No. 18-____

In The
Supreme Court of the United States

ERLINDA ABIBAS ANIEL *Petitioner*
v.

RESIDENTIAL CAPITAL, LLC and RES CAP LIQUIDATING TRUST
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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January 31, 2018

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SUPREME COURT, U.S.

QUESTIONS PRESENTED

I. Does the Court of Appeals possess unfettered discretion in cancelling an already scheduled oral argument duly communicated to the parties therein who strictly complied with and followed the instructions to the letter causing her to be placed in a lose-lose situation that amounted to a gross violation of her rights of procedural due process as constitutionally guaranteed under the 5th and 14th Amendments to the U.S. Constitution on due process?

II. Did the Court of Appeals gravely err in its refusal to give due effect to the doctrine of *res judicata* as a consequence of the bankruptcy court's decision discharging her of all her debts disclosed in the records and thus giving a fresh start, in respect to core issue of her vested interests in the subject property wrongfully foreclosed?

III. Did the Court of Appeals gravely err when it ruled that she lacked standing under Article III of the U.S. Constitution to pursue her proofs of claim over the subject property which was wrongfully foreclosed thereby depriving her of her constitutional right to substantive due process under the 5th and 14th Amendments to the U.S. Constitution to the effect that no person shall be deprived of her property without due process of law?

PARTIES TO THE PROCEEDINGS

ERLINDA ABIBAS ANIEL, Petitioner

RESIDENTIAL CAPITAL, LLC and RES CAP LIQUIDATING TRUST, Respondents

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OPINION BELOW

The unpublished *Summary Order* of the United States Court of Appeals for the Second Circuit denying Petitioner's appeal is included herein as Appendix 1.

The unpublished *opinion* of the United States District Court for the Southern District of New York is included herein as Appendix 2.

JURISDICTION

This Court has jurisdiction of this petition to review the judgment of United States Court of Appeals for the Second Circuit pursuant to 28 USC §1254(1). The Second Circuit's *Summary Order* was filed on September 20, 2017 and Petitioner's Petition for Panel Rehearing and Rehearing *En Banc* was denied on November 28, 2017.

The jurisdiction of this Court is invoked under 28. U.S.C.§ 1254(1).

STATEMENT OF THE CASE

Petitioner is a part owner of a parcel of land located at 801 Foothill Drive, San Mateo, California 94402, and registered in the name of the spouses Raul and Corazon Estiva (the subject property). As part owner thereof, it was their agreement with the spouses Estiva that Petitioner will act, as she did, as the administrator and manager of the subject property which was leased to tenants paying fixed monthly rentals, specifically tasked to collect monthly rentals from tenants and pay the realty

taxes due the government. In March 2007, the subject property was mortgaged by the spouses Estiva who executed the mortgage note and the accompanying deed of trust in their name and with Petitioner's prior agreement and conformity as evidenced by the Note and Deed of Trust. Since the execution of the mortgage, petitioner managed to pay the mortgage, pay the applicable taxes, and spend her own money maintaining the property. Petitioner and the Estivas were always in agreement that they would be 50/50 partners in the property. This was also evidence by the spouses Estiva executing a grant deed in petitioner's favor when issues of Petitioner's interest in the property were questioned. On February 25, 2009, petitioner filed her own bankruptcy proceedings under Chapter 11 which was amended to Chapter 7. In her inventory of real estate property submitted before said bankruptcy court (BkCt), she included in the inventory list the subject property wrongfully foreclosed as one of those real property she possessed interests.

On May 14, 2012, respondent Residential Capital, LLC initiated a bankruptcy proceeding. As a consequence thereto and as a matter of due course, on June 9, 2012, petitioner filed two (2) proofs of claim in the BkCt claiming, among others, wrongful foreclosure against respondent Residential Capital, LLC. On March 5, 2015, the trustee, respondent Res Cap Liquidating Trust, of the bankruptcy estate of respondent Residential Capital, LLC objected to her claims on the basis that she lacked standing.

The BkCt sustained the standing objections and the district court affirmed. *District Court's*

Memorandum Opinion, Appendix 2. Hence, petitioner appealed the district court's decision before the Court of Appeals (CtApp) which affirmed the judgment of the district court. *Summary Order, Appendix 1.* On a petition for panel rehearing or, in the alternative, for rehearing *en banc*, the CA refused to grant her petition. *Order, Appendix 6.*

ARGUMENTS
IN SUPPORT OF THE GRANT OF THIS PETITION

I

THERE IS GROSS DENIAL OF HER PROCEDURAL DUE PROCESS

The facts are clear: In its July 27, 2017 Notice of Hearing Date the above-captioned case was set for oral argument on September 13, 2017 at 10:00 A.M. wherein petitioner was given five (5) minutes period to orally argue her case. *Notice of Hearing Date, Appendix 3.* The said notice was received by her. She had read the directions and strictly complied with the same by filling out the form and promptly sending the filled out form to the court. She then booked airplane tickets from California for Newark, New Jersey. She then commenced reading the case folder and taking some notes in preparation for her scheduled oral argument.

Then, without entertaining any idea whatsoever and neither did she have any inkling about what the CtApp will do next, she received on August 7, 2017, a notice from the court about its "*intent to hear the ... appeal on submission.*" *Notice dated August 01, 2017, Appendix 4.* The said notice contained the following: "*The Court has determined that oral argument of this appeal is unnecessary according to the standard set forth in FRAP 34(a)(2). Accordingly, this appeal will be determined on submission of the briefs on September 13, 2017.*" Thus, it is very clear from what appears in the context of the said afore-quoted notice (Appendix 4) that the CtApp's determination to cancel the already scheduled oral argument is based on its own unilateral and arbitrary decision – it is unilateral because there was no prior consultation of the parties, especially petitioner, and arbitrary because such cancellation prejudiced exclusively petitioner considering that the burden of proving her case on appeal is placed on her shoulder and the scheduled oral argument would have been her only available vehicle that she can utilize to expound more on the point and argument she adamantly insisted to the effect that the district court err in affirming the objections interjected by the Respondent Res Cap Liquidating Trust in denying her two (2) proofs of claim and to move the CtApp to reverse and set aside the assailed objections and remand the case. Thus, she considered such abrupt and unceremonious cancellation of the hearing on oral argument as a sign of the CtApp's unfairness and a denial of her opportunity to make an oral argument as the same is considered part and parcel of procedural due process

– she emphasized that it was a necessary process in order for her to amplify the reason why she is claiming that she has the standing to pursue her claims against the respondents.

Under date of August 08, 2017, she formalized her objections to the unilateral, arbitrary, abrupt and unceremonious cancellation by the CtApp of the hearing on oral argument by seeking reconsideration of the same through her letter of even date. The CtApp refused to act on said plea for reconsideration by its failure to respond to it and neither did it explain the reasons why it earlier determined that oral argument was not necessary anymore.

The gross denial of petitioner's procedural due process culminated in the court's issuance of the *Summary Order* on September 20, 2017 AFFIRMING the judgment of the district court. *Appendix 1.*

There is certainly patent and obvious gross denial of her procedural due process, *i. e.,* the right to be heard on oral argument, because of the way the court did when it abruptly, unceremoniously, unilaterally and arbitrarily cancelled the scheduled oral argument that eventually prevented her from expounding and further amplifying the issue of her standing, among others, she adamantly insisted that she possesses at the time she commenced her case for the court's adjudication and for the latter to take cognizance of the same and decide her case on the merits. The importance of an oral argument need not be over emphasized since it is a tool related to

procedural due process of law where a party litigant is given all the leeway to develop argument consistent with his plea in a different manner and the court is mandated to consider any number of new arguments or theories underlying the claim so long as that claim is properly placed before it. *Lebron v. National Railroad Passenger Association,* 513 U.S. 382-383 (holding that "(a) it is proper for this Court to consider the argument that Amtrak is part of the Government, even though Lebron disavowed it in both lower courts and did not explicitly raise it until his brief on the merits here. It is not a new claim, but a new argument to support his First Amendment claim, ... it was passed upon below, ... and it was fairly embraced within both the question presented and the argument set forth in the petition.)" In Kamen v. Kemper Fin. Svcs., Inc., 500 U.S. 90 (1991), this Court ruled that "*It is immaterial that Kamen failed to advert to state law until her reply brief in the proceedings below, since once an issue or claim is properly before a court, the court is not limited to the particular legal theories advanced by the parties, but retains the independent power to identify and apply the proper construction of governing law. Having undertaken to decide whether federal common law allows a shareholder plaintiff to forgo demand as futile, the Court of Appeals was not free to promulgate a federal common law demand rule without identifying the proper source of federal common law in this area.*" See also *United States Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.,* 508 U.S. 439 (1993). For, as this Court in Hormel v. Helvering, 312 U.S. 552 (1941) ruled: "*3. A rigid and undeviating judicially declared*

practice whereby courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with the policy that rules of procedure and practice should promote, not defeat, the ends of justice." Moreover, petitioner made her appearance as *Pro Se* and whatever imperfection in her brief in respect to style and language she used – the way she argued her case – is quite understandable and should be given liberal treatment. Thus, in Hughes v. Rowe, 449 U.S. 5 (1980), this Court has the occasion to rule that:

> *"Petitioner's complaint, like most prisoner complaints filed in the Northern District of Illinois, was not prepared by counsel. It is settled law that the allegations of such a complaint, "however inartfully pleaded," are held "to less stringent standards than formal pleadings drafted by lawyers. . . ." Haines v. Kerner, 404 U. S. 519, 404 U. S. 520 (1972). See also Maclin v. Paulson, 627 F.2d 83, 86 (CA7 1980); French v. Heyne, 547 F.2d 994, 996 (CA7 197).*
>
> *"x x x*
>
> *"... Although petitioner's pleadings are prolix and lacking in stylistic precision, this is not a case like Estelle v. Gamble, 429 U. S. 97 (1976), in which a pro se litigant's*

detailed recitation of the facts reveals on its face the insufficiency of the complaint. We cannot say with assurance that petitioner can prove no set of facts in support of his claim entitling him to relief. Haines v. Kerner, 404 U.S. at 404 U. S. 521. Accordingly, the Court of Appeals should have reversed the dismissal of this claim and remanded for further proceedings."

Finally, to better understand the point of petitioner in this instant petition, it would be appropriate to stress, at the outset, the fact that appeals to the Court of Appeals are governed by the Federal Rules of Appellate Procedure (FRAP) under Title VII [General Provisions] consisting of Rules 25 to 48. Under the pertinent rules, the parties are required to submit their respective Brief: first, is the Brief of the appellant; second, the Brief of the appellee; and, finally, the Reply Brief of the appellant. *Rule 28, FRAP.* Thereafter, appeal conferences may be had. *Rule 33, id.* Finally, the appealed case will enter the oral argument aspect under Rule 34, *id.*, that provides that *"(a) IN GENERAL. (1) Party's Statement. Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted."*

In due adherence of said mandate, the CtApp resolved on July 27, 2017 the need for such oral argument giving petitioner five (5) minutes to orally

argue (Appendix 3) her point in support and/or amplification of the issue, among others, of her possession of standing as a party litigant. However, the CtApp countermanded its order after a few days after she had already strictly complied with and followed the instruction contained therein (Appendix 3) and after booking a flight from California for New Jersey. She also prepared for the said oral arguments by reading the records and making notes and brainstorming the different methods by which she may effectively orally present her case before the CtApp and be able to convince it to take her side of the issue. Simply speaking, the CtApp was somehow already estopped not to do away with the scheduled oral argument; otherwise, it will make her suffer irreparable damage and prejudice under the facts and circumstances obtaining, apart from depriving her of the vehicle by which she may be able to convince the CtApp of the merit of her case, aware of the burden imposed upon her as appellant. Hence, when the CtApp cancelled the oral argument already set, the CtApp had wrongfully abridged her right to make out a case that would show her standing in court, among others. There is here gross denial of procedural due process.

The Supreme Court of California, in the case of People v. Pena [No. S106906. Feb. 5, 2004] 32 Cal.4th 389, has recognized the importance of this oral argument phase of the proceedings on appeal. Thus, it ruled, as follows:

> *"In Brigham, cited by defendant here, the defendant appealed his*

convictions for robbery and attempted robbery, and requested oral argument. The appellate court granted the Attorney General's motion for a "summary affirmance" and denied the defendant's request for oral argument. This court held that the denial of oral argument was improper. Although the appellate court had characterized the defendant's appellate claim as "theoretically arguable" but "as a practical matter hopeless," in Brigham we held that "the appellate court had an obligation to hear the arguable argued" in light of the defendant's right to present oral argument on appeal. (Brigham, supra, 25 Cal.3d at p. 289.) fn. 5

"Unlike what transpired in Brigham, the Court of Appeal's action in the present case did not deny defendant the opportunity to present oral argument, because the oral argument waiver notice employed by the appellate court allowed defendant to request oral argument within 12 days of receiving the notice. Defendant argues the notice here nevertheless infringed upon his right to present oral argument on appeal by improperly suggesting the Court of

> *Appeal already had decided the case prior to oral argument or waiver thereof, and by intimating appellate counsel might face sanctions if counsel argued matters covered by the written briefing. As we shall explain, we agree with defendant's concerns and find that the notice employed by the Court of Appeal creates a risk of interfering with the right to oral argument that is "unnecessary and inadvisable to incur ... ." (People v. Engelman (2002) 28* ***[32 Cal.4th 399]*** *Cal.4th 436, 449 [121 Cal. Rptr. 2d 862, 49 P.3d 209] (Engelman).) Accordingly, in the exercise of our supervisory power over the courts, we shall direct the Court of Appeal not to utilize the challenged form in the future."* (Underscoring supplied)

In fine, it is very clear that, as part and parcel of procedural due process, it is the right of petitioner-appellant to present oral argument on appeal and curtailing the same amounts to gross denial of due process of law.

II

THERE IS ALREADY *RES JUDICATA* ON THE ISSUE OF STANDING

Petitioner presented her petition for bankruptcy before the BkCt. In line with the requirements of the pertinent bankruptcy rules (U.S. Code, Title 11), she filed with the BkCt, her under oath schedule of assets. *Bankruptcy Official Form No. 106A/B.* Among those real property she listed in her Schedule A of which she claimed she has legal, equitable or future interests is the subject property wrongfully foreclosed.

After due proceedings were had – none of the interested parties appearing therein objected to her sworn declaration that she owned and/or had equitable or future interests in the subject property wrongfully foreclosed – the BkCt granted the petition and ordered petitioner discharged from any debt and/or liability and, thus, gave her a fresh start. *Order in re Erlinda Abibas Aniel, Petitioner, Bankruptcy Case No. 09-30452; Grogan v. Garner,* 498 U.S. 279 (1991). This order of discharge was never appealed and, with the lapse of time, the same became final, unappealable and executory. *Federated Department Stores, Inc., Et Al. v. Moitie, Et Al.,* 452 U.S. 394 (1981) (holding that [r]es judicata bars relitigation of the unappealed adverse judgments against respondents as to their federal-law claims. The res judicata consequences of a final, unappealed judgment on the merits are not altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. There is no general equitable doctrine which countenances an exception to the finality of a party's failure to appeal merely because his rights are "closely interwoven" with those of another party who

successfully appeals. Cf. Reed v. Allen, 286 U.S. 191. Nor is there any principle of law or equity which sanctions rejection of the salutary principle of res judicata on the basis of "simple justice" or "public policy." "[The] doctrine of res judicata is not a mere matter of practice or procedure . . . . It is a rule of fundamental and substantial justice, `of public policy and of private peace,' which should be cordially regarded [452 U.S. 394, 395] and enforced by the courts . . . ." Hart Steel Co. v. Railroad Supply Co., 244 U.S. 294, 299. Pp. 398-402). Therefore, the law on *res judicata*, both on the claim and issue aspects of the law, has set in. The claim can no longer be relitigated under the "claim preclusion" doctrine and neither an issue related to and connected therewith, under the "issue preclusion" doctrine otherwise known as "collateral estoppel." *RESTATEMENT OF JUDGMENTS, 2D (American Law Institute 1982-1988).*

Does the principle of *res judicata* apply to the judgment of a BkCt? The answer is in the affirmative. *Northern Pipeline Construction Company v. Marathon Pipe Line Company,* 458 U.S. 50 (1982); *Commodity Futures Trading Commission v. Schor,* 478 U.S. 833 (1986). But the applicability of the *res judicata* doctrine depends on whether the issue barred is a core[1] issue which, indisputably, is precluded by the application of the said rule; otherwise, said rule does not bar non-core[2] issue. See *Northern Pipeline Construction Company*, supra) – the split of the justices in the 1982 case of the

[1] Involving public rights.

[2] Involving non-public rights or private rights.

afore-cited Northern Pipeline Construction Company caused the U.S. Congress in 1984 to pass legislation (1984 Act) amending the bankruptcy law giving district courts original and exclusive jurisdiction over bankruptcy matters and likewise granting them original, but non-exclusive, jurisdiction of all civil proceedings arising under, arising in or related to the bankruptcy case. *28 U.S.C. §§ 1334(a) & 1334(b).* And the 1984 Act, under Section 157(b)(1), authorizes bankruptcy judges to hear and determine all bankruptcy cases, and all core proceedings arising under the bankruptcy code or arising in a bankruptcy case, even allowing them to enter final judgments in these with the dissatisfied parties allowed to appeal such judgments to the district court. Further, the 1984 Act granted them, under Section 17(c)(1), authority to hear non-core proceedings that is otherwise related to a bankruptcy case; however, they cannot enter final judgments in these non-core proceedings and, instead, they are supposed to submit proposed findings of fact and conclusions of law to the district court for its consideration and approval. *28 U.S.C. § 157(a)(1).*

Inasmuch as there is no issue anymore that in core proceedings the doctrine of *res judicata* applies, it is submitted that presenting Schedule A as a necessary requirement of the bankruptcy law per Bankruptcy Official Form No. 106A/B is a core issue in bankruptcy cases. *28 U.S.C. § 157(b)(2).* Thus, when petitioner declared under oath her ownership, if not equitable or future interests, in the said subject property wrongfully foreclosed, she professes her present legal interests that entitled her to legally

act to defend such interests against any action or intrusion by third parties adverse to her legal interests. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 435 (1982), quoting United States v. General Motors Corp., 323 U.S. 373, 378 (1945), (holding that "[plroperty rights in a physical thing have been described as the rights 'to possess, use and dispose of it.'") Now, by reason of the fact that said subject property was wrongfully foreclosed – an obvious violation of her property rights 'to possess, use and dispose of' – she suffered injury-in-fact attributable to the act of respondents and which injury-in-fact certainly could be redressed by the courts.

Petitioner's filing of said Schedule A with the BkCt could not just be set aside, ignored and disparaged because such filing had already invested her with the property interests that had given her legal standing for purposes of Article III of the U.S. Constitution considering that the discharge granted her by the court has never been appealed (Federated Department Stores, Inc., Et Al. v. Moitie, Et Al., supra) and, therefore, constitutes *res judicata* in respect to the issue of property ownership or interests. Therefore, when both the BkCt and district court, affirmed by the CtApp[3], refused and failed, as they all refused and failed, to abide by the rule on *res judicata*, all of them committed reversible error that warrants the issuance of a writ of certiorari by this Court and, consequently, a reversal

[3] Ruling that "she has not demonstrated a connection to the property sufficient to establish her standing,' at p. 2, Appendix 1.

and remand, to afford her the chance to litigate the issue as to the validity of her proofs of claim on the merits as an injured property owner and/or interests holder.

III

PETITIONER HAS THE REQUIRED STANDING BECAUSE [1] THERE IS INJURY-IN-FACT; [2] THERE IS CAUSAL CONNECTION OF THE INJURY SHE SUFFERED TO THE WRONGFUL ACT OF RESPONDENTS; AND, [3] THE INJURY IS REDRESSIBLE BY A JUDGMENT OF THE COURT

Assuming *arguendo* for sake of argument that the principle of *res judicata* as urged in the preceding discourse does not apply to the facts and circumstances of the case, nonetheless, it quite clear and manifest on the basis of the records and the facts established by the evidence that petitioner possesses the required standing under Article III of the U.S. Constitution. As decisions of this Court consistently held, to have standing *"a plaintiff must show (1) an injury in fact, (2) a causal connection between the injury and the defendant's conduct, and (3) that it is likely the injury will be "redressed by a favorable decision","* citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992) (at p. 2, Appendix 1). Petitioner has met all the three (3)

elements afore-cited. ***First,*** there is an injury-in-fact because she has a one (1%) percent interest in the subject property wrongfully foreclosed. She was the one directly injured and her injury is concrete and particularized. Thus, this fact, of her being directly injured by an injury which can be described as concrete and particularized under the ruling in the Spokeo, Inc. v. Robins (136 S. Ct. 1540, 1548 (2016) cited by the CtApp (at p. 2, Appendix 1) may be derived from her allegation that she has one (1%) percent ownership or interests in the subject property wrongfully foreclosed. This is a clear assertion that she has sufficient interest in the dispute, being a part owner or interest holder of the subject property wrongfully foreclosed.

Now, what was the act of respondents complained of? Definitely, it was the wrongful foreclosure done by respondents on the subject property of which she claimed as part owner or interest holder. Wrongful foreclosure is the actionable conduct of respondents which caused her to file her proofs of claim as said conduct directly harmed her in violation of a federal right, that is, the constitutional right not to be deprived of property without due process of law. *Fifth (5th) and Fourteenth (14th) Amendments to the U.S. Constitution.* The ruling in the afore-cited case of Lujan v. Defenders of Wildlife is not applicable to the case at bench because of the difference between the situation of the parties therein *vis-à-vis* the situation of petitioner herein. In the Lujan case, the parties are group of individuals (known as wildlife conservation and other environmental organizations) seeking declaratory relief and injunction as against a

government agency (Interior) and they are not claiming direct harm or injury as the direct object of the questioned action are third parties and the Lujan court holding that "[s]tanding is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object."; while, in the case at bench petitioner is seeking remedial measure against the assailed action of respondents and clearly claiming that because of such action (of wrongful foreclosure) she is claiming, by way of proofs of claim, compensation for the sustained damages caused directly to her occasioned by the loss of her property. Hence, when the subject property was wrongfully foreclosed, her property rights of possession, use and disposition had been violated that entitled her to seek judicial remedies which she did by filing two (2) proofs of claim against respondents. Her injury-in-fact amounted to losing her actual interest in the subject property wrongfully foreclosed. If she would not be allowed to prove her claims on the merits by way of denying her legal standing in court, she would suffer permanent loss of her property and irreparable damage that would amount to a deprivation of her constitutional right of property without due process of law. ***Second,*** there is a causal connection between the injury-in-fact she directly suffered that is concrete and particularized by reason of the wrongful foreclosure of the subject property which she claimed to be a part owner or interest holder. And, ***third,*** the injury-in-fact she suffered which is concrete and particularized may be redressed by a favorable judgment by the court through the award of specified damages which she

may be able to prove through trial on the merits if she will be granted legal standing.

Certainly, on the basis of the foregoing disquisition, there is no legal basis for the CtApp to deny standing to petitioner. She satisfied all the three (3) elements required by decisions of this Court on standing under Article III of the U.S. Constitution and, hence, the ruling that she lacked standing is without any factual and legal basis. Thus, the judgment on appeal before this Court must be reversed and set aside and the case remanded to the lower court for further proceeding and trial in line with the requirements of procedural due process.

CONCLUSION

For the above and foregoing reasons, Petitioner requests the issuance of a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully,

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