23-5376
No.

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

ENRIQUE DIAZ and
MARIA DIAZ,
Petitioners

v.

NATIONSTAR MORTGAGE, LLC,
d/b/a Mr. Cooper,
Respondent.

On Petition for writ of certiorari to The
United States Court of Appeals for The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioners in proper persons

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE ELEVENTH CIRCUITS DECISION VIOLATES PRINCIPLES OF FUNDAMENTAL FAIRNESS BY HAVING DECIDED AN ISSUE OF BOTH FIRST IMPRESSION AND OF GREAT PUBLIC IMPORTANCE[1/] BASED UPON 1) A PRO SE PLEADING IT, SUA SPONTE, FOUND DEFECTIVE, AND 2) A CLEARLY ERRONEOUS REPRESENTATION OF CRUCIAL MATERIAL FACTS BY THE LOWER COURT?

2. WHETHER THE ELEVENTH CIRCUIT ERRED IN FINDING THAT A PRO SE PRISONER ABANDONED AN ISSUE THAT WAS SUBJECT TO DE NOVO REVIEW, WHERE THE PRO SE PRISONER ADOPTED, INCORPORATED AND REALLEGED INTO HIS INITIAL BRIEF THE ARGUMENTS BELOW BECAUSE THE PRISON LAW LIBRARY LOST HIS ARGUMENT DURING THE WORD PROCESSING OF THE BRIEF AND MOVING FOR AN EXTENSION OF TIME WAS NOT AN OPTION?

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1. The contractual provision at bar is found in more than 80% of the hundreds of millions of U.S. Mortgages and the interpretation challenged herein would only adversely affect the mortgagors that are struggling (i.e., those that are 31 days or more late on their payments and need hardship consideration).

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CONTRACTUAL PROVISION INVOLVED

5. Property Insurance. Borrower shall keep the improvements now existing or hereafter erected on the Property insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to earthquakes and floods, for which Lender requires insurance ...

If Borrower fails to maintain any of the coverages described above, Lender may obtain insurance coverage, at Lender's option and Borrower's expense...

In the event of loss, Borrower shall give prompt notice to the insurance carrier and Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. ...

OPINION BELOW

The opinion of the United States Court of Appeals, Eleventh Circuit affirming the dismissal of petitioners' complaint is attached as Appendix B and is not reported in the Federal Reporter, but petitioners expect it will be reported by WL and LEXIS. The petition for panel rehearing was denied on March 28, 2023 (Appendix A).

JURISDICTIONAL STATEMENT

The United States Court of Appeals, Eleventh Circuit affirmed the lower court's dismissal of the complaint on January 20, 2023 (Appendix B) and denied petitioners' petition for panel rehearing on March 28, 2023 (Appendix A). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners Enrique Diaz and Maria Diaz (the Diazes) are homeowners. In 2007 Enrique Diaz was remanded to prison for a technical violation of his parole (i.e., testing positive for drugs via urinalysis). Without his income Maria Diaz could not afford to make the mortgage payments on their home and she turned in the keys to her residence of over twenty years to the mortgagee and moved out. The mortgagee foreclosed with no opposition from the Diazes and obtained a judgment of foreclosure. Unable to sell the property and fearing vandalism the mortgagee lured Maria Diaz back and had the foreclosure court rescind the order of foreclosure. The mortgagee filed a Stipulation Agreement with the court it used to lure Maria Diaz back to her home. Under the terms of the Stipulation Agreement (S/A) the Diazes were to make six (6) monthly payments of $1,643.00 and one $2,000.00 fee in a timely fashion and the mortgagee would allow the Diazes to apply for a loan modification. After making all the timely payments the Diazes applied for the loan modification but the mortgagee, rather than considering the application told Maria Diaz that she would have to make additional payments under a Trial Period Plan (TPP). The TPP required three (3) payments of $1,643.00 and the Diazes made them, as well as a fourth payment for a total of $18,430 only to have the mortgagee falsely state that they had not made the required payments and this matter has been under continuous litigation since.

In 2017 the Diazes home was damaged by Hurricane Irma. The roof was severely damaged and the Diazes filed a claim with United Property & Casualty Insurance Company (UPC) which UPC depreciated. After hiring a lawyer UPC issued a check for $35,108.00 to replace the roof, ceilings, walls, etc...

By this point the mortgagee, U.S. Bank, had hired the respondent Nationstar as its loan servicer so the check was made payable to Maria Diaz and Nationstar. when Maria Diaz sent the check she called Nationstar to inquire on how they would endorse the check so she could start the repair process. Nationstar freely spoke with Maria Diaz and gave her instructions on where to mail the check. Upon tracking and verifying receipt Maria Diaz called Nationstar and was advised that pursuant to paragraph five (5) of the mortgage Nationstar was exercising its right to oversee the repairs and the disbursal of the insurance proceeds. Nationstar instructed Maria Diaz (Ms. Diaz) to secure a general contractor (GC), have him submit a detailed estimate and, inter alia, execute a waiver of lien.

After complying with all the requirements Ms. Diaz called Nationstar about the first payment of $9,918.00 for the roof replacement. Nationstar instructed Ms. Diaz that because the underlying mortgage was in litigation they could not talk to her. Ms. Diaz continued calling them daily explaining that the mortgage was always in litigation and that such never was an issue, that rain water was pouring into her home, that the roofer had the repair

materials on site and that Nationstar's delay was causing further damage to the property and to Ms. Diaz who was living in the property. After four (4) months Nationstar issued a check for $ 9,918.00 to the GC for the roof replacement. Because the roof replacement estimate was $ 15,670.00, and because the GC feared having to wait another four months for the next $ 6,297.50 from Nationstar the GC refused to replace the roof unless he was paid in full; he had to pay his workers and he had been waiting for four (4) months to do the roof.

Ms Diaz continued calling Nationstar and although they would not talk to her she explained the situation and requested an additional payment of $ 6,297.50 to have the roof replaced. Ms. Diaz explained that it was raining, that their delays were exacerbating the property damages, that she was nervous and sick. After dozens of calls and constant emails with weekly weather forecasts a Nationstar representative told Ms. Diaz to use the $ 9,918.00 for the ceiling repairs.

Despite the backwardness of such instruction Ms. Diaz had the GC replace the ceiling on March 15, 2019. She immediately called Nationstar for the prompt inspection required by paragraph 5 of the mortgage and by the situation itself, but Nationstar refused to talk to her. Counsel for Nationstar, Henry Bolz IV had emailed Ms. Diaz instructing her not to call Nationstar anymore so Ms. Diaz called and emailed Attorney Bolz explaining the repairs, the predicted March weather and the needed inspection. Twelve (12) days later Ms. Diaz received an email from Attorney Bolz.

informing her that he had unilaterally set an inspection for April 1, 2019 between 8:30 am - 10:30 am to "Please confirm date and time is acceptable." Ms. Diaz immediately emailed that she had a doctor's appointment for April 1, 2019 but that she'd be home by noon, to "please confirm the change of time"[2] Attorney Bolz "You are not available" and said he'd reset. Instead he disappeared and would not respond to numerous calls and emails.

Despite Attorney Bolz's warning Ms. Diaz continued calling Nationstar and on April 16, 2019 a sympathetic Nationstar employee gave Ms. Diaz the telephone number to MSC Inspections so she could set the inspection herself. Within 7 days Ms. Diaz was able to have the inspection completed with a report and pictures sent to Nationstar.

On May 1, 2019, rather than issuing the $15,670.00 to replace the roof Nationstar issued a check for $6,297.50 and the GC refused to accept it. Calls and emails by Ms. Diaz to Nationstar were ignored.

In the midst of this mess Nationstar notifies Ms. Diaz that they have taken out an insurance policy on this severely damaged property, without any inspection, and that Ms.

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2. Unbeknownst to her Ms. Diaz's sickness which included an upper respiratory infection, urinary tract infection, eye infections and constant coughing was a result of mold that defeloped in the home as a result of the rain water that poured in and accumulated in the walls, ceilings and air conditioner vents. The appointment was urgent.

Diaz now owes $4,630.00 for the coverage. The insurer American Security Insurance Company (ASIC) would not talk to Ms. Diaz or provide any documents related to the coverage because she is not a party to the policy.

On June 16, 2019 the living room ceiling collapsed bringing down the air conditioning vents causing Ms. Diaz to slip and hurt her side requiring a visit to urgent care. A claim to ASIC was denied based upon Nationstars failure to disclose the damages that pre existed.

The Diazes filed a complaint in the United states District Court pursuant to Diversity of Citizenship jurisdiction (28 U.S.C., §1332) alleging Breach of Contract (Count I); Breach of Implied Convenant of Good Faith and Fair Dealing (Count II) and Fraud (Count III). The first and second causes of action were based on Nationstar not complying with paragraph 5 of the mortgage. Specifically that they failed to promptly provide for the repair of the property which is required by paragraph 5 and by Florida law on breach of contract. The third cause of action was based on Nationstar taking out a worthless insurance policy without notifying the insurer of the property damages which made the property uninsurable.

The district court found that there was no lack of promptness; its finding was based on the April 1, 2019 inspection which never occurred. As to the fraud claim it found that the complaint did not meet the requirements of Rule 9(b), Fed. R. Civ. P.

The Diazes timely appealed and the Eleventh Circuit affirmed finding that the complaint failed to state a cause of action for breach of contract. Specifically the Eleventh Circuit erroneously stated:

> However, paragraph 5 of the Mortgage Contract makes clear that the promptness requirement only relates to Nationstar's undertaking of the **final inspection** rather than imposing a promptness requirement on the repair process as a whole. The lack of promptness alone, therefore, does not constitute a breach of contract.

(Emphasis added). The court went on to find that the Diazes forfeited review of the fraud claim, which was subject to de novo review by only perfunctorily raising it in their initial brief.

On petition for panel review the Diazes, inter alia, pointed out that paragraph 5 does not relate nor does it mention any "final inspection" and that the court's misapprehension of this material fact renders its finding erroneous. As to the forfeiture of the fraud claim Enrique Diaz, under oath, testified that due to gang related activities he was repeatedly denied law library access which necessitated his moving for extensions of time to the point where the court stated it would not grant any more extensions absent exceptional circumstances. That upon his release from

yet another lockdown he was able to have his work supervisor Nick McClendon, Sgt. escort him to the law library where on June 28, 2023 he turned in his Initial Brief for word processing. When Diaz returned to the law library on the morning of June 30, 2022 (which was the due date for the brief) he was handed an initial brief that was atrociously formatted, erroneously paginated, chock full of misspellings and issue III, the fraud claim was missing the entire argument.

Faced with the brief being due that day, the court's previous warning about further extensions and Diaz's state of mind upon discovering that his brief had been butchered, he, in 5 minutes of time before legal mail, adopted, incorporated and realleged into his brief the complaint, and his extensive memorandum of law in opposition to Nationstar's motion to dismiss. Diaz never intended to forfeit review. Despite this uncontroverted evidence the Eleventh Circuit denied the February 13, 2023 Petition for Panel Rehearing on March 28, 2023.

Petitioners now respectfully seek a writ of certiorari for the reasons set forth below.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S DECISION VIOLATES PRINCIPLES OF FUNDAMENTAL FAIRNESS BY DECIDING AN ISSUE OF BOTH FIRST IMPRESSION AND GREAT PUBLIC IMPORTANCE BASED UPON: 1) A PRO SE PLEADING IT, SUA SPONTE, FOUND DEFECTIVE; AND, 2) A CLEARLY ERRONEOUS REPRESENTATION OF MATERIAL FACTS BY ITSELF AND BY THE DISTRICT COURT BELOW.

The contract provision at bar, paragraph 5 of the underlying mortgage, is found in hundreds of millions[3] of mortgages in the U.S. and the Diazes respectfully submit that such numbers make this an issue of great public importance especially where it is also an issue of first impression. The Diazes have not found any case law which addresses the promptness requirement of paragraph 5 and the Eleventh Circuit's interpretation is clearly erroneous and based on clearly erroneous "facts". These reasons warrant this Great Court's attention.

i) **The Pro Se Pleadings**: While the Diazes submit that the Second Amended Complaint (SAC), contrary to the trial court's finding, does state a cause of action, they aver that given the great

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3. In the first quarter of 2022 mortgage lenders in the United States issued 2.71 million residential loans. https://www.bankrate.com/mortgages/mortgage-s.

public importance of the matter such pleadings should not be the source of this first impression ruling. Courts have held that a pro se litigant cannot represent a class action or a qui tam action because a pro se litigant cannot provide adequate legal representation for the interest of others. *Timson v. Sampson*, 518 F.3d 870, 873-74 (11th Cir. 2008) (per curiam) (holding that a pro se realtor could not maintain a qui tam action under the FCA because a pro se litigant cannot provide adequate legal representation for the United States' interests, particularly where the U.S. would be bound by the judgment in future proceedings.) Likewise this Court should not allow the hundreds of millions of mortgagors to be bound by the judgment of the Eleventh Circuit. Were it not for the Diazes pro se status the trial court and the Eleventh Circuit's clearly erroneous factual findings would have been corrected by a lawyer at the motion to dismiss hearing or at oral argument before the Eleventh Circuit.

ii) <u>The Misrepresentation of Material Facts</u>: In the District Court the court's entire finding of promptness was premised upon the defendant having scheduled the inspection "for April 1, 2019, only 17 days after the initial work was completed on March 15, 2019." No such inspection occurred on April 1, 2019. The SAC, the facts of which were to be accepted as true, states that the inspection did not occur until April 24, 2019 and only because the Diazes themselves were able to schedule

it. Although this was argued in their Appellants' Initial Brief the Eleventh Circuit did not address it. Instead the Eleventh Circuit made up its own facts with no record support. As already set forth above the Eleventh Circuit found that Nationstar is only obligated to act promptly when conducting a Fictituous "final" inspection:

> However, paragraph 5 of the Mortgage Contract makes clear that the promptness requirement only relates to Nationstar's undertaking of the final inspection rather than imposing a promptness requirement on the repair process as a whole. (e.s.)

Paragraph 5 states nothing about a final inspection and such a qualification renders the Eleventh Circuit's finding stillborn and D.O.A. In fact, if there were a final inspection there would be no sense in a requirement of promptness as all the repairs would be completed. The purpose for promptness is to prevent Nationstar from dragging its feet in carrying out inspections between the different repairs.

Without this Court's intervention the Eleventh Circuit's opinion would remain the law of the land; it allows a mortgage servicer, which have atrocious histories of fraudulent actions against mortgagors, to hold insurance proceeds indefinitely during the repair process with no regard to further deterioration of

the home or harm to the mortgagors that live in the home during the repair process. Under the Eleventh Circuit's interpretation that the promptness requirement applies only to a final inspection Nationstar or any other shady loan servicer can take 10 years to make an economically feasible determination and then 15 years to issue the payment for the first of several repairs. During that time the damaged property will deteriorate, develop into a community sore, be subject to code violations and the mortgagors would be exposed to untold dangers and hardships. That defeats the very purpose of the mortgage. The Eleventh Circuit's interpretation is a prescription for abuse and disaster, it is patently unreasonable and defeats the purpose of the mortgage. A proper in pari materia construction of the mortgage would not tolerate such an interpretation which lacks harmony.

Nationstar has a checkered past where the rights of mortgagors are concerned; they have been accused in several class action suits of fraudulent activities in relation to lender placed insurance which they have settled and remain pending. The Diazes respectfully submit that it is incumbent upon this Great court to grant certiorari and snatch away the carte blanche the Eleventh Circuit has conferred upon Nationstar and its brethren.

II. THE ELEVENTH CIRCUIT ERRED IN FINDING THAT A PRO SE PRISONER ABANDONED AN ISSUE THAT WAS SUBJECT TO DE NOVO REVIEW, WHERE THE PRO SE PRISONER ADOPTED, INCORPORATED AND REALLEGED INTO HIS INITIAL BRIEF THE ARGUMENTS BELOW BECAUSE THE PRISON LAW LIBRARY LOST HIS ARGUMENT DURING THE WORD PROCESSING OF THE BRIEF AND MOVING FOR AN EXTENSION OF TIME WAS NOT AN OPTION.

It is axiomatic that appellate review of the dismissal of a complaint for failure to state a cause of action is de novo. During such review the appellant cannot present any new facts or issues therefore the appellate review can be completed based on the record on appeal which consists of the complaint, the motion to dismiss, the opposition to the motion to dismiss and the lower court's order.

In the case at bar the Eleventh Circuit found that the pro se prisoner abandoned review of the issue "by only perfunctorily raising it in their initial brief." The Diazes raised the issue in their initial brief as follows:

III

THE LOWER COURT ERRED BY FAILING TO ACCEPT THE FACTUAL ALLEGATIONS IN THE SECOND AMENDED COMPLAINT WHICH STATED A CLAIM FOR FRAUD

ARGUMENT

Appellants respectfully submit that they state a claim for fraud in their Second Amended Complaint as they reiterated in their response to Nationstar's motion to dismiss (Doc. 89, 12-14). Paragraphs 31-37 and 54 of the SAC contain sufficient particularity of the circumstances constituting fraud.

The Diazes submit that the Eleventh Circuit, in deeming the issue abandoned failed to hold them to less stringent standards as required by *Haines v. Kerner*, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed 2d 652 (1972) and failed to consider that the issue was not more fully raised due to the prison library losing the argument when Diaz submitted it for word processing. The Diazes submitted the facts to the Eleventh Circuit in affidavit form and though uncontroverted they were ignored. See: Petition for Panel Rehearing at "6. Fourth Point of Fact Overlooked."

Based on the foregoing and the fact that a de novo review does not require or even permit new argument this Court should find that the Eleventh Circuit's finding that the Diazes abandoned review is erroneous. Aside from the fact that the issue was raised by incorporation involuntarily and due to situations beyond the Diazes control they submit that raising it in such a way should be permitted where the truncated record alone provides the Appellate Court with all the facts necessary for review and such promotes judicial economy.

CONCLUSION

For the foregoing reasons, petitioners Enrique and Maria Diaz respectfully pray that this Honorable Court issue a writ of certiorari to review the decision of the Eleventh Circuit affirming the dismissal of their complaint.

Dated: June 22, 2023

Respectfully submitted,

/s/ [signature]

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