

22-112

No. _____

6th Circuit
21-1346

IN THE
Supreme Court of the United States

SIMONETTA VESPUCCI SUTTON,

PETITIONER,

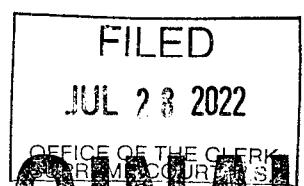
v.

MOUNTAIN HIGH INVESTMENTS, LLC,
A MICHIGAN LIMITED LIABILITY COMPANY,
INHERITANCE FUNDING GROUP 1, LLC,
A MICHIGAN LIMITED LIABILITY COMPANY,
PREMIUM HOMES REALTY, LLC,
A MICHIGAN LIMITED LIABILITY COMPANY,
REALTY SHARES REO, LLC,
A DELAWARE LIMITED LIABILITY COMPANY,
AND BOWMAN K. MITCHELL, A UTAH RESIDENT,
RESPONDENTS.

*PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

PETITION FOR WRIT OF CERTIORARI

Simonetta Vespucci Sutton
In Pro Per
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ORIGINAL

QUESTIONS PRESENTED

A. Whether The District Court Erred In Denying Petitioner's Motion To Remand When The Respondent, Realty Shares Had Failed To Meet The Statutory Requirement For Removal From The Wayne County Circuit Court To The United States Federal District Court?

Petitioner would answer "Yes"
Respondent would answer "No"
The District Court answered "No"
This Court should answer "Yes"

B. Whether The District Court Erred In Denying Petitioner's Request For A Default Judgment Against Respondent, Realty Shares?

Petitioner would answer "Yes"
Respondent would answer "No"
The District Court answered "No"
This Court should answer "Yes"

C. Whether The District Court Erred In Granting Respondent, Realty Shares Reo, LLC'S Motion To Dismiss?

Petitioner would answer "Yes"
Respondent would answer "No"
The District Court answered "No"
This Court should answer "Yes"

D. Whether The District Court Erred In Amending The Judgment In Favor Of Respondent, Petitioner And Against Petitioner, Simonetta Vespucci Sutton And The Claims In Petitioner's Complaint Against Named Defendants Mountain High Investments, LLC, Inheritance Funding Group 1, LLC, Premium Homes Realty, LLC, And Bowman K. Mitchell Being Dismissed Without Prejudice?

Petitioner would answer "Yes"

Respondent would answer "No"

The District Court answered "No"

This Court should answer "Yes"

PARTIES TO THE PROCEEDING

SIMONETTA VESPUCCI SUTTON¹,

PETITIONER,

v.

MOUNTAIN HIGH INVESTMENTS, LLC,
A MICHIGAN LIMITED LIABILITY COMPANY,
INHERITANCE FUNDING GROUP 1, LLC,
A MICHIGAN LIMITED LIABILITY COMPANY,
PREMIUM HOMES REALTY, LLC,
A MICHIGAN LIMITED LIABILITY COMPANY,
REALTY SHARES REO, LLC,
A DELAWARE LIMITED LIABILITY COMPANY,
AND BOWMAN K. MITCHELL, A UTAH RESIDENT,

RESPONDENTS.

¹ This document was drafted or partially drafted with the assistance of a lawyer licensed to practice in the State of Michigan, pursuant to MRPC 1.2(b).

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit and the opinion of the United States District Court for the Eastern District of Michigan were unpublished opinions.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit, affirming the appeal from the District Court's March 8, 2021, Opinion and Order Denying the Petitioner's Motion to Remand; and Granting Respondent, Realty Shares REO, LLC's Motion to Dismiss and the March 9, 2021, Amended Judgment in favor of Respondent, Realty Shares REO, LLC. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1)

RELEVANT PROVISIONS INVOLVED

28 U.S. Code 1446 (b) (2) (B); **MCR 2.603; MCR 2.105**; In Hill v Frawley, 155 Mich App 611, 614; 400 NW2d 328 (1986)

STATEMENT

On March 3, 2020, Petitioner commenced this action in the Wayne County Circuit Court. The case was transferred to the United States District Court for the Eastern District of Michigan on June 23, 2020. The basis of subject matter jurisdiction is the diversity of the parties pursuant to 28 U.S.C 1332.

The District Court granted Respondent, Realty Shares REO, LLC's Motion to Dismiss on March 8, 2021, and denied Petitioner's Motion to Remand. The Petitioner appealed to this 6th Circuit Court of Appeals from the District Court's granting of the Respondents Motion to Dismiss and denying the Petitioner's Motion to Remand on April 7, 2021.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C 1291.

This appeal is from a final order of the District Court which disposed of all parties' claims.

REASONS FOR GRANTING THE PETITION

ARGUMENT

- A. **The District Court erred in Denying Petitioner's Motion To Remand when the Respondent, Realty Shares had failed to meet the statutory requirement for removal from the Wayne County Circuit Court to the United States Federal District Court.**

1. Service of process

In the case at bar, the District Court agreed with the Respondent, that there was no basis to find proper service. However, Respondent, Realty Shares' claim that they were not properly served because their resident agent was not personally served is without merit. MCR 2.105(E) (D) is a non-issue because Petitioner received actual notice under MCR 2.105(J) (3) which states as follows:

(3) An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.

Petitioner's actual notice of the Complaint is evidenced by the fact that the Complaint was signed for by the Register Agent or its designee. In *Hill v Frawley*, 155 Mich App 611, 614; 400 NW2d 328 (1986) the Court stated that an action shall not be dismissed for improper service of process unless the service failed to

inform the defendant of the action within the time provided in these rules for service." "Thus, if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill v Frawley*, 155 Mich App 611, 614; 400 NW2d 328 (1986).

The failure to technically comply with MCR 2.105(E) does not render service of process ineffective. Notably, the rules applicable to service of process "are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant." MCR 2.105(J)(1). As a result, strict compliance with the rules is not mandated. MCR 2.105(J)(3); *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich.App. 502, 505-506; 448 N.W.2d 43 (1989). Rather, "[t]his Court has held that service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defense." *Bunner v Blow-Rite Insulation Co*, 162 Mich.App. 669, 673-674; 413 N.W.2d 474 (1987).

Because the purpose underlying the rules governing service of process is to provide actual notice of a lawsuit and an opportunity to defend, MCR 2.105(I)(1), courts shall not dismiss an action based on improper service unless the service failed to inform the defendant of the existence of a claim within the time specified within the court rules. MCR 2.105(J)(3); *Holliday v Townley*, 189 Mich.App. 424, 425; 473 N.W.2d 733 (1991). Contrary to the majority's opinion,

the focus is not on the method of process used to provide the notice but rather on whether the service used actually provided timely notice of the complaint to an authorized individual.

Defendants may argue MCR 2.105(J)(3) does not apply where there is "a complete failure of service of process." Holliday v Townley, 189 Mich.App. 424, 425; 473 N.W.2d 733 (1991). Contrary to that argument, however, the facts presented here did not establish a "complete failure of service of process in that evidenced by the fact that Complaint was signed for by the Register Agent or its designee. The Respondent was "aware of" the pending action as a result of the service under MCR 2.105(J)(3).

A motion for Default Judgment shall be granted unless good cause is shown and an affidavit of facts showing a meritorious defense is filed. Respondent, Realty Shares cannot show good cause in that Respondent, Realty Shares was served with a copy of the Complaint on March 27, 2020, and the Respondent, had until April 24, 2020, to file its Answer. Petitioner filed her Motion for a Default Judgment under MCR 2.603. MCR 2.603(A)(2) MCR 2.603(A)(2) MCR 2.105(J) (3)

A motion to set aside a default or a default judgment, except when grounded on lack of jurisdiction over the defendant, shall be granted only if good cause is shown and **an affidavit of facts showing a meritorious defense** is filed. Defendants cannot show good cause in that a motion for Default Judgment shall be granted unless good cause is shown and an affidavit of facts showing a meritorious defense is filed. Respondent cannot show good cause in that Respondent

was served with a copy of the Complaint on March 27, 2020, and the Respondent, had until April 24, 2020, to file its Answer. Petitioner filed her Motion for a Default Judgment under MCR 2.603. MCR 2.603(A)(2) MCR 2.603(A)(2) MCR 2.105(J) (3)

Finally, Respondents do not have a meritorious defense in that the Respondents unlawfully foreclosed on the subject property in breach of Quiet Title statutes and case law.

2. FEDERAL JURISDICTION DOES NOT EXIST BECAUSE THE REMOVAL WAS UNTIMELY

The timeframe for Respondent, Realty Shares to remove the Wayne County Circuit case to Federal Court is governed by 28 U.S. Code 1446 (b) (2) (B) which states that “defendant shall have 30 days after receipt by or service on that defendant” to file a removal. Respondent, Realty Shares that “(t)he other Defendants in this action have not appeared in this case, they were improperly joined, and no party including Realty Shares has been served. The Respondent may therefore remove under 28 U.S.C. § 1446(b)(2) is just plain wrong. Respondent, Realty Shares was served on March 27, 2020, and a default was entered on June 19, 2020. Respondent, Realty Shares had until April 24, 2020, to remove the case. However, the removal did not occur until June 23, 2020. Thus, Federal Jurisdiction does not exist because Respondent, Realty Shares’ removal was untimely.

3. DIVERSITY JURISDICTION DOES NOT EXIST BECAUSE SEVERAL DEFENDANTS ARE LOCATED IN THE STATE OF MICHIGAN

Diversity jurisdiction does not exist in the case at bar for the reason that several Defendants are located in the State of Michigan. The nondiverse co-Defendants are as follows:

- A. Defendant, Mountain High Investments, LLC, a Michigan limited liability company, upon information and belief is located in Eaton Rapids, MI and doing business in Wayne County, State of Michigan.
- B. Defendant, Inheritance Funding Group 1, LLC, a Michigan limited liability company, upon information and belief is located in Grosse Pointe, MI and doing business in Wayne County, State of Michigan.
- C. Defendant, Premium Homes Realty, LLC, a Michigan limited liability Company, upon information and belief is located in Brighton, MI. and doing business in Wayne County, State of Michigan.

Respondent, Realty Shares' assertion that none of the Defendants were properly joined or served is simply not true. The Complaint includes nondiverse co-

defendants, Defendant Mountain High of which has been served (ECF No 1-2, Page ID 23-36) and therefore Removal is not applicable because of lack of diversity, thus, 28 U.S.C 1441 and 28 U.S.C. 1332 do not apply.

For the reasons stated above, **Respondent, Realty Shares'** argument that **None of the other Defendants here have been properly joined or served or "forum defendant"** argument does not apply and simply not true.

THIRTY DAYS TO SEEK TO REMAND

Respondent, Realty Shares' argument that 28 U.S.C. §1441(b) was waived and 28 U.S.C. § 1447(c) is the correct section is a distinction without a difference at best and nonsense at worse. **Respondent, Realty Shares** cited 28 U.S.C. §1441 and 28 U.S.C. §1441(b) as its basis for removal and Plaintiff cited 28 U.S.C. §1441 and 28 U.S.C. §1441(b) as its basis for remand. (ECF No 4-2, Page ID 398-463)

B. THE DISTRICT COURT ERRED IN DENYING PETITIONER'S REQUEST FOR A DEFAULT JUDGMENT AGAINST RESPONDENT, REALTY SHARES.

MCR 2.603

MCR 2.603(A)(1) provides that a default may be entered against a party who has "failed to plead or otherwise defend" as required by the court rules. "Once

the default of a party has been entered, that party may not proceed with the action until the default has been set aside by the court" in accordance with MCR 2.603(D) or MCR 2.612. MCR 2.603(A)(3). (Emphasis added)

A defaulted party may move to set aside the default before entry of a default judgment or to set aside a default judgment within 21 days after the default judgment was entered. MCR 2.603(D)(1) and (2); ISB Sales Co v Dave's Cakes, 258 Mich App 520, 528, 530; 672 NW2d 181 (2003). An order granting a default judgment is a final judgment, MCR 7.202(6)(a)(i); Allied Electric Supply Co v Tenaglia, 461 Mich 285, 288; 602 NW2d 572 (1999), and relief from that judgment may also be sought under MCR 2.612(C) after the judgment is entered. Alken-Ziegler, Inc v Waterbury Headers Corp, 461 Mich 219, 234 n 7; 600 NW2d 638 (1999).

A motion to set aside a default or default judgment shall be granted only for a showing of **good cause** and the filing of an **affidavit** of facts showing a meritorious defense. MCR 2.603(D)(1); Woods v SLB Prop Mgt, LLC, 277 Mich App 622, 628; 750 NW2d 228 (2008). The moving party bears the burden of demonstrating good cause and a meritorious defense. Saffian, 477 Mich at 14.

An affidavit of meritorious defense "requires the affiant to have personal knowledge of the facts, state admissible facts with particularity, and show that the affiant can testify competently to the facts outlined in the affidavit." Huntington Nat'l Bank, 292 Mich App at 390. Factors relevant to the existence of a meritorious defense include whether there is evidence that: (1) the plaintiff cannot prove or the defendant can disprove an

element of the claim or a statutory requirement; (2) ground for summary disposition exists; and (3) the plaintiff's claim rests on inadmissible evidence. Shawl, 280 Mich App at 238. However, in the case at bar **Respondent, Realty Shares** failed to file any type of affidavit.

MCR 2.105

Moreover, **Respondent, Realty Shares'** claim that it was not properly served according to MCR 2.105(E) is without merit. MCR 2.105(E) (D) is a non-issue because **Respondent, Realty Shares** received actual notice under MCR 2.105(J) (3) which states as follows:

- (3) An action shall not be dismissed for improper service of process unless the service failed to inform the defendant of the action within the time provided in these rules for service.

Respondent, Realty Shares' actual notice of the Complaint is evidenced by the fact that **Respondent, Realty Shares** filed their Notice to Remove and subsequently filed their Motion to Dismiss. What is glaringly missing is any affidavit from the **Respondent, Realty Shares** stating that they were not served and how they ultimately obtained notice of the Complaint. Without more information, this Court cannot establish when **Respondent, Realty Shares** was served, and its Notice of Removal was due.

In *Hill v Frawley*, 155 Mich App 611, 614; 400 NW2d 328 (1986) the Court stated that an action shall not be dismissed for improper service of process unless

the service failed to inform the defendant of the action within the time provided in these rules for service." "Thus, if a defendant actually receives a copy of the summons and complaint within the permitted time, he cannot have the action dismissed on the ground that the manner of service contravenes the rules." *Hill v Frawley*, 155 Mich App 611, 614; 400 NW2d 328 (1986).

The failure to technically comply with MCR 2.105(E) does not render service of process ineffective. Notably, the rules applicable to service of process "are not intended to limit or expand the jurisdiction given the Michigan courts over a defendant." MCR 2.105(J)(1). As a result, strict compliance with the rules is not mandated. MCR 2.105(J)(3); *Alycekay Co v Hasko Constr Co, Inc*, 180 Mich.App. 502, 505-506; 448 N.W.2d 43 (1989). Rather, "[t]his Court has held that service-of-process rules are intended to satisfy the due process requirement that a defendant be informed of the pendency of an action by the best means available, by methods reasonably calculated to give a defendant actual notice of the proceeding and an opportunity to be heard and to present objections or defense." *Bunner v Blow-Rite Insulation Co*, 162 Mich.App. 669, 673-674; 413 N.W.2d 474 (1987).

Because the purpose underlying the rules governing service of process is to provide actual notice of a lawsuit and an opportunity to defend, MCR 2.105(I)(1), courts shall not dismiss an action based on improper service unless the service failed to inform the defendant of the existence of a claim within the time specified within the court rules. MCR 2.105(J)(3); *Holliday v Townley*, 189 Mich.App. 424, 425; 473 N.W.2d 733 (1991). Contrary to the majority's opinion,

the focus is not on the method of process used to provide the notice but rather on whether the service used actually, provided timely notice of the complaint to an authorized individual.

Respondent, Realty Shares may argue MCR 2.105(J)(3) does not apply where there is "a complete failure of service of process." *Holliday v Townley*, 189 Mich.App. 424, 425; 473 N.W.2d 733 (1991). Contrary to that argument, however, the facts presented here did not establish a "complete failure of service of process in that evidenced by the fact that for some reason **Respondent, Realty Shares** on June 23, 2020, filed a Notice of Removal.

Since the **Respondent, Realty Shares** was "aware of" the pending action as a result of the removal filing and Motion to Dismiss, then service was proper under MCR 2.105(J)(3). We just do not know how they became aware or when. Thus, factually and legally, **Respondent, Realty Shares** has no defense regarding service.

MOTION FOR DEFAULT JUDGMENT

A Motion for Default Judgment shall be granted unless good cause is shown and an affidavit of facts showing a meritorious defense is filed. **Respondent, Realty Shares** cannot show good cause in that **Respondent, Realty Shares** was served with a copy of the Complaint on March 27, 2020, and the **Respondent, Realty Shares** had until April 24, 2020, to file its Answer. Petitioner filed her Motion for a Default Judgment under MCR 2.603. MCR 2.603(A)(2) MCR 2.603(A)(2) MCR 2.105(J) (3)

With regards to the Default, the party seeking entry of a Default must provide notice of the entry to the defaulted party who has not appeared and file a proof of service and copy of the notice with the court. MCR 2.603(A)(2); MCR 2.603(A)(2)(b). Petitioner has complied with the Default notice in her Motion to Remand or in the alternative Motion for Default Judgment. **Respondent, Realty Shares** has failed to Motion this Court to Set Aside the Default.

Finally, **Respondent, Realty Shares** does not have a meritorious defense in that the Respondents unlawfully foreclosed on the subject property in breach of Quiet Title statutes and case law.

C. THE DISTRICT COURT ERRED IN GRANTING RESPONDENT, REALTY SHARES REO, LLC'S MOTION TO DISMISS.

- a. The Foreclosure Sale Should Be Set Aside Even After the Expiration of the Redemption Period.**
 - a. Count I and Count II Should NOT Be Dismissed.**
 - a) Quite Title-Plaintiff Can Establish Legal Violations Sufficient To Demonstrate The Need For Quiet Title**

In the case at bar, the subject property was sold at a Sheriff's Sale on August 16, 2018. Therefore, Petitioner had until February 16, 2019, to redeem the subject property. While the potential expiration of the redemption period has serious consequences for Petitioner's legal rights, the Court retains the power to rescind the foreclosure sale -- even after the expiration of the redemption period -- if the sale itself was invalid based on a showing of fraud or irregularity. *Overton v. Mortg. Elec. Registration Sys.*, No. 284950, 2009 WL 1507342, at *1. Otherwise, statutory foreclosures could never be set aside once the redemption period had expired. While 'statutory foreclosures should not be set aside without very good reason,' it is possible for courts to set statutory foreclosures aside." *Hornbuckle v. Mortg. Elec. Registration Sys., Inc.*, No. 10-14306, 2011 WL 5509214, at *5 (E.D. Mich. Nov. 10, 2011) (quoting *United States v. Garno*, 974 F. Supp. 628, 633 (E.D. Mich. 1997)). See also *Langley v. Chase Home Fin. LLC*, No. 10-604, 2011 WL 1130926, at *2 n. 2 (W.D. Mich. Mar. 28, 2011).

Moreover, MCL 600.2932 provides, in pertinent part, as follows:

(1) Any person, whether he is in possession of the land in question or not, who claims any right in, title to, equitable title to, interest in, or right to possession of land, may bring an action in the circuit courts against any other person who claims or might claim any interest inconsistent with the interest claimed by the plaintiff, whether the defendant is in possession of the land or not

(3) If the plaintiff established his title to the lands, the defendant shall be ordered to release to the plaintiff all claims thereto. In an appropriate case the court may issue a writ of possession or restitution to the sheriff or other proper officer of any county in this state in which the premises recovered are situated

(5) Actions under this section are equitable in nature.

Petitioner alleges that she is the owner of the Subject Property. One or more of the Respondents claim an interest in the Subject Property inconsistent with the interest claimed by Petitioner. For the reasons outlined in infra, Respondents do not have an interest in the Subject Property, and their claims to the contrary are therefore without merit.

Petitioner has suffered damages as a result of Respondents' wrongful claim to an interest in Petitioner's real property. For the reasons set forth above, the Sheriff's Deed to the Subject Property is void or voidable. For the reasons set forth above, the Sheriff's Deed has created a cloud on the title to the Subject Property that can only be resolved through a quiet title action by Petitioner against Respondents.

Therefore, despite the expiration of the redemption period, Petitioner may challenge the foreclosure of the subject property and request the opportunity to do so based upon the facts of this case, the supporting documentation, the applicable case law and legal argument set forth below.

b. Count II Wrongful Foreclosure By Advertisement

See argument in Section A above.

c. Count III Unjust Enrichment

Under Belle Isle Grill Corp vs. Detroit, 256 Mich. App. 463 (2003) the elements of a claim for unjust enrichment are 1.) receipt of a benefit by the Defendants from the Plaintiffs and 2.) an inequity resulting to Plaintiffs because of the retention of the benefit by Defendant. In the case at bar, the actions of the Defendants were intentionally/unintentionally/negligently designed to preclude the Petitioner from keeping possession of her home. The Respondents knew or should have known that Petitioner had a financial interest in the subject property. Notwithstanding that knowledge, the Respondents failed to communicate with the Petitioner and went forward with the Sheriff's Sale, and ultimately refused to allow Petitioner to redeem the subject property before the expiration of the redemption period on February 16, 2019. As a result of the conduct of the Respondents the subject property has ended up in the name of the Respondent, Realty Shares REO, LLC. If the Sheriff Deed were to stand, Respondent would be unjustly enriched in excess of \$25,000.00 and Petitioner would suffer a loss in that amount, plus the loss of the subject property as a result of Petitioner's attempts to communicate with the Respondents in

order to continue making mortgage payments, pay any arrearages, or any other commendations and to redeem the subject property before the expiration of the redemption period to no avail.

**d. Count IV Fraud, Based Upon Silent Fraud And
Bad Faith Promises**

Traditional common-law requires the Plaintiff to establish the following: a.) The defendant made a representation of a material fact. b.) The representation was false when it was made. c.) The defendant knew it was false when it was made or made it recklessly, without knowledge of its truth. d.) The defendant made the representation with the intention of inducing the plaintiff's reliance. e.) The plaintiff acted in reliance upon it. f.) The plaintiff was damaged as a result. A&A Asphalt Paving Co v Pontiac Speedway, Inc,363 Mich 634, 110 NW2d 601 (1961). The fraud may be worked by silence. Silent fraud arises where the defendant has an affirmative duty to speak but fails to disclose material facts, causing the plaintiff to have a false impression. M&D,Inc v McConkey,231 Mich App 22, 585 NW2d 33 (1998),appeal denied,459 Mich 962, 590, 11NW2d 536 (1999).

Silence may also lead to a finding of fraud if that party later acquires information that renders previous representations misleading and does not pass it on. See Hord vEnvironmental Research Inst of Michigan,463 Mich 399, 617 NW2d 543 (2000);United StatesFid & Guar Co v Black,412 Mich 99, 313 NW2d 77 (1981);

Temborius v Slatkin, 157 Mich App 587, 403 NW2d 821 (1986).

In the case at bar, Petitioner attempted to make the monthly payments to Respondent(s) through Mountain High Investments, LLC. However, Respondent(s) refused to communicate with Petitioner. As a result of Respondent(s)' failure to communicate with Petitioner, Petitioner was forced to file a Chapter 13 Bankruptcy and Chapter 7 Bankruptcy. The Bankruptcies were subsequently dismissed. After the Bankruptcies were dismissed, Petitioner attempted to communicate with Respondent(s) in order to continue making mortgage payments, pay any arrearages and or any other commendations through Mountain High Investments, LLC to no avail.

Respondent(s) went forward with the Sheriff's Sale on August 16, 2018. During the redemption period, Respondent(s) refused to allow Petitioner to redeem the subject property before the expiration of the redemption period on February 16, 2019.

e. Count V Request For Conversion To Judicial Foreclosure

A foreclosure which is governed by MCL 600.3101 ("judicial foreclosure") requires some Court supervision and/or review of the foreclosure procedure and sale and would offer protections to Petitioner which is not available under a foreclosure by advertisement. A judicial foreclosure requires the foreclosing entity to file a lawsuit in the county in which the property is located and serve the lawsuit according to applicable

court rules. The homeowner then has the option to respond to the complaint and may also file a counter-claim if he or she deems it necessary as well as provides the option for discovery and if needed, a trial by either a judge or jury.

If the foreclosing entity is successful in the judicial foreclosure lawsuit, a judgment will be entered which provides the right to sell the property. There are two extra weeks of publication required for a judicial foreclosure sale (a foreclosure by advertisement requires 4 successive weeks of publication (MCL 600.3208); a judicial foreclosure requires 6 successive weeks (MCL 600.6052)).

The publication for a judicial foreclosure cannot begin until at least 21 days (appeal period – MCR 7.204(A)(1)(a)) from the date of the judgment of sale (MCR 3.410(C)) and 6 months from the date of the filing of the Complaint (MCR 3.410(C)(1)) and the sale of property sold under a judgment of foreclosure may not occur until at least six months from the filing of the Complaint (MCL 600.3115). Also, in a judicial foreclosure, the Court may, on request of a party, or on its own initiative, set an “upset price” – the minimum price at which the real property covered by the mortgage may be sold at the sale under the foreclosure proceedings. MCL 600.3155.

If they are legally allowed to do so, there would be no prejudice to Respondents if they were required to foreclose judicially instead of simply by advertisement. If allowed to proceed, the foreclosure which is the subject of this Complaint should be ordered to proceed under the Michigan judicial foreclosure statute, MCL 600.3101, et seq.

f. Count VI Injunction And Other Relief

Since the redemption period expired in violation of the aforementioned counts the Petitioner has a great **likelihood of success on the merit** of the case. The **irreparable harm** is obvious, the subject matter is Real Property and the Petitioner would ultimately be evicted from her home with no adequate remedy at law Petitioner has **no adequate remedy at law**.

The **harm to the Respondent(s) is considerably less** if the Temporary Restraining Order is issued than the harm to the Petitioner if the Temporary Restraining Order does not issue for the reason that if Petitioner is evicted from her home the subject property will most probably be vandalized and the value of the property will be greatly diminished. While on the other hand, if the Temporary Restraining Order is issued and continued the subject property is maintained. The granting of this **Temporary Restraining Order will further the public interest**. The Petitioner prays that this Honorable Court shall set aside the Sheriff's Sale based upon the fact that Respondent(s) unlawfully went forward with the Sheriff's Sale and failed to rescind the unlawful Sheriff's Sale in order for the Petitioner to have the opportunity to redeem the subject property.

The right to have equitable controversies dealt with by equitable methods is as sacred as the right of trial by jury. *Brown v. Kalamazoo Circuit Judge*, 75 Mich 274 at 284, (1988). After hearing the evidence, the court may grant a constructive trust over the property in favor of Plaintiff. A constructive trust is

an equitable remedy that the court may impose where the facts justify it, *In re Estate of Swantek*, 172 Mich App 509, 517; 432 NW2d 307 (1988). Constructive trusts are creatures of equity. Michigan has permitted its courts to exercise their equitable powers to preclude forfeiture or foreclosure under unusual circumstances or where the party against whom the action has been brought has raised a valid fraud claim. *Mitchell v Dahlberg* 215 Mich App 718, 547 NW2d 74 (1996), quoting *Senters v Ottawa Savings Bank, FSB*, 443 Mich. 45, 56-57; 5-3 NW2D 639 (1999).

D. THE DISTRICT COURT ERRED IN AMENDING THE JUDGMENT IN FAVOR OF RESPONDENT, REALTY SHARES REO, LLC AND AGAINST PETITIONER, SIMONETTA VESPUCCI SUTTON AND THE CLAIMS IN PETITIONER'S COMPLAINT AGAINST NAMED RESPONDENTS, MOUNTAIN HIGH INVESTMENTS, LLC, INHERITANCE FUNDING GROUP 1, LLC, PREMIUM HOMES REALTY, LLC, AND BOWMAN K. MITCHELL BEING DISMISSED WITHOUT PREJUDICE.

For the reasons stated above, the District Court erred in amending the

Judgment in favor of Respondent, Realty Shares REO, LLC and against Petitioner, Simonetta Vespucci Sutton and the claims in Petitioner's Complaint against named Respondents Mountain High Investments, LLC, Inheritance Funding Group 1, LLC, Premium Homes Realty, LLC, and Bowman K. Mitchell being

dismissed without prejudice.

CONCLUSION

Petitioners request that the District Court's March 8, 2021, Opinion and Order Denying the Petitioner's Motion to Reman and Granting the Respondent, Realty Shares, REO, LLC's Motion to Dismiss and the March 9, 2021, Amended Judgment in favor of the Respondent, Realty Shares REO, LLC's be be reversed and that this matter be remanded to the District Court.

Respectfully submitted,

/s/ Simonetta Vespucci Sutton
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Dated: July 29, 2022