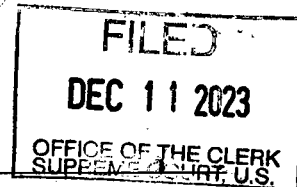


ORIGINAL

23-654

6th Circuit
22-1917



IN THE
Supreme Court of the United States

MALKA LEEAL

Petitioner,

v.

**NEWREZ LLC, dba Shellpoint Mortgage
Servicing,**

**FEDERAL NATIONAL MORTGAGE
ASSOCIATION,**

**DITECH FINANCIAL LLC, fka Green Tree
Serving, LLC**

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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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).

QUESTIONS PRESENTED

1. WHETHER THE DISTRICT COURT ERRED IN ITS BURDEN TO ESTABLISH ALL FOUR ELEMENTS OF RES JUDICATA AND CONDUCT DE NOVO REVIEW. (I) IT INVOLVES THE SAME PARTIES AS THE SAME SUIT; (II) THE FIRST SUIT RESULTED IN A FINAL JUDGMENT ON THE MERITS; (III) THE SECOND SUITE RAISES CLAIMS BASED ON THE SAME TRANSACTION OR OCCURRENCES AS THE FIRST SUIT; (IV) THE CLAIMS IN THE SECOND SUIT WERE RAISED OR COULD HAVE BEEN RAISED IN THE FIRS SUIT.
 - i. Petitioners answered: "Yes"
 - ii. Respondents answered: "No"
 - iii. The District Court answered "No"
 - iv. The 6th Circuit answered: "No"
 - v. This Court should answer: "Yes"
2. ALTERNATIVELY, WHETHER THE DISTRICT COURT JUDGMENT, AND MAGISTRATE REPORT & RECOMMENDATION CONTAINS A FUNDAMENTAL FLAW, WHEN BOTH IGNORED MALKA LEEAL'S MOTION TO AMEND CASE CAPTION REMOVING MATI LEEAL'S NAME FROM THE COMPLAINT, AND ITS EFFECT.

- i. Petitioners answered: "Yes"
- ii. Respondents answered: "No"
- iii. The District Court answered "No"
- iv. The 6th Circuit answered: "No"
- v. This Court should answer: "Yes"

3. WHETHER THE RECORD SUPPORTS THE DISTRICT COURT'S FACTUAL FINDINGS: PLAINTIFF MALKA LEEAL IS A BORROWER, OR THE DISTRICT COURT INTENDED TO ENFORCE PETITIONER MALKA LEEAL TO PAY MATI LEEAL (DECEASED) 2007 NOTE OBLIGATION, A NOTE SHE DID NOT SIGN IS A FUNDAMENTAL FLAW?

- i. Petitioners answered: "Yes"
- ii. Respondents answered: "No"
- iii. The District Court answered "No"
- iv. The 6th Circuit answered: "No"
- v. This Court should answer: "Yes"

4. WHETHER THE DISTRICT COURT'S DECISION CONTAINING A FUNDAMENTAL FLAW: THAT IT GRANTED RESPONDENT'S MOTION FOR SUMMARY JUDGMENT, RELIES ON NOVEL EXPLANATION WITHOUT IDENTIFYING THE SUB RULE UNDER WHICH IT GRANTED SUMMARY JUDGMENT. SMITH V. GLOBE LIFE INS. CO, 460 MICH 446, 454; 597 NW2D 8 (1999), IS

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SUFFICIENT FOR MEANINGFUL
APPELLATE REVIEW?

- i. Petitioners answered: "Yes"
- ii. Respondents answered: "No"
- iii. The District Court answered
"No"
- iv. The 6th Circuit answered: "No"
- v. This Court should answer: "Yes"

5. ALTERNATIVELY, WHETHER THE LAW
ALLOWED RESPONDENTS TO ENLIST THE
AID OF THE COURT TO TRANSFER TO
PETITIONER MALKA LEEAL, THE
OBLIGATION OF MATI (DECEASED) TO PAY
HIS NOTE, SIMPLY BECAUSE THAT WAS
RESPONDENTS ONLY REMAINING
AVENUE TO RECOVER ITS FUNDS?

- i. Petitioners answered: "Yes"
- ii. Respondents answered: "No"
- iii. The District Court answered
"No"
- iv. The 6th Circuit answered: "No"
- v. This Court should answer: "Yes"

PARTIES TO THE PROCEEDING

MALKA LEEAL,

PETITIONER,

v.

NEWREZ LLC, dba Shellpoint Mortgage Servicing,
FEDERAL NATIONAL MORTGAGE ASSOCIATION,
DITECH FINANCIAL LLC, fka Green Tree Serving,
LLC.,

RESPONDENTS.

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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 Granting Respondents' Motion for Summary Judgment on September 30, 2020. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT PROVISIONS INVOLVED

See Brief Below.

STATEMENT

This is an appeal of the district courts dismissal of Petitioner's, Malka Leeal's motion for summary judgment claim she is a borrower who "avoided paying her mortgage". In 2022, Malka filed her complaint (Case II) in State Court. (See Compl., R. 1-3), Despondent, NewRez removed the case to federal district court to dismiss plaintiff complaint based on res judicata, contending the Complaint (case II) was essentially the same as Case I Complaint. The district court agreed and granted the motion for Summary Judgment. (R. 23: District Court Op.)

REASONS FOR GRANTING THE PETITION

A. STANDARD OF REVIEW

When reviewing a motion to dismiss, the court should treat all factual allegations in the complaint as true and construe the complaint in the light most favorable to the plaintiff. *Gunasekera v. Irwin*, 551 F.3d 461, 466 (6th Cir. 2009).

This court also reviews de novo the district court application of res judicata, with the party asserting the defense (here NewRez) bearing the burden of proof *Winget v JP Morgan chase Bank, N.A.*, 537 F.3d 565,572 (6th Cir. 2008).

B. RES JUDICATA

1. **The District Court Error as a matter of law, did not Meet its burden to Establish That**

**Res Judicata Bars Petitioner, Malka Leal's
Suit (Case II), by res judicata**

Res judicata is a phrase covering two forms of preclusion. *Gutierrez v. Lynch*, 826 F.2d 1534, 1537 n.1 (6th Cir. 1987). Typically, and as used in this case, it means preclusion: a final judgment on the merits precludes parties from relitigating a claim that was or could have been raised in that action. *Id.* The phrase is also used to describe issue preclusion (also known as collateral estoppel), which bar relitigation of a particular issue that has already been decided in an action between parties. *Id.* Consistent with the parties' briefing and the district court opinion, this brief uses the phrase "res judicata" to mean preclusion.

NewRez contends that Petitioner, Malka's current suit is barred, through res judicata, by Case II judgment that affirmed Ditech 2017 Complaint. This Court "must give the same preclusive effect... to the district Court judgments" *Ingram v. City of Columbus*, 185 F.3d 579, 593 (6th Cir. 1999). "[I]f an individual is precluded from litigating a suit in a state court by the traditional principles of res judicata, [the litigant] is similarly precluded from litigation the suit in federal court." *Gutierrez*, 826 F.2d at 1537

Res judicata consists of four elements¹, its doctoring bars a second suit where (1) a second action involves the same parties as the first suite; (2) the first suit resulted in a final judgment on the merits; (3) the second suite arising out of the transaction or

¹ *Portage Cty. Bd. Of Comm'rs v. city of Akron*, 846 N.E.2d 478, 495 (Ohio 2006)

occurrence that was the subject matter of the first suit; and (4) the claims in the second suit were raised or could have been raised or could have been litigated in the first suit.

The factual findings set forth in the district court decision are erroneous when it did not set forth any analytical argument for arising two rationales to Petitioner's, motion for summary judgment in addition to its factual erroneous claim *Malka a borrower* base on case I. In addition, it relied on the report and recommendation, and did not follow with the doctrine of res judicata and had prejudice Malka rights.

2. *de novo* Review

As noted by the district court judgment dated September 6, 2022, in its order the question of *de novo* review depends on the elements of res judicata².

The district Court based its Judgment on the Magistrate Judge's Report and Recommendation. In short, Petitioner, Malka filed her objections, yet, both the district court, and the magistrate judge did not apply the standard of *de novo* review as if the case was brought to the court for the first time.

Where a Magistrate Judge has submitted a Report and Recommendations and a party properly filed objections to it, the District Court must conduct a *de novo* review of those parts of the Report and Recommendation to which the party objects. 28 U.C.C 636(b) (1) (c); Fed, R. Cir. P. 72(b)(3); *Flournoy v.*

² ECF No.23, Page ID 555

Marshall, 42 F.2d 87, 875-76 (6th Cir. 1998), holding that the standard of review for Report and Recommendation is de novo review. The district court may “accept”, “reject, or modify the recommended disposition, receive further evidence, or return the matter to the magistrate judge with further instruction.” *Id.*

Under a de novo standard, the court should give no deference to the other Courts Judgments, or Report and Recommendation and should review the case from the position of amending the case caption.

Here, report and recommendation mistakenly; (i) continue to refer to Petitioner, Malka as a borrower who could have litigated her objection in Case I (ii) neglect to acknowledge a dower is not a borrower, and have no legal standing to challenge her husband obligations. It is disputed that the Magistrate Judge Report and Recommendation had a *de novo* review, when it stated that “*While Malka Leeal’s motion to amend has not been referred to the undersigned, the resolution of that motion has no bearing on any of the legal issues discussed herein*”

3. This Case Does not involve the Same Parties As in Case I

This case (case II) does not involve Mati, a borrower with obligations to pay his note. Following Malka’s motion to amend case caption to remove her husband Mati (deceased) caption. Petitioner, Malka conceded that her name appeared on Case I, she was not a party to case I, only a dower. Case II involves

Petitioner, Malka as a widow, and the issues on this case involved facts transpired **AFTER** the death of Mati.

The district court failed to establish the first requirement of res judicata. It should have acknowledged, that when I[t] granted Malka motion to amend case caption Mati is no longer part of the case. The district court erred when it continued to claim Malka is a borrower. As a matter of fact the district court judgment relied on the report and recommendation with no supporting evidences.

4. NewRez (Petitioner) Motion for Summary Judgment Failed to Establish res judicata

A defendant must plead sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A plaintiff obligation in response to a motion is to provide the grounds for his entitlement to relief which requires more than label and conclusions. The court need only to accept as true the "well-pleaded" facts in a plaintiff complaint *Papasan*, 478 U.S. at 283; *Greene v. Greenwood Pub. Sch. Dist.*, 890 F.3d 240, 242 (5th Cir. 2018).

NewRez motion for summary judgment, failed to establish the requirements of res judicata in relationship to Malka, and relies on case I judgment, in which the argument was different from the current case (case II), where Malka's name reflects that a dower is not party to the suit. In fact, Respondent, NewRez argument centers on Mati (a deceased) who is no longer part of case II. In fact, case I and case II are not substantially similar to one another.

Respondent, NewRez bears the burden to establish all four res judicata requirements. Yet, it fails on the first requirement same or similar parties..... Malka was not a party to case I, as to Mati, is now deceased, also it fails on the third and fourth requirements as to Respondent, NewRez failed to establish res judicata

C. CASE II (THE CURRENT SUIT) RAISES CLAIMS, THAT DID NOT ARISE OUT OF THE SAME IN PRIOR CASE LITIGATION, NOR COULD HAVE BEEN RAISED IN CASE

1. The effect of motion to amend caption removing Mati name, status change from dower to widow.

The fact regarding the history of Petitioner, Malka's name on mortgage only is undisputed that she was not a signatory to the 2007 note. Her name was added as required by law of dower, a non-borrower.

On September 2015, again Malka name was added as dower nonparty, to Mati's motion for declaratory judgment as the law required, Case I, listed Malka as a dower³. Dower interests is inchoate in that it arises in a married women while her husband is alive (case I), but doesn't vest until he dies.

³ As of 2016, Public Act 378 of 2016 (the "Act"), abolishes all statutory or common law rights of dower in Michigan.

When Michigan abolished dower rights, it did not include lender need for clear title.

The district court's factual error when it denied Petitioner, Malka's motion for summary judgment it relied on case I where Malka was listed as a dower and denied motion to reconsider "*Plaintiff Leeal has not shown that the court committed any error ...that would warrant reconsideration.*" Furthermore, the district court error as a matter of law, when it did not cite an authority, relied on a novel explanation to conclude that Malka is a borrower that used the court to avoid foreclosure and participate in NewRez efforts to enlist the court to their cause.

2. Case I judgment relied on *in personam* rights and obligations of a borrower

In 2014, Petitioner, Mati Leeal filed a declaratory complaint⁴ in Oakland State Court, seeking to clarify If ABN AMRO mortgage group is licensed to sell mortgages in Michigan. Review of state complaint dated September 2015, clarify Malka Leeal name was listed to reflect her status as dower non borrower and mortgagor⁵, 7 CFR 4279.202. Malka was not bound by the terms of the 2007 note, and had not financials obligations to make payments. In simple words: Malka was not a party to the motion.

⁴ Case no 21-191350-CH R. 1-3, Pages 1-10

⁵ Borrower definitions-the person that borrows, or seek to borrow, money from the lender, including any party liable for the loan except for guarantors.

The state court issued a default judgment to void the mortgage loan and void the note. Eighteen months later, the servicer, Ditech, filed summary judgment motion on Leeals' property, arguing that Leeals' sued the wrong parties.

Plaintiff Mati Leal (deceased) appealed to the 6th circuit court, which affirmed the district court judgment, concluding; the state action case was *in Personam*. (R. 23-2, Page id 2),

"An *in personam* action, the court added, determines only "personal rights and obligations." (R. 55, Dist. Ct. Op., Page 12 (quoting *Int'l Typographical Union v. Macomb County*, 11 N.W.2d 242, 247 (Mich. 1943).) And it cited the principle that *in personam* judgments do not bind anyone who was not a party to the action, in part because of the serious due process concerns that would result." (R. 23-2, page id 3).

When a case judgment relies on *in personam* it applies to borrowers only. This judgment did not bind nor included a non-borrower dower, since Mati Leal was alive.

3. Judgment was on the Merit to Mati ONLY.

In 2017, Ditech filed motion for summary judgment arguing the 2015 judgment does not apply to them. The 6th Cir. Agree. As this argument stated before case I argument was (i) does 2015 judgment apply to Mati a borrower? The 6th Cir court was very clear in its decision

Case I listed Malka as a dower, a non-borrower, nonparty. It is undisputed that Petitioner Malka was not a party⁶ to the suit nor the judgment. The judgment did not apply to Malka.

The district court denied Petitioner, Malka's motion for summary judgment based on his own view that Malka is a borrower with no supporting evidence, and citing no authority, relied on a magistrate report and recommendation to conclude that Case I is similar or the same as Case II

4. Case II

Both Mati and Malka were mortgagor grantors on the 2007 mortgage, but Malka was a signatory to the note. There is no evidence that Malka was bound by the term of the note. In 2021,

Mati Leeal passed away, and the 2007 mortgage was extinguished when his interest in the property passed to Malka. Respondent, NewRez still held the 2007 note. It is common knowledge that substitution of one person debt by another is usually important to a mortgage when a lien exist, if no such existed, NewRez could simply sue on the obligation, and obtain a judgment lien against Mati's estate. In this case, NewRez did not obtain a judgment and their only avenue was to enlist the district court through a summary judgment and argue res judicata which the district court supported.

⁶ Malka had no need to challenge any lender since she had no financial obligations, nor did she signed a note.

**D. THE DISTRICT COURT ERRED IN
DETERMINING PETITIONER, MALKA A
BORROWER**

Malka and Mati owned a home as husband and wife, which as of November 2007, was encumbered by a mortgage to ABN AMRO in the amount of \$301,000. Both Mati and Malka were mortgagors on the mortgage to ABN AMRO, but Malka was not a signor on the note. There is no evidence that Malka was bound by the terms of the note. Mati Passed away on August 2021, his interest passed to Malka by right of his will and survivorship (who suppress a will). At the time a balance remained outstanding on the 2007 note to ABN AMRO.

In case I, Malka status was, a dower nonparty to the suit, with no legal standing to challenge. Mati her husband was alive, and Malka had no financial obligations to pay Mati 2007 note. Whereas, in the case II, Malka status changed to widow.

The factual question arising is not whether Malka is a borrower that could have litigated it in the prior case, but the effect of the district court error when it granted NewRez summary judgment, worse the court has injustice Malka rights by making her primarily liable for a debt she did not incur. Based on the court view that there are no material facts in dispute and that, as a matter of law, the court erred.

**E. THE DISTRICT COURT WIPED OUT
MALKA OWNERSHIP, IN THE ABSENCE
OF EVIDENCE MALKA IS A BORROWER**

**1. The District Court Finding of Fact are not
Supported by the Record**

The district court factual error is that the court failed to notice, there are no facts in the record to support NewRez claim that ABN AMRO, its predecessor, intended to hold a mortgage on the entire property, not subject to Malka rights of survivorship. ABN AMRO 2007 mortgage stated that the borrower Mati must hold title... NewRez did not make reference in their summary judgment motion that there were any mistakes or errors in the 2007 mortgage or note documents and, the magistrate judge report and recommendation does not point to any evidence that show Malka was a borrower except for repeat facts that belong to Case I, not to case II.

The district court case II judgment wiped Malka's right of survivorship

**THE DISTRICT COURT EFFECT WHEN it's
JUDGMENT RELIED ON A NOVEL EXPLANATION
AND DID NOT CITE AUTHORITY**

This is not a new argument but expansion when Petitioner, Malka argues that she is not a borrower.

**1. Substitute Petitioner, Malka in place of
Mati financial obligations**

Restatement in the context of substituting one person by another in respect of a debt to a mortgage is usually important only when a lien or other interest exists on the real estate. "*Restatement, supra at § 7.6 comment a, at 509*". Here, although Respondent, NewRez did not hold a clear title, the 2007 mortgage was extinguished upon Mati's death on August 2021, when his interest in the real estate properly passed to Malka, NewRez still held the 2007 note secured by that mortgage, NewRez could have made a claim against Mati's estate for the balance of the note, but chose to file motion for summary judgment based on res judicata.

F. PETITIONER, NEWREZ MOTION FOR SUMMARY JUDGMENT WAS AN ACT TO ENLIST THE DISTRICT COURT AID

The law does not allow defendant nor plaintiff to enlist the court aid when a factual mistake is made, and no other option is available to them.

When Mati died, and his interest in the property passed to Malka, NewRez could have made a claim against Mati's estate, but chose not to. The statute of limitations has expired, the only remaining option for Newrez to recover its funds was to enlist the aid of the district court; to transfer to Malka the obligation of Mati to pay the note when defendant filed a motion for summary judgment. See, Worcester N. Sav. Inst. V. Farwell, 292 mass. At 574; North Eaton co-op. Bank v.

MacLean, 300 Mass. 285,292 (1983)⁷. The district court made a factual error when it allowed NewRez to enlist the district court to recover their funds. The district court factual error when it granted NewRez summary judgment to foreclose, that it subject Malka to be materially prejudiced placing NewRez on the record position of the 2007 mortgage and note, and exposed her to foreclose and sheriff sale of her residence, because alleged she did not pay a debt that only her deceased husband was obligated to pay.

CONCLUSION

Petitioner requests that the District Court's September 6, 2022 Opinion and Order Granting Defendants' Motion for Summary Judgment be reversed and that this matter be remanded to the District Court.

Respectfully submitted,
/s/ Malka Leeal
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December 11, 2023

⁷ Although Michigan Courts have not adopted a definitive rule regarding substitution one person debt by another, the restatement approach is consistent with earlier case law.