds. This matter comes before the Court on Plaintiff and Defendant's cross-motions for summary judgment. There was no oral argument. Fed. R. Civ. P. 78(b). For the reasons set forth below, Plaintiff's motion for summary judgment, ECF No. 71, is **GRANTED** and Defendant's motion for summary judgment, ECF No. 72, is **DENIED**.

I. BACKGROUND

This case is a dispute over the proper owner of insurance proceeds issued in connection with a residential property damaged by fire. On January 25, 2008, Defendant Ngoje and her business partner, Auslene Simon, closed on property located at 403 Lawnridge Road, Orange, New Jersey. Pl.'s Mot. Summ. J. Ex. 1, 15:19-24, 16:1-4. GFI Mortgage, Inc. financed the purchase of the property through a residential mortgage loan in the amount of $275,400. The residential mortgage loan was secured by a mortgage. Pl.'s Mot. Summ. J. Ex. 2. The mortgage provided in relevant part:

> All insurance policies required by Lender and renewals of such policies shall be subject to Lender's right to disapprove such policies, shall include a standard mortgage clause, and shall name Lender as mortgage as an additional loss payee. . . . In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. . . . [A]ny insurance proceeds . . . shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. . . . If the restoration or repair is not economically feasible or Lender's security

> would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower.
>
> Borrower shall not destroy, damage, or impair the Property, allow the Property to deteriorate or commit waste on the Property. Whether or not Borrower is residing the Property, Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to Section 5 that repair or restoration is not economically feasible, Borrower shall promptly repair the Property if damaged to avoid further determination or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the Property, Borrower shall be responsible for repairing or restoring the Property . . .
>
> The covenants and agreements of this Security Instrument shall bind (except as provided in Section 20) and benefit the successors and assigns of Lender.

Id. In 2009, GFI Mortgage, Inc. assigned and sold the Mortgage to Wells Fargo Bank, N.A. See Pl.'s Mot. Summ. J. Ex. 3. In 2012, Wells Fargo Bank, N.A. sold and assigned the Mortgage to U.S. Bank National Association as Legal Title Trustee 2012 SC Title Trust. Pl.'s Mot. Summ. J. Ex. 4. In January 2016, the Mortgage and Note were sold and assigned to Plaintiff Wilmington. Pl.'s Mot. Summ. J. Ex. 5.

On June 26, 2009, Simon transferred ownership of the property to Ngoje for $1.00. *Id.* Ex. 1 at 34, Ex. 6. Defendant Ngoje and her family moved into the property sometime in 2011, continued to live there until November 2015, but by 2009, stopped making mortgage payments. Ex, 1 at 36, 44. On April 30, 2011, Ngoje purchased a homeowner's insurance policy from Liberty Mutual. *Id.* Ex. 1 at 52, Ex. 12. The policy provided insurance coverage for damage to the dwelling and contents caused by a fire at the property. *Id.* Ex. 6. The policy names Ngoje as the named insured and Wells Fargo Bank, its successors and assigns, as the mortgagee. *Id.* The policy provides that Liberty Mutual payment for losses will be made jointly to the insured and to the mortgagee, or the mortgagee's trustee. Pl.'s Mot. Summ. J. Ex. 7, at 10. Ngoje renewed the insurance policy each year through 2015. Each successive insurance policy identified Wells Fargo Bank, its successors and assigns, as the mortgagee and contained an identical mortgagee clause. Defendant Ngoje contemporaneously received each declarations page identifying Wells Fargo Bank, its successors and assigns, as the mortgagee, as well as the insurance policy containing the mortgagee clause.

On November 30, 2015, a fire damaged the property and was henceforth been uninhabitable. A few weeks after the fire, Wells Fargo Bank, N.A. sold and assigned all of the rights, title, and interest in the mortgage and property to Plaintiff Wilmington. *Id.* Ex. 1 at 60, Ex. 3. Wilmington retained Carrington Mortgage Services, LLC to service the mortgage loan. At the time of the fire, the sum of $423,896.62 was due and owing on the mortgage. *See id.* at Ex. 7. Within days of the fire, Ngoje made a claim against the

insurance policy, representing to Liberty Mutual that she intended to repair the house with the insurance proceeds. *Id.* at Ex. 12.

From December 2015 to July 2016, Liberty Mutual sent Ngoje at least four written communications advising her that the mortgage company may be listed as a payee on insurance proceeds checks and directing Ngoje to contact the mortgage company about processing the insurance proceeds payments: "Your current mortgage company may be listed as the payee on payment(s) for the covered repairs to your home. If so, you will need to contact your mortgage company to determine their procedures for processing claims payments. . . ." *Id.* Ex 1 at 71-74, 79, 94, Ex. 8.

Liberty Mutual determined that the value of the damage to the property was $408,554.79 and after accounting for depreciation, agreed to pay $292,658.44 with an additional amount to be paid upon completion of repairs to the property. *Id.* Ex. 1 at 81. Because the insurance policy contained a mortgagee clause, Liberty Mutual asked Defendant and the public adjuster for the name of the current mortgagee for purpose of issuing an insurance proceeds check payable jointly to the Defendant and the mortgagee. *Id.* Ex. 9. On May 16, 2016, Liberty Mutual issued a check in the amount of $292,658.44 payable to Ngoje, D. Simon & Associates, and Carrington. Ex. 10. Liberty Mutual sent the check to David Simon. *Id.* Ex. 9 at 62. Mr. Simon endorsed the check and provided it to Ngoje with instructions that she contact Carrington to determine how the mortgage company would like the insurance proceeds handled. *Id.* Ex. 9 at 65-66. Without contacting Carrington or Plaintiff Wilmington, Ngoje forged Carrington's endorsement on the May check and deposited the entire insurance proceeds check into her personal bank account at JPMorgan Chase Bank. *Id.* Ex. 12, ¶¶ 4-8, 10-12. In July 2016, Liberty Mutual adjusted the value of the damage to the dwelling upward to $470,302.12. *Id.* Ex. 1 at 93. Consequently, on July 29, 2016, Liberty Mutual issued a second insurance proceeds check in the amount of $47,906.19. *Id.* Ex. 1 at 95-96. Like the first check, the second check was jointly payable to Ngoje, D. Simon & Associates, and Carrington. Liberty Mutual sent the check to David Simon, who endorsed it and provided it to Ngoje with instructions that Ngoje contact Carrington regarding the insurance proceeds. *Id.* Ex. 9, 71-72. Without contacting or alerting Carrington about the July check, Ngoje deposited the insurance proceeds into her personal bank account at JPMorgan Chase Bank. *Id.* Ex. 12, ¶¶ 13-14, 16-18.

During 2016, Defendant Ngoje used $340,000 of insurance proceeds for a variety of personal matters such as to support her business by bidding on sheriff's sale properties, making repairs to Defendant's other property in Hillside, New Jersey, and purchasing goods and shipping those goods overseas in support of Defendant's husband's business. None of the insurance proceeds were used to repair the Property. *Id.* Ex. 1 at 102, 105, Ex. 12 at ¶ 12.

Plaintiff filed its complaint on September 16, 2016, to recover the Liberty Mutual insurance proceeds in the amount of $340,000. ECF Nos. 1, 4. Plaintiff Wilmington asserts claims against Defendant for conversion, unjust enrichment, and fraud. On

November 17, 2016, the Court granted Plaintiff's motion and enjoined Defendant from transferring assets and placing a constructive lien on the sheriff's sale deposits. *Id.* Ex. 14.

II. LEGAL STANDARD

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56. A fact is material if its determination might affect the outcome of the suit under the applicable substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). A dispute is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Id.* To make this determination, the Court views the facts in the light most favorable to the nonmovant and all reasonable inferences must be drawn in the nonmovant's favor. *Scott v. Harris*, 550 U.S. 372, (2007); *Green v. New Jersey State Police*, 246 F. App'x 158, 159 (3d Cir. 2007).

The moving party bears the burden of demonstrating the absence of a genuine dispute of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The movant meets this burden by pointing to an absence of evidence supporting an essential element as to which the non-moving party will bear the burden of proof at trial. *Id.* at 325. If the moving party carries this initial burden, "the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial." *United States v. Donovan*, 661 F.3d 174, 185 (3d Cir. 2011) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (internal quotation marks omitted)).

III. DISCUSSION

Plaintiff Wilmington asserts claims against Defendant for conversion, unjust enrichment, and fraud. In sum, Plaintiff contends that it is entitled to, the Liberty Mutual insurance policy proceeds because: (1) the mortgagee clause in the Liberty Mutual Insurance Policy provides that payment for loss to the Property would be made jointly to the insured (Defendant Ngoje) and the mortgagee (Plaintiff Wilmington) as their interests in the Property appear; (2) Plaintiff Wilmington had a first lien security interest in the Property and in the Policy; (3) the dollar value of Plaintiff Wilmington's interest at the time that the loan proceeds were distributed was in excess of the amount of the loan proceeds; and (4) therefore, Plaintiff Wilmington was legally entitled to the full amount of the Liberty Mutual Insurance Policy proceeds.

A. Conversion

"Conversion is an intentional exercise of domain or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." *Chicago Title Ins. Co. v. Ellis*, 978 A.2d 281, 287 (App. Div. 2009) (quoting *Restatement (Second) of Torts* § 222A(1)). To

state a claim for conversion, a plaintiff must establish: (1) the existence of property; (2) the right to immediate possession of the property; and (3) the wrongful interference by a defendant." *Corestar Int'l Pte LTD v. LPB Commc'ns, Inc.*, 513 F. Supp. 2d 107, 127 (D.N.J. 2007). "The crux of conversion is wrongful exercise of dominion or control over property of another without authorization and to the exclusion of the owner's rights in that property. *Ellis*, 978 A.2d at 288. "Where a sum of money is identifiable, courts look to the relative rights of each party to possession and use of the money to determine whether a cause of action lies for conversion." *Id.*

1. Plaintiff Wilmington's Right to the Liberty Mutual Insurance Proceeds

The Liberty Mutual Insurance Policy contains a mortgage clause which expressly provides for the named mortgagee (or its successors and its assigns) to receive insurance proceeds for losses to the insured property to the extent of its interest. Wells Fargo Bank was the mortgagee named on the Liberty Mutual Insurance Policy. However, at the time that Liberty Mutual disbursed the insurance proceeds, Wells Fargo Bank had assigned the mortgage to Plaintiff Wilmington. As the assignee, Wilmington was entitled to the insurance proceeds to the extent of its insurable interest. *See Liberty Mutual Fire Insurance Company v. Alexander*, 864 A.2d 1127 (App. Div. 2005) ("[t]he standard mortgage clause in the homeowner's insurance policy is an independent agreement between the insurer and the mortgagee that entitles the mortgagee to recover the insurance proceeds for damages to the insured's property"). If "the property owner remains the title owner of the property, a mortgagee has the right to apply fire insurance proceeds to the outstanding debt in the absence of any agreement to the contrary . . . ." *Id.* at 1133.

The Liberty Mutual Insurance Policy, here, contains a standard mortgage clause which provides for payment of insurance proceeds to the mortgagee. *See* Def.'s Mot. Ex. 6. At the time that Liberty Mutual disbursed the insurance proceeds for the fire damages to the property, Wilmington was the mortgagee on the property. *See id.* at Ex. 3. In accordance with the obligations created by the mortgagee clause, Liberty Mutual made the May check and July check payable to Wilmington's agent, Carrington Mortgage Services. *Id.* at Exs. 10, 11. New Jersey law gives Plaintiff Wilmington the legal right to the insurance proceeds to apply to the outstanding debt.

2. Defendant Ngoje's Wrongful Interference with Plaintiff's Right to Possession of the Insurance Proceeds

Defendant need not knowingly or intentionally act wrongfully for a conversion to occur. *Ellis*, 978 A.2d 281; *Delzotti v. Morris*, 2015 WL 5306215, *9 (D.N.J. 2015) (conversion does not require that defendant have an intent to harm the rightful owner, or know that the money belongs to another). Rather,

> [t]he general rule is that one who exercises unauthorized acts of dominion over the property of another, in exclusion or denial of his rights or inconsistent therewith, is guilty of conversion although he acted in good faith and in ignorance of the rights or title of the owner. The state of knowledge with respect to the rights of such owner is of no importance, and cannot in any respect affect the case.

McGlynn v. Schultz, 218 A.2d 408 (Ch. Div. 1966). The repudiation may be manifested in the injured party's demand for the funds and the tortfeasor's refusal to return the money sought. *Bondi v. Citigroup, Inc.*, 32 A.3d 1158, 1190 (App. Div. 2011).

Defendant Ngoje's contention that she "reasonably, innocently and honestly believed the check was hers" is contradicted by Defendant Ngoje's sworn deposition testimony, as well as the deposition testimony of Defendant's public adjuster and the documents. Both insurance proceeds checks were jointly payable to Carrington on the face of each check. Defendant admits signing Carrington's name on the May, 2016 check without Carrington's permission. Pl.'s Mot. Ex. 12. At the time that she received the insurance proceeds checks, Defendant knew that the mortgage company claimed a right to the insurance proceeds. *Id.* Ex. 1 at 77-78. David Simon, Defendant's public adjuster, gave specific instructions to turn over the insurance proceeds checks to the mortgage company. Ex. 9 at 65-66. Defendant was aware that Carrington was a joint payee on each check and that the mortgage company had asserted a right to the insurance proceeds. She has also been expressly directed by her public adjuster to send the insurance proceeds checks to the mortgage company. Instead, Defendant made a calculated decision not to send the insurance proceeds because she did not want to keep the property.

Defendant Ngoje admits that she took the insurance proceeds checks, forged Carrington's endorsement on the May check and deposited the checks into her personal bank accounts. *See* Def's Mot. Exs. 1, 12. After taking possession of the insurance proceeds checks, Defendant Ngoje refused to turn over the insurance proceeds to Plaintiff Wilmington. Because Plaintiff has a right to the insurance proceeds to pay down the $443,000 debt owed on the mortgage loan, Defendant Ngoje converted those insurance proceeds.

B. Unjust Enrichment

In New Jersey, "[t]o establish a claim for unjust enrichment . . . a plaintiff must show both that the defendant received a benefit and that retention of that benefit without payment would be unjust." *Stewart v. Beam Global Spirits & Wine, Inc.*, 877 F. Supp. 2d 192, 196 (D.N.J. 2012). A plaintiff must allege that: (1) at plaintiff's expense; (2) defendant received benefit; (3) under circumstances that would make it unjust for defendant to retain said benefit without paying for it. *Maniscalco v. Brother Intern. Corp. (USA)*, 627 F. Supp. 2d 494, 505 (D.N.J. 2009).

Defendant Ngoje was unjustly enriched in the amount of $340,544.65. Defendant Ngoje deposited into her personal account insurance proceeds to which Plaintiff Wilmington was entitled. By forging Carrington's endorsement on the May check and retaining the funds, Defendant Ngoje was enriched in the amount of $292,638.46. *See* Ex. 11. By depositing and retaining the funds from the July check, Defendant Ngoje was enriched by an additional $$47,906.19. *See* Ex. 12. Plaintiff Wilmington had a right to the insurance proceeds in order to compensate it for the loss of value to its mortgage interest caused by near total destruction by fire of the Property. At the time of the fire, the security interest exceeded $443,000. *See* Ex.8.

C. Fraud

Under New Jersey law, fraud consists of: "(1) a material misrepresentation of a presently existing or past fact; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon by the other person; and (5) resulting damages." *Gennari v. Weichert Co. Realtors*, 691 A.2d 350 (1997).

Defendant Ngoje committed fraud by forging Carrington's endorsement on the May check. By depositing and retaining the insurance proceeds, Defendant falsely represented that she had exclusive right, title and interest to the insurance proceeds. Defendant Ngoje also committed fraud by omission by failing to disclose to Plaintiff WSFS that she had received insurance proceeds from Liberty Mutual. Ex. 1 at 98.

Defendant Ngoje intentionally made the aforesaid false representations and omissions of material fact in order to unlawfully abscond with the insurance proceeds. Defendant Ngoje further intentionally concealed from Plaintiff WSFS that she received, deposited and spent the insurance proceeds. Plaintiff WSFS is harmed by Defendant's fraud because it was unable to use the proceeds to repair the property thereby decreasing the value of the property and its mortgage lien.

IV. CONCLUSION

Accordingly, Plaintiff's motion for summary judgment, ECF No. 71, is **GRANTED** and Defendant's motion for summary judgment, ECF No. 72, is **DENIED**. An appropriate order follows.

Dated: February 14, 2020

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILMINGTON SAVINGS FUND SOCIETY, FSB as Trustee of Stanwich Mortgage Loan Trust A, **Plaintiff,** **v.** **BERYL OTIENO-NGOJE,** **Defendant.**	Civ. No.: 2:16-05631 (WJM) **ORDER**

WILLIAM J. MARTINI, U.S.D.J.:

This matter comes before the Court on Plaintiff and Defendant's cross-motions for summary judgment, ECF Nos. 71 & 72. For the reasons set forth in the accompanying opinion, **IT IS** on this 14th day of February 2020, **ORDERED** that Plaintiff's motion for summary judgment, ECF No. 71, is **GRANTED**. Defendant's motion for summary judgment, ECF No. 72, is **DENIED**.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILMINGTON SAVINGS FUND SOCIETY, FSB as Trustee of Stanwich Mortgage Loan Trust A, **Plaintiff,** **v.** **BERYL OTIENO-NGOJE,** **Defendant.**	Civ. No. 2:16-5631 (WJM) **OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

Plaintiff Wilmington Savings Fund Society ("Plaintiff") brings this action against Defendant Beryl Otieno-Ngoje ("Defendant"), alleging counts of conversion, unjust enrichment and fraud, in connection with Defendant's purported illegal appropriation of insurance proceeds. This matter comes before the Court on Plaintiff's motion for a preliminary injunction under Federal Rule of Civil Procedure 65 to enjoin Defendant from further dissipating the insurance funds in question. There was no oral argument. Fed. R. Civ. P. 78(b). For the reasons set forth below, Plaintiff's motion for a preliminary injunction is **GRANTED**.

I. BACKGROUND

Plaintiff is a federal savings bank with its principal place of business in Wilmington, Delaware. Compl. ¶ 1, ECF No. 1. Defendant is an adult individual and New Jersey resident. *Id.* at ¶ 2. In 2009, Defendant bought a residential property ("Property") in Orange, New Jersey, which was subject to a mortgage at the time of its purchase. *See* Pl.'s Mem. of Law in Supp. of Mot. for Prelim. Inj. ("Pl.'s Mem.") 1–2, ECF No. 3. Through various sales and assignments, Plaintiff came to be the owner of that mortgage in December 2015. *See id.* at 2.

On a date unknown to Plaintiff, the Property was damaged by a fire. *Id.* at 3. In early 2016, Defendant made an insurance claim for the fire damage to Liberty Mutual Insurance Company ("Liberty Mutual"). *Id.* Liberty Mutual approved the claim and issued two checks in May and July of 2016 for the amount of $292,638.46 and $47,906.16, respectively. *Id.* The checks were jointly payable to three payees: (1) Defendant; (2) Carrington Mortgage Services, Plaintiff's agent and mortgage servicer (the "Servicer");

and (3) D. Simon & Associates LLC, Defendant's adjuster (the "Adjuster"). *Id.* The Adjuster endorsed both checks on its own behalf and delivered them to Defendant, who thereafter purportedly deposited the checks into her personal bank account. *Id.*

On September 16, 2016, Plaintiff filed a complaint in this Court, alleging that Defendant had absconded with $340,544.62 in insurance proceeds, which belonged to Plaintiff pursuant to its mortgage on the property. *See* Compl. at ¶¶ 21–30, 35. Plaintiff contends that Liberty Mutual issued payment unbeknownst to Plaintiff or the Servicer and that Defendant had forged the Servicer's endorsement on both checks when depositing them into her personal bank account. *See id.* at ¶¶ 22, 26. Plaintiff maintains that it requires the insurance proceeds to repair the damaged Property and that, without them, the Property will continue to deteriorate and result in a hazardous condition. *See id.* at ¶¶ 32–33.

Plaintiff now moves this Court to issue a preliminary injunction, enjoining Defendant from "further dissipating unlawfully obtained insurance proceeds." Pl.'s Mem. at 10. Plaintiff claims that Defendant has been "rapidly spending the insurance proceeds" by using portions of the funds to make down payments on three properties located in New Jersey in July and August 2016. *See id.* at 4. Plaintiff asks this Court to also place a constructive trust and equitable lien on the remaining insurance proceeds in Defendant's possession and on the funds used to purchase the properties that are now in possession of the Essex County Sheriff's Department. *See id.* at 10–11.

Defendant has not responded to the instant motion, nor has she filed an answer to Plaintiff's complaint. The record reflects that Defendant was properly served with the complaint through her counsel on September 29, 2016. ECF No. 4. At Plaintiff's request, an entry of default was filed against Defendant on October 25, 2016, for failure to plead or otherwise defend the complaint. ECF Nos. 6–7. Plaintiff subsequently moved for default judgment on October 28, 2016. ECF No. 8. Defendant recently wrote to this Court, seeking an adjournment of Plaintiff's default judgment motion and indicating that it will oppose. ECF No. 10. Defendant did not reference the instant motion.

II. LEGAL STANDARD

A court must consider four factors before granting a preliminary injunction: (1) the moving party's likelihood of success on the merits; (2) irreparable harm to the moving party; (3) the possibility of harm to other interested parties; and (4) the public interest. *See Instant Air Freight Co. v. C.F. Air Freight, Inc.*, 882 F.2d 797, 800 (3d Cir. 1989). "'The grant or denial of a preliminary injunction is committed to the sound discretion of the district judge . . . .'" *PNY Techs., Inc. v. Salhi*, No. 12-cv-4916, 2016 WL 4267940, at *1 (D.N.J. Aug. 10, 2016) (quoting *Kershner v. Mazurkiewicz*, 670 F.2d 440, 443 (3d Cir. 1982)). The Third Circuit has "recognized many times that the grant of injunctive relief is an extraordinary remedy, which should be granted only in limited circumstances." *See Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp.*, 847 F.2d 100, 102 (3d Cir. 1988) (citations omitted). A failure to establish any of the four factors "renders a preliminary

injunction inappropriate." *See PNY Techs.*, 2016 WL 4267940, at *1 (citing *ACE Am. Ins. Co. v. Wachovia Ins. Agency Inc.*, 306 F. App'x 727, 730–31 (3d Cir. 2009)).

Where a party seeks injunctive relief concerning a claim of money damages, the general rule is that an injunction will not be issued "prior to the determination of liability and an award of damages." *See Fechter v. HMV Indus., Inc.*, 879 F.2d 1111, 1119 (3d Cir. 1989). Nonetheless, in extraordinary circumstances, injunctive relief can be appropriate where the moving party shows that it will probably be unable to satisfy a judgment without a preliminary injunction. *See Elliot v. Kiesewetter*, 98 F.3d 47, 57–58 (3d Cir. 1996); *Hoxworth v. Blinder, Robinson & Co., Inc.*, 903 F.2d 186, 197 (3d Cir. 1990).

III. DISCUSSION

Plaintiff contends that there is "a substantial likelihood that Defendant will dissipate all of the insurance proceeds" if this Court does not issue a preliminary injunction, which will render Plaintiff unable to recover the funds that it requires to repair its property. *See* Pl.'s Mem. at 8–9. Plaintiff points to Defendant's use of $163,000.00 of the insurance money to make down payments on three New Jersey properties as evidence of the dissipation. *See id.* Plaintiff asks this Court to view these purchases as proof of the irreparable harm that it will suffer if Defendant is not enjoined. *Id.* The Court agrees with Plaintiff and will grant the preliminary injunction.

"The purpose of a preliminary injunction is to maintain the status quo during the pendency of a litigation." *PNY Techs.*, 2016 WL 4267940, at *2 (citing *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 290 (1940)). "That irreparable harm would occur absent an asset freeze is even more apparent where the very assets subject to a potential judgment will likely be dissipated without entry of the order." *Kiesewetter*, 98 F.3d at 58.

Plaintiff has clearly shown that Defendant has already dissipated a portion of the funds subject to a potential judgment to make down payments on three separate properties. *See* Certification of Sandhya M. Feltes ("Feltes Cert."), Ex. 9, ECF No. 3. Thus, the Court finds that Plaintiff has shown irreparable harm because there is a high likelihood that dissipation will continue without the issuance of a preliminary injunction. *See Kiesewetter*, 98 F.3d at 58. Plaintiff has also shown a likelihood of success on the merits by properly pleading a contractual right to the insurance funds through its ownership of the mortgage. Pl.'s Mem. at 6–8. The balance of hardships favors an injunction because further dissipation would hinder the enforceability of any potential judgment. *See Kiesewetter*, 98 F.3d at 58–59. The public interest is served by preserving a potential judgment against a fraudulent conveyance claim. *See Berger v. Weinstein*, No. 07-cv-994, 2008 WL 191172, at *11 (E.D. Pa. Jan. 23, 2008) ("the prevention of unjust enrichment by means of fraud or misappropriation, even that affecting only private entities, is in the general public interest") (internal quotations omitted). Accordingly, a preliminary injunction is warranted.

IV. CONCLUSION

For the reasons stated above, Plaintiff's motion for a preliminary injunction is **GRANTED**. An appropriate order follows.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: November 17, 2016

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILMINGTON SAVINGS FUND SOCIETY, FSB as Trustee of Stanwich Mortgage Loan Trust A, **Plaintiff,** **v.** **BERYL OTIENO-NGOJE,** **Defendant.**	Civ. No. 2:16-5631 **OPINION**

WILLIAM J. MARTINI, U.S.D.J.:

Plaintiff Wilmington Savings Fund Society ("Plaintiff") brings this action against Defendant Beryl Otieno-Ngoje ("Defendant"), alleging counts of conversion, unjust enrichment and fraud, in connection with Defendant's purported illegal appropriation of insurance proceeds. This matter comes before the Court on Plaintiff's motion for default judgment and Defendant's cross-motion to vacate default. Plaintiff also moves for release of funds deposited by the Essex County Sheriff in a trust account. There was no oral argument. Fed. R. Civ. P. 78(b). For the reasons set forth below, Plaintiff's motions are **DENIED** and Defendant's cross-motion is **GRANTED**.

I. BACKGROUND

This case is a dispute over the proper owner of insurance proceeds issued in connection with a residential property damaged by fire. In 2009, Defendant bought the property via quit claim deed from the previous owner for $1.00 of consideration. *See* Cross-Mot. to Set Aside Default 1 ("Def.'s Opp'n"), ECF No. 13-3; Certification of Michael Orozco ¶ 4 ("Orozco Cert."), Ex. B, ECF No. 13-2. At the time of Defendant's purchase, the property was subject to a mortgage under the previous owner's name, Auslene Simon. *See id.* at ¶ 2, Ex. A. At some point, Simon apparently defaulted on her mortgage obligation. In 2012, U.S. Bank National Association, the owner of the mortgage at that time, brought a foreclosure action in New Jersey Superior Court. *See id.* at ¶ 3.

In November 2015, the property was damaged by fire and has henceforth been uninhabitable. *See id.* at ¶ 5. In early 2016, Defendant made an insurance claim for the fire damage to Liberty Mutual Insurance Company ("Liberty Mutual"). *See* Mem. of Law in Supp. of Mot. for Entry of Default J. 2 ("Pl.'s Mot."), ECF No. 8-2. Liberty Mutual approved the claim and issued two checks in May and July of 2016 for the amount of

$292,638.46 and $47,906.16, respectively. *Id.* at 2–3. The checks were jointly payable to three payees: (1) Defendant; (2) Carrington Mortgage Services, Plaintiff's mortgage servicer ("Servicer"); and (3) D. Simon & Associates LLC, Defendant's adjuster ("Adjuster"). *Id.* The Adjuster endorsed both checks on its own behalf and delivered them to Defendant, who thereafter deposited the checks into her personal bank account. *Id.*

In December 2015, Plaintiff bought the mortgage from U.S. Bank. *See id.* at 2. Servicing of the mortgage was transferred to the Servicer in January 2016. *Id.* At some point prior to the fire but during the foreclosure proceeding, Defendant claims that the Servicer contacted her via telephone and informed her that it maintained its own insurance policy to cover damage to the property. *See* Orozco Cert. at ¶ 6. Plaintiff is unaware of any insurance on the property other than Defendant's policy, but it does not outright deny that a conversation occurred between Defendant and the Servicer. *See* Br. in Opp'n to Cross-Mot. ("Pl.'s Reply") 2–3, ECF No. 15.

Plaintiff filed its complaint on September 16, 2016, and the record reflects that Defendant was properly served through her counsel on September 29, 2016. ECF Nos. 1, 4. Default was entered against Defendant on October 25, 2016. ECF No. 7. Three days later, Plaintiff filed the instant motion for default judgment. ECF No. 8. On November 16, 2016, counsel requested an extension to respond to the instant motion, apologizing for the delay and explaining that he was occupied with other matters and out of the country on vacation for several weeks prior. *See* ECF No. 10. On November 21, 2016, Defendant filed her opposition to default judgment and cross-moved to vacate default. ECF No. 13. Plaintiff filed its opposition to Defendant's cross-motion and a reply to Defendant's opposition on December 1, 2016. Finally, Plaintiff filed a motion for release of funds held in a constructive trust pursuant to a preliminary injunction issued by this Court. ECF No. 18. This opinion will address both of Plaintiff's motions and Defendant's cross-motion.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 55 governs entries of default, providing, in pertinent part: "The court may set aside an entry of default for good cause . . . ." Fed. R. Civ. P. 55(c). The Court must consider three factors in exercising its discretion to either grant or deny a motion to set aside an entry of default: "(1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; (3) whether the default was the result of defendant's culpable conduct." *United States v. $55,518.05 in U.S. Currency*, 728 F.2d 192, 195 (3d Cir. 1984) (citations omitted). The same three factors apply to the Court's consideration of whether to enter a default judgment. *See Chamberlain v. Giampapa*, 210 F.3d 154, 164 (3d Cir. 2000) (quoting *$55,518.05*, 728 F.2d at 195). The Third Circuit "does not favor entry of defaults" and "require[s] doubtful cases to be resolved in favor of the party moving to set aside the default [] so that cases may be decided on their merits." *See $55,518.05*, 728 F.2d at 194–95 (quotation omitted).

III. DISCUSSION

Defendant raises four defenses in favor of vacating the entry of default: (1) the parties lack privity of contract; (2) Plaintiff has failed to state a claim upon which relief can be granted; (3) Plaintiff has failed to add all proper parties to the dispute; and (4) the terms of the mortgage agreement do not impose the obligations on Defendant that Plaintiff claims. *See* Def.'s Opp'n at 6–7. Defendant also argues that Plaintiff will not be prejudiced by vacation of default because the Defendant's delay in responding was minimal and the Court's issuance of a preliminary injunction has preserved Plaintiff's potential rights to the amount in controversy. *See id.* at 5–6. Additionally, Defendant argues that her conduct was not reckless. *See id.* at 12–13.

Plaintiff responds that it is entitled to default judgment because Defendant cannot allege any meritorious defense for the following reasons: (1) Defendant admits all facts supporting judgment in Plaintiff's favor, *see* Pl.'s Reply at 7–11; (2) Defendant is collaterally estopped from challenging the validity of the mortgage, *see id.* at 11–13; and (3) Defendant's defenses are barred by the New Jersey Recording Act ("NJRA"), *see id.* at 13–14. Plaintiff also argues that Defendant's conduct is culpable because her failure to respond was intentional and that Plaintiff will be prejudiced by vacation of default because it requires the insurance proceeds to repair the property. *See id.* at 13–16. The Court will consider these arguments under the aforementioned three-factor rubric.

A. Prejudice to Plaintiff

Plaintiff's claim that it requires the insurance proceeds to repair the property does not support a finding of prejudice. "Delay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening [of] a default judgment entered at an early stage of the proceeding." *Feliciano v. Reliant Tooling Co., Ltd.*, 691 F.2d 653, 656–57 (3d Cir. 1982) (citation omitted). Plaintiff has not asserted that its ability to pursue the claim has been hindered since the entry of default. *See id.* at 657. This Court has also granted Plaintiff a preliminary injunction, freezing the assets at issue and preventing dissipation. Plaintiff, therefore, has not been prejudiced by Defendant's late response and this factor favors vacating default. *See id.*

B. Meritorious Defenses

A meritorious defense is established when a defendant's allegations would constitute a complete defense, if established at trial. *See $55,518.05*, 728 F.2d at 195. Defendant raises four defenses that would provide complete defenses to Plaintiff's claim on the insurance proceeds. The Court, therefore, will focus on Plaintiff's arguments that Defendant cannot raise these defenses.

First, Plaintiff asserts that Defendant has admitted all of the facts supporting Plaintiff's allegations because of Defendant's failure to respond to Plaintiff's motion for a preliminary injunction. *See* Pl.'s Reply at 7. Plaintiff cites Federal Rule of Civil Procedure 8(b)(6), which provides that an allegation is deemed admitted if a responsive pleading is

required and the allegation is not denied. Plaintiff misapplies Rule 8 to a motion for relief from the Court, such as a preliminary injunction. Defendant was not required to respond to Plaintiff's motion for a preliminary injunction and, therefore, she has not admitted any of Plaintiff's factual allegations by failing to respond to that specific motion.

Second, Plaintiff argues that Defendant is estopped from making any arguments concerning the validity of the mortgage pursuant to the doctrine of *res judicata*. *See* Pl.'s Reply at 12. Plaintiff seeks to impose non-mutual offensive collateral estoppel against Defendant. *See Mann v. Estate of Meyers*, 61 F. Supp. 3d 508, 522–23 (D.N.J. 2014) (defining offensive collateral estoppel).

Collateral estoppel precludes parties from litigating issues at trial where four factors are met: (1) the identical issue was previously adjudicated; (2) the issue was actually litigated; (3) the previous determination was necessary to the decision; and (4) the party being precluded from relitigating the issue was fully represented in the prior action. *See Smith v. Borough of Dumore*, 516 F. App'x 194, 199 (3d Cir. 2013). "Moreover, where, as here, a plaintiff attempts to assert nonmutual offensive collateral estoppel, the procedural posture presents a unique potential for unfairness." *Id.* (quotation omitted). District courts "'have broad discretion to determine when to apply non-mutual offensive collateral estoppel.'" *Id.* (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979)).

Here, Plaintiff points to an order from the Superior Court of New Jersey in November 2013, which granted summary judgment to U.S. Bank against Defendant, and a subsequent appellate decision affirming the judgment. *See* Certification of Sandhya M. Feltes, Exs. 4–5. The trial court's decision appears to have been issued orally and no transcript was provided to the Court. The appellate decision affirms U.S. Bank's standing to file the foreclosure complaint, but does not address any other substantive issues that were litigated, nor does it confirm which issues were necessary to the trial court's decision. This Court, therefore, has no way to determine from the record whether the defenses now raised by Defendant were actually litigated and whether the previous determinations addressing those defenses, if any, were necessary to the trial court's decision. At a minimum, Plaintiff has failed to establish the second and third factors supporting non-mutual offensive collateral estoppel. Additionally, the facts have changed considerably since November 2013. The Court exercises its discretion in rejecting Plaintiff's argument that Defendant should be collaterally estopped.

Third, Plaintiff argues that Defendant's defenses are barred by the NJRA. The portion of the NJRA cited to by Defendant provides: "Any recorded document affecting the title to real property is, from the time of recording, notice to all subsequent purchasers, mortgagees and judgment creditors of the execution of the document recorded and its contents." N.J.S.A. 46:26A-12(a). Plaintiff argues that this portion of the statute makes Defendant a subsequent purchaser, thereby subjecting her to the terms and conditions of Plaintiff's mortgage. *See* Pl.'s Reply at 14.

Defendant cites to a separate New Jersey statute covering mortgages, which establishes that a purchaser of real estate shall not be deemed to have assumed the debt of an existing mortgage on the property unless expressly stated in writing. *See* N.J.S.A. 46:9-7.1. Plaintiff did not make any argument in its reply addressing this statute, which appears to be in direct conflict with how Plaintiff interprets the NJRA. Furthermore, none of the cases Plaintiff cites to address the applicability of this express writing requirement where, as here, real estate was conveyed via quit claim deed while subject to an existing mortgage.

The Court makes no finding as to whether these statutes are actually conflicting or as to which statute properly applies in the instant case. The Court only notes that real questions of law and fact remain that warrant full litigation. Thus, this factor favors vacating default. *See $55,518.05*, 728 F.2d at 194–95.

C. Defendant's Culpability

Plaintiff argues that Defendant's failure to respond was intentional and, therefore, culpable. *See* Pl.'s Reply at 16. Culpable conduct is an action taken willfully or in bad faith. *See Gross v. Stereo Component Sys., Inc.*, 700 F.2d 120, 123–24 (3d Cir. 1983). The record does not reflect willful conduct or bad faith on the part of Defendant. To the contrary, it is plainly Defendant's counsel who is responsible for the delayed response. *See* ECF No. 10. Oversights by counsel do not amount to the type of culpability required here. *See Dambach v. United States*, 211 F. App'x 105, 109–10 (3d Cir. 2006). This factor favors vacating default.

D. Motion to Release Funds

Finally, Plaintiff moves for the release of funds, which were portions of the insurance proceeds used by Defendant to purchase three properties in Essex County. *See* Certification of Sandhya M. Feltes ¶ 12, ECF No. 18-2. The Sheriff of Essex County distributed the funds to Plaintiff after service of this Court's preliminary injunction order and Plaintiff subsequently deposited them into a trust account. *See id.* at ¶¶ 13–15. As noted, the Court will vacate default and require the parties to fully litigate the issues before it. Plaintiff's request prior to a final judgment on the merits is improper and denied.

IV. CONCLUSION

For the reasons stated above, Plaintiff's motions for default judgment and release of funds are **DENIED**. Defendant's cross-motion to vacate default is **GRANTED**.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

Date: January 23, 2017

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

WILMINGTON SAVINGS FUND SOCIETY, FSB as Trustee of Stanwich Mortgage Loan Trust A, **Plaintiff,** **v.** **BERYL OTIENO-NGOJE,** **Defendant.**	Civ. No. 2:16-05631 **ORDER**

THIS MATTER comes before the Court on Plaintiff's motion to for a preliminary injunction pursuant to Federal Rule of Civil Procedure 65; for the reasons set forth in the accompanying opinion;

IT IS on this 17th day of November 2016, hereby,

ORDERED that Plaintiff's motion is **GRANTED**; and it is further

ORDERED that Defendant is prohibited from transferring, selling, encumbering, or disgorging any assets and/or real property owned in whole or in part by Defendant (individually or jointly) until the insurance proceeds are deposited with the Court; and it is further

ORDERED that a constructive trust and equitable lien in favor of Plaintiff be placed on that portion of the insurance proceeds still in Defendant's possession; and it is further

ORDERED that a constructive trust and equitable lien in favor of Plaintiff be placed on the following funds paid by Defendant to the Sheriff of Essex County, New Jersey, for the purpose of purchasing the following properties:

a. $50,000.00 deposited on July 5, 2016, for 4 Chestnut Road, West Orange, New Jersey 07052;

b. $53,000.00 deposited on August 16, 2016, for 102 West Northfield Road, Livingston, New Jersey 07039;

c. $60,000.00 deposited on July 19, 2016, for 28 Buena Vista Road, Cedar Grove, New Jersey 07009; and it is further

ORDERED that this order shall remain in full force and effect until such time as this Court specifically orders otherwise.

/s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

APPENDIX D

NB: Copy of Check for downpayment I gave My Attorney

Bank of America

Cashier's Check

No. 1006831

Notice to Purchaser - In the event this check is lost, mislaid or stolen, a stop payment may be placed on it. A lost or stolen check will be required prior to replacement. This check is void for negotiation after 90 days.

Date OCTOBER 17, 2007

36-1411/0
NBX

Banking Center NEWARK AVENUE

0090100 00003 001006831

BERYL A OTIENO

Remitter/Purchaser

10000.00

$

Pay **TEN THOUSAND DOLLARS AND 00 CENTS**

To The Order Of **STEPHANIE HAND-LITTLE LLC**
****

Authorized Signature

Bank of America, N.A.
San Antonio, Texas

VOID AFTER 90 DAYS

⑈1006831⑈ ⑆111000019⑆ 00164006048⑈

THE ORIGINAL DOCUMENT HAS REFLECTIVE WATERMARK ON THE BACK

THE ORIGINAL DOCUMENT HAS REFLECTIVE WATERMARK ON THE BACK

10-14-3774B 06-2005

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: CRIMINAL PART
ESSEX COUNTY
INDICTMENT NO.: 17-11-3154
A.D. # _____

STATE OF NEW JERSEY,

vs.

BERYL OTIENO-NGOJE,

Defendant.

TRANSCRIPT
OF
HEARING

Place: Essex County Veterans Cthse.
50 West Market Street
Newark, NJ 07102

Date: September 10, 2018

BEFORE:

HONORABLE MARK ALI, J.S.C.

TRANSCRIPT ORDERED BY:

BERYL OTIENO-NGOJE
Defendant

APPEARANCES:

JOHN RUSSELL, ESQ. (Assistant Prosecutor)
Attorney for the State

ALEXANDRA BRIGGS, ESQ.
Attorney for Defendant

Transcriber: Teresa Ulrich
PHOENIX TRANSCRIPTION
796 Macopin Road
West Milford, NJ 07480
(862)248-0670

Audio Recorded
Recording Opr: Lakisha Boyd

I N D E X

(Proceeding commenced at 9:41 a.m.)

THE COURT: Okay, we're on the record on page 17, number 53; State of New Jersey versus Otieno-Ngoje, indictment number 17-11-3154. May we have appearances for the record please.

MR. RUSSELL: Good morning, Your Honor, John Russell on behalf of the State.

MS. BRIGGS: Alexandra Briggs on behalf of Ms. Otieno-Ngoje.

THE COURT: Very good. So, it's set for trial, my understanding is the matter is going to be resolved through a plea agreement -- strike that, through a PTI acceptance; is that correct?

MS. BRIGGS: Yes.

THE COURT: I also received from the State -- well actually it's not from the State, from the Firm of Kaplin, Stewart, Meloff, Reiter and Stein of Blue Bell, Pennsylvania concerning the release of certain funds to a plaintiff in that civil case that were seized in this case; is that correct?

Did you receive a copy of this?

MR. RUSSELL: I did not, Your Honor.

THE COURT: You did not, well then --

MR. RUSSELL: Is that something that just arrived?

THE COURT: -- why don't you get a copy from my law clerk; okay.

MR. RUSSELL: Okay.

THE COURT: All right.

MR. RUSSELL: I don't know if that would apply here because we have really done away with the restitution requirement on the criminal case --

THE COURT: I -- look, all I have before me right now is -- I don't have Counsel from that firm here and all I have before me is what that State of New Jersey has brought before me; okay.

All right, so Ma'am what I'm going to do is go through this PTI order with you. Did you already go through it with your attorney?

MS. OTIENO-NGOJE: Yes, I did.

THE COURT: All right, very good. So it states that you are to serve 50 hours of community service; do you understand that?

MS. OTIENO-NGOJE: I do.

THE COURT: You are to pay an enrollment fee of $50; do you understand that?

MS. OTIENO-NGOJE: I do.

THE COURT: As well as what is called a Safe Neighborhood Assessment of $75; do you understand that?

MS. OTIENO-NGOJE: Yes, I understand.

THE COURT: Very good. You shall have no contact at any time with the victim in this case, Carrington Mortgage Services; do you understand that?

MS. OTIENO-NGOJE: I understand.

THE COURT: Just a little louder please.

MS. OTIENO-NGOJE: I understand.

THE COURT: Thank you. The thing is the microphone just picks up your voice it does not amplify it.

You must maintain gainful employment; do you understand that?

MS. OTIENO-NGOJE: Yes I do understand that.

THE COURT: You shall remain arrest and crime free for all crimes and not limited to forgery and theft; do you understand that?

MS. OTIENO-NGOJE: I understand.

THE COURT: Any violation of the conditions will result in termination of PTI; do you understand that?

MS. OTIENO-NGOJE: I understand.

THE COURT: Okay. It's a total of $125 and that is to be paid -- I guess we should come up with a payment schedule although this is a small amount, this is for a two year period.

What can your client pay per month?

MS. BRIGGS: Your Honor, she can pay it off in one lump sum but I'll just set it at $50 a month just to be safe.

THE COURT: Very good. All right, I am signing the order, it's for a two year period beginning --

MS. BRIGGS: Your Honor, just for the record, I did talk with Mr. Russell and he did proffer to me that there could be an opportunity for early release from the program and that -- so it might not actually be the full two years.

THE COURT: Well, I didn't state that because the requirement of no early release was crossed out so which means there could be early release.

MS. BRIGGS: Also, for the record, something Ms. Ngoje was concerned about was traveling and Mr. Russell is not placing any limitations on her being able to travel outside of the country.

THE COURT: I don't see why there should be.

MS. BRIGGS: Thank you.

THE COURT: Okay, the order is signed. Mr. Russell, please take a look at -- talk to my law clerk concerning -- making copies for yourselves of the order concerning the -- that separate order; okay.

Now what should Ms. Otieno-Ngoje do

concerning meeting with the Probation Officer?

COURT CLERK: Please remain in the courtroom for the Judgment.

THE COURT: Thank you.

MR. RUSSELL: Your Honor, I have just one thing if I may approach. I have the plea cut-off form that was signed by -- I think it was Judge Cronin as the acting, presiding.

THE COURT: Thank you very much.

(Proceeding concluded at 9:47 a.m.)

* * * * *

CERTIFICATION

I, Teresa Ulrich, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CourtSmart, from 9:41:50 to 9:47:39, is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate non-compressed transcript of the proceedings, as recorded.

/s/ Teresa Ulrich
Teresa Ulrich

AD/T 656
AOC Number

Phoenix Transcription LLC
Agency Name

08/02/19
Date

No. 20-

IN THE

Supreme Court of the United States

BERYL OTIENO-NGOJE

Petitioner,

v.

WILMINGTON SAVINGS FUNDS SOCIETY

Respondent.

On Petition for a Writ of Certiorari to the U.S.

Court of Appeals for the Third Circuit

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I Beryl Otieno- Ngoje, certify that the document contains 8,760 words, excluding the parts of the document that are exempted by the Supreme Court Rule 33.1(d).

I declare under penalty perjury that the foregoing is true and correct.

April 25, 2022

BERYL OTIENO-NGOJE

Pro-se

No. 20 -

Supreme Court of the United States

BERYL OTIENO-NGOJE
Petitioner,
v.
WILMINGTON SAVINGS FUNDS SOCIETY
Respondent.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

PROOF OF SERVICE

I, Beryl Otieno-Ngoje, hereby certify that I am a Pro-Se litigant, and that, pursuant to the Supreme Court Rule 29.5, I have this 25th day of April, 2022, I have served my petition for a Writ of Certiorari in the above captioned -case to the party below by first class postage mail at the following address:

I declare under penalty of perjury that the foregoing is true and correct

Sandhya Mathur Feltes, Esq
Union Meeting Corporate Center
910 Harvest Dr., P.O.Box 3037
BLUE BELL, PA 1942

Dated: April 25, 2022

4/28/2022

Beryl Otieno- Ngoje
Pro-Se

BERYL OTIENO- NGOJE