

No. 17-_____

In the
Supreme Court of the United States

DOROTHY S. FAUNTROY,

Petitioner,

—v—

BANK OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the
District of Columbia Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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MARCH 21, 2018

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

The Mortgage Industry in the United States is a ten trillion dollar enterprise. Sixty-five percent of homes in America carry mortgages. Since 2006, mortgage foreclosures have been on the rise.

The District of Columbia is no different, posting more than 3,000 judicial foreclosure actions in 2016 alone. Judicial foreclosures have dominated since April 2014 when the D.C. Superior Court created a special process for litigating foreclosure matters. Designed to emphasize mediation, the result has been a failure of Due Process and Equal Protection. Nearly all of the defendants are African American. Many of these cases are dated and have not followed clear statutory requirements. Mortgagors, alleged to be in default, have been forced to accept settlement terms of the Mortgagees or risk Summary Judgments.

These summary judgments have been entered notwithstanding the fact that there are genuine issues of fact involved in these cases; notwithstanding the fact that courts in the two surrounding jurisdictions, Virginia and Maryland, have issued distinctly different rulings; and courts in other parts of Eastern United States, New York and New Jersey, have also issued distinctly different rulings. Courts throughout the Eastern Region have been thrown into conflict and confusion by the nonconformist stance of the D.C. Courts.

The Question Presented is whether the decision of the D.C. Court of Appeals—granting Summary Affirmance—should be reversed and the case remanded

because the due process and equal protection rights of Petitioner were violated.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner was the Appellant before the District of Columbia Court of Appeals and the Defendant in the trial court. Petitioner, though a co-record-owner of the subject property, did not sign the Promissory Note that formed the basis for the Foreclosure Action. The Note was signed by her Husband—who was never served with process—a former member of Congress whose bizarre behavior at the time of that signing and since is well documented. Congressman Fauntroy allegedly signed an Adjustable Rate Note dated 17 March, 2006 in the principal amount of \$659,400.00 with a maturity date of 1 April, 2036 and allegedly defaulted on that Note on or about 1 March 2008. A Complaint for foreclosure in the instant case was not filed until 2014, more than six years later.

Walter E. Fauntroy, a former 20-year Member of Congress, was continually and mysteriously out of the Country for a five-year period and has never been served in the manner prescribed by Statute and Court Rule for parties who are out of the country. Moreover, upon his return, Appellee did not avail itself of the opportunity to serve him by mandated means. Mr. Fauntroy, also a record co-owner of the subject property, was the only named Defendant who signed the Note that was the basis of the Complaint. He is now 85 years old, and at the time the alleged allegations in the Complaint took place, eleven years ago, was 74 years of age. Because he has never been properly served, Mr. Fauntroy is not a Petitioner in the instant Appeal.

Respondent Bank of New York, was the Plaintiff in the subject foreclosure action and was Trustee, in trust for GSC Alternative Loan Trust Notes, Series 2006-2. All prior and recent communications about this matter have been sent from Shellpoint to Mr. Fauntroy, not Petitioner. Respondent concedes that Petitioner, Mrs. Fauntroy did not sign the Note that is the subject of this Foreclosure action.

It is noteworthy that while the Case is on appeal, Respondent sought to substitute the Trustees, a move apparently designed to avoid demonstrating that it has standing to enforce foreclosure, as strictly required by Statute.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Dorothy S. Fauntroy respectfully submits this petition for a writ of certiorari.



OPINIONS BELOW

The summary affirmance judgment of the District of Columbia Court of Appeals, the Court of Last Resort for the District of Columbia, because it is a summary decision is not yet reported in the Atlantic Reporter and likely will not be reported there, but can be accessed directly at www.dccourts.gov/internet/mojlocator.jsf. The Summary Judgment of the District of Columbia Superior Court may become available at DAILY WASHINGTON LAW REPORTER. Not all decisions are printed, except those deemed by the Chief Judge of the D.C. Superior Court to be worthy of general publication. Both Opinions are provided here, at App.4a and App.1a respectively as part of Petitioner's Appendix.



JURISDICTION

The D.C. Superior Court entered Summary Judgment on 8 May 2017. (App.4a) The D.C. Court of Appeals entered Summary Affirmance on 16 November 2017. (App.1a) *En Banc* Review was denied by the D.C. Court of Appeals on 10 January 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Table of Authorities cites to the relevant statutes. In addition, this matter is largely about provisions of the Fourteenth Amendment to the United States Constitution, made applicable to the District of Columbia through the Fifth Amendment. Those are produced as part of the Appendix.



STATEMENT OF THE CASE

A. Constitutional Implications

There was no showing by the movant of exigent circumstances, no emergency which mandated summary affirmance as is required, *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006) (“Summary disposition is appropriate in an emergency, when time is of the essence and the court cannot wait for full briefing and must decide a matter on motion papers alone.”)

1. Summary Judgment and Summary Affirmance in These Mortgage Foreclosure Cases Violate Established Principles of Due Process and Equal Protection

Every litigant is entitled to fair and equal treatment and no citizen should be deprived of life, liberty or property without due process of law. The Mortgage

Foreclosure System in the District of Columbia, since April of 2014, has not conducted its judicial process in accordance with well established procedures, and defendants in such cases, almost exclusively African American, are treated differently than other litigants in non-foreclosure judicial cases. Moreover, these defendants, because of the nature of the Court's proceedings in foreclosure cases, are not afforded a right to trial.

2. Equal Protection and Due Process Violations

Petitioner and nearly all of the litigants in the Foreclosure Court in the District of Columbia are African Americans, even though African Americans make up only half of the population in the District of Columbia. A *prima facie* case of discrimination is shown by establishing that 1) A Party is a member of a protected class; 2) has suffered an adverse action; and 3) similarly situated litigants, outside of the protected class, received more favorable treatment, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). “[T]he burden of establishing a *prima facie* case of disparate treatment is not onerous,” *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). A plaintiff can establish a *prima facie* case by “offering evidence adequate to create an inference that decision was based on a discriminatory criteria illegal under [law],” *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 846 (9th Cir. 1986) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)); and see *Lowe v. City of Monrovia*, 775 F.2d 998, 1006 (9th Cir. 1985) (complainant can establish a *prima facie* case of disparate treatment without satisfying the *McDonnell Douglas* test if he or

she provides evidence suggesting rejection was based on discriminatory criteria), amended, 784 F.2d 1407 (1986). A plaintiff who provides such evidence for his or her *prima facie* case may be able to survive summary judgment on this evidence alone, *Lowe*, 775 F.2d at 1008. “The purpose of America’s laws is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of gender or other impermissible classification,” 411 U.S. 792, 800-801 (1973). In sum, *McDonnell Douglas* enunciates that the primary purpose is to assure neutrality in decisions.

Unlike equal protection, under the D.C. Human Rights Act, Petitioner does not need to prove intent. Once a complainant proves disparate impact, the Respondent has the burden of proving that their purported justification is a genuine legal justification that they relied on and that motivated them. The D.C. Human Rights Act holds at D.C. Code § 2-1402.11(a) that “It shall be an unlawful discriminatory practice to do any of the following acts, wholly or partially for a discriminatory reason based upon the actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual: The District of Columbia Court of Appeals has read D.C. Code § 2-1402.68, the Effects Clause of the DCHRA to mean that “despite the absence of any intention to discriminate, practices are unlawful if they bear disproportionately on a protected class and are not independently justified for some nondiscriminatory reason,” *Gay Rights Coalition of Georgetown Univ. Law Ctr.*

v. Georgetown Univ., 536 A.2d 1, 29 (D.C. 1987); *see also Ramirez v. District of Columbia*, No. 99-803 (TFH), 2000 WL 517758 (D.D.C. 2000) (holding that “the effects clause of the DCHRA prohibits unintentional discrimination as well as intentional”), *Mitchell v. DCX, Inc.*, 274 F. Supp. 2d 33, 47 (D.D.C. 2003). The Court has held that statistical data can be used to show disparate impact and make a *prima facie* showing of discrimination, “[t]he tenants charge the District with discrimination in violation of the D.C. Human Rights Act . . . A separate provision states that “[a]ny practice which has the effect or consequence of violating any of the provisions of this chapter shall be deemed to be an unlawful discriminatory practice.” § 2-1402.68. The D.C. Court of Appeals has held that this “effects clause” imports into the Act “the concept of disparate impact discrimination developed by the Supreme Court in *Griggs v. Duke Power Co.*,” *Gay Rights Coal. v. Georgetown Univ.*, 536 A.2d 1, 29 (D.C. 1987). “. . . [t]he Second Circuit developed a burden-shifting framework: once the plaintiff demonstrates that the challenged practice has a disproportionate impact, the burden shifts to the defendant to “prove that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect,” *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 935-36 (2d Cir. 1988), *aff’d on other grounds*, 488 U.S. 15, 18, 109 S.Ct. 276, 102 L.Ed.2d 180 (1988). Several circuits have adopted this burden-shifting framework. *See, e.g., Darst Webbe Tenant Association Board v. St. Louis Housing Authority*, 417 F.3d 898, 901-02 (8th

Cir. 2005); *Langlois v. Abington Housing Authority*, 207 F.3d 43, 51 (1st Cir. 2000).

The United States Supreme Court has stated that a plaintiff must allege a “plausible entitlement to relief” by setting forth “a set of facts consistent with the allegations,” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1956 (2007). Further, the Rules manifest a preference for resolution of disputes on the merits, not on technicalities of pleading, and pleadings are construed as to do substantial justice, *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008), quoting *Carter-Obayuwana v. Howard University*, 764 A.2d 779, 787 (D.C. 2001). The D.C. Court of Appeals was required to take all factual allegations in the Complaint as true, *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009), citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986). *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009) is instructive. That case sets out a two-pronged test to measure the weight of summary dismissal, and such a test necessarily resolves in favor of Petitioner. Under *Iqbal*, a court must first determine what a legal conclusion and what a factual assertion are. When there are well pleaded factual allegations a court must accept those factual allegations as true. Second, the court must determine whether the factual allegations state a claim for relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads enough facts to allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. When analyzing a summary dismissal motion, the Court must construe the complaint in a light most favorable to the plaintiff, while assuming the facts alleged in a complaint as true. Dismissal is only proper where the

plaintiff can prove no plausible facts which would support the claim, *Cauman v. George Wash. Univ.*, 630 A.2d 1104, 1105 (D.C. 1993) and *Aronoff v. Lenkin Co.*, 618 A.2d 669, 684 (D.C. 1992). The claims of Petitioner are not only plausible and possible but likely as well.

The Supreme Court has declared that the existence of a racially disparate “impact of the official action”—that is, “whether it ‘bears more heavily on one race than another,’”—“may provide an important starting point” for the analysis of constitutional purpose. It is, in fact, a profoundly important starting point because proof of a clear racially disparate impact can often illuminate—in a way that bare professions of official neutrality and even-handedness cannot—the underlying purposes and social meaning of a public policy: “Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face,” *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (citing) *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); and *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)). The Court in *Arlington Heights* went further to state that, when such a “clear pattern” of racial disparity, “unexplainable on grounds other than race,” emerges, the appearance of such a pattern makes concluding the “evidentiary inquiry” of discriminatory purpose “relatively easy.” As the Supreme Court clearly indicated, a pattern of racially disparate impact alone can be determinative of the purpose inquiry where there is “a pattern as stark as that in *Gomillion* or *Yick Wo*,” *Id.* It is hard to imagine a more discrimina-

tory policy with the kind of consequences the Foreclosure Court in the District of Columbia has had on African Americans. This racialized effect is comparable to the policy invalidated in *Gomillion v. Lightfoot*, where the Alabama legislature had changed the political boundaries of the City of Tuskegee in such a way as to remove from the city several hundred African-American voters “while not removing a single white voter or resident,” 364 U.S. 339, 341 (1960). Although the displaced African-Americans still had the statewide voting rights they began with, they alone suffered the dislocating local political effects of the boundary revisions. Whatever differences may exist in the racial dynamics of gerrymandering in the electoral context and the racial dynamics of gerrymandering in the context of foreclosure litigations, we can see that, in both cases, a completely lopsided and unfair burden is placed on the backs of non-white citizens. Similarly, in *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), the Court found a violation where a facially neutral ordinance, which forbade operation of a laundry in a wooden structure without the special permission of the city’s Board of Supervisors, was applied in an unequal way disfavoring Chinese laundry owners. No Chinese owners were granted the special permit while all white applicants except for one received it. Further, according to the evidence, “more than 150” Chinese laundry operators were arrested for violating the ordinance while more than 80 non-Chinese owned laundries operating in wooden facilities without a permit were “left unmolested.” In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court invoked *Arlington Heights* and *Gomillion* to find that, even without any evidence of an independent discriminatory public pur-

pose, “a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregate . . . voters’ on the basis of race,” *Id.* at 646-47. In *Shaw*, the challenged North Carolina congressional redistricting plan revealed nothing more shocking than irregularly drawn district lines and the existence of two majority-African-American districts. Yet, these innocuous facts, combined with the Court’s recognition that “the legislature always is aware of race when it draws district lines,” *Id.* at 660, were sufficient to justify the majority’s holding that a valid claim existed. The critical insight of the *Shaw* Court appeared in its statement that reapportionment “is one area in which appearances do matter,” *Id.* at 647. When government classes people together “who belong to the same race . . . and who may have little in common with one another but the color of their skin,” and then treats them differently from others, the public regime comes to bear “an uncomfortable resemblance to political apartheid,” *Id.*

3. Summary Affirmance Was Not Appropriate at Either Level of the Lower Courts

This Case was not appropriate for Summary Affirmance because the basic facts are complicated and in dispute, *Carl v. Tirado*, 945 A.2d 1208 (D.C. 2008). Moreover, the Trial Court’s granting of Summary Judgment did not rest “on a narrow and clear-cut issue of law,” *Id.* at 1209. *See also Oliver T. Carr Management, Inc. v. National Delicatessen, Inc.*, 397 A.2d 914 (D.C. 1979). The *Carr* and *Tirado* tests were recently affirmed in *Watson v. United States*, 73 A.3d 130, 131 (D.C. 2013). The Trial Judge’s 8 May 2017 Order

granting Summary Judgment, demonstrates that this matter does not rest “on a narrow and clear-cut issue of law.” Indeed that Order does not even address the manifold issues raised by Appellant in her Opposition to the Motion for Summary Judgment, in other pleadings filed by Appellant at the Trial level, in matters raised before the D.C. Court of Appeals and in the instant Petition. If there is any doubt that the legal issues are not narrow, the Trial Judge’s shallow Order erases that doubt.

Summary disposition is only proper “when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists,” *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). *See also Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969).

B. Relevant Factual Background

As a Co-Defendant at the Trial level, Congressman Fauntroy was never properly served in this matter and is thus not a Petitioner. Mr. Fauntroy is a well-known, celebrated, former 20-year Member of Congress; former Vice Chair of the D.C. Council; former Pastor for more than 50 years of the Church of his childhood New Bethel Baptist; and a distinguished civil rights activist and protégé of Dr. Martin Luther King, Jr. The behavior of Congressman Fauntroy—about which the Court should have taken judicial notice—before his return from a five-year odyssey abroad was the subject of serious questions raised by the media, print and electronic.¹ He was inexplicably away from his

¹ Every major local news outlet has covered Congressman Fauntroy’s seemingly bizarre behavior, including the Washington

home, out of the Country for more than five years, and had communicated very little with anyone, including his wife and Family. The Congressman was said to be living a Nomad-like existence with possible health challenges. He is now 85 years old and was 74 years old at the time he entered into this purported, 30-year, \$694,000 Agreement. Under its terms, he would be 104 years old before it was repaid. Appellant, Mrs. Fauntroy would be 100. Of particular note, Mrs. Fauntroy's signature does not appear on the Adjustable

City Paper, whose article was previously annexed in the Record before the Trial Court and is again annexed here at App.22a. Other articles and reports can be found at

Washington Post Article:http://www.washingtonpost.com/local/walter-fauntroys-friends-appeal-for-financial-help-for-him-and-his-wife/2015/03/25/51042784-d2ff-11e4-ab77-9646eea6a4c7_story.html;

(WD) Washington Informer Newspaper Article "Friends of Fauntroy" March 25, 2014 (a) [http://washingtoninformer.com/news/2015/mar/25/when-and-perhaps-why-congressman-fauntroy-fell/\(b\)http://washingtoninformer.com/news/2015/mar/25/fauntroys-friends-lead-fundraising-initiative/](http://washingtoninformer.com/news/2015/mar/25/when-and-perhaps-why-congressman-fauntroy-fell/(b)http://washingtoninformer.com/news/2015/mar/25/fauntroys-friends-lead-fundraising-initiative/);

CHANNEL 4 NEWS, Two (2) Video Clips <http://www.nbcwashington.com/news/local/Walter-Fauntroy-Concern-Grows-Whereabouts-Former-DC-Congressman-297523251.html>;

CHANNEL 4 NEWS: FAUNTROY PRESS CONFERENCE 9-24-15, 2 Video Clips <http://www.nbcwashington.com/news/local/Walter-Fauntroy-Concern-Grows-Whereabouts-Former-DC-Congressman-297523251.html>;

Friends seek financial aid for family of U.S. civil rights leader Fauntroy; <http://www.reuters.com/article/2015/03/25/us-usa-district-ofcolumbia-fauntroy-idUSKBN0ML2IB20150325>;

Channel 8 News; <http://www.wjla.com/articles/2015/03/friends-of-walter-fauntroy-d-c-s-first-congressman-seek-donations-to-help-save-family-home-112614.html>

Rate Note. *See* Appellee's Exhibit B, annexed to the Complaint, or The Prepayment Fee, also annexed to the Complaint as part of that Exhibit. Prior to the subject Note, their home of more than 50 years was mortgage free, paid for, owned by them without any burdens or encumbrances. It is the only home in Washington, D.C. ever visited by Dr. Martin Luther King, Jr. Mrs. Fauntroy never received any of the proceeds of the purported \$694,000 loan, and at this time it is unclear what became of the money. Mr. Fauntroy, according to Appellee, defaulted on the Note on 1 July 2008, less than two years after it was allegedly signed and some seven years before the filing of the instant action. A Petition Regarding a Disappeared, Missing, or Detained Person, 2015 INT 464, was filed with the Probate Division of the D.C. Superior Court, and following a closed hearing on the Petition Mr. Fauntroy was declared a Missing Person.² In addition, many friends, Family and persons who have known Mr. Fauntroy submitted declarations and affidavits, raising questions about his mental and physical health, not only during his absence, but dating back to the time that the purported Deed and Note was allegedly signed by him.³ In considering

² The Status of Missing Person was subsequently removed, following Mr. Fauntroy's return to the District of Columbia after his five-year odyssey.

³ Among those whose Statements, annexed together as, is Professor Michael K. Fauntroy, a Nephew of the Congressman; Dr. Carol A. Page, a long time staff member for the Congressman; and Ms. Joyce Harris who served as the Congressman's Executive Assistant during his entire 20 years in Congress, from 1971 until 1989 and as his Assistant when he served on the D.C. Council, from 1965 to 1971.

Mr. Fauntroy's capacity to enter into agreements, the Trial Court should also have taken careful note of three photographs that were annexed to Appellant's pleadings, which show Mr. Fauntroy at various relevant stages.⁴ In support of its Motion for Summary Judgment, Appellee relied almost exclusively on multiple discovery instruments directed at Mr. Fauntroy that it served on Appellant's Counsel, not Mr. Fauntroy, however, 1) because Co-Defendant Walter E. Fauntroy has yet to be personally and appropriately served; 2) because he was for the most part the sole individual who allegedly sought and purportedly signed the documents at issue in the instant Case; 3) because Mr. Fauntroy was and is uniquely in position to respond to the discovery instruments and not Appellant, Mrs. Fauntroy, who lacks the relevant information; 4) because Mr. Fauntroy was in an unknown location in Dubai, United Arab Emirates, and had very rarely communicated with his wife and Family; and 5) because Mr. Fauntroy had been out of the Country continuously for more than five years.

Having never served Co-Defendant Walter E. Fauntroy,⁵ and conceded that he was never properly

⁴ The first photograph shows the Congressman with President Johnson, Dr. King and Attorney General Bobby Kennedy at the signing of the 1964 Civil Rights Act. The second shows him with Congressman John Lewis on an occasion just before his departure to Dubai. And, the third, disturbing photograph is very recent, taken of the Congressman then in Dubai and sent to the undersigned Counsel by an anonymous source. *See* which contains the three photographs.

⁵ Respondent has known at least for four years that Co-Defendant Walter E. Fauntroy had been out of the country for a protracted period of time yet made no attempt whatsoever to

served,⁶ nonetheless Appellee states in its Complaint (Paragraph 4, page 2) that “The Court has personal jurisdiction of the Defendant herein.” This is clearly not the case inasmuch as Congressman Fauntroy resided outside of the United States for at least five years. Having chosen to avail itself of judicial foreclosure in order to collect an alleged debt pursuant to D.C. Code Section 42-816, Respondent was required to provide personal service on Defendant Walter E. Fauntroy whose sole signature appears on the Note. Attached and incorporated into Petitioner’s Motion to Dismiss were Exhibits A and B, verifying Defendant Walter E. Fauntroy’s absence from the country. When a Motion for Summary Judgment is under consideration, “the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [her] favor,” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). And *see Richards v. Option One*, 682 F. Supp. 2d 40 (D.D.C. 2010). Additionally, Appellee’s own Affidavit of Service filed on June 27, 2014 (Tracking No. 5000146602) shows that Congressman was not personally served. Moreover, Plaintiff has misled the Court in its Complaint by stating that both Dorothy and Walter E. Fauntroy are “Borrowers” under the Note contained in its Exhibit B of the Complaint. That document does not bear the signature of Dorothy S. Fauntroy. A judicial foreclosure

properly serve him. *See Exhibits A and B*, the original, authenticated copies previously filed with the Court.

⁶ Respondent’s Affidavit of Service, filed on 27 June 2014, Tracking Number 5000146602, concedes that Co-Defendant Walter E. Fauntroy was not personally served. District of Columbia Superior Court Rule 4(c)(5)(f) is clear and unambiguous. Appellee did not meet the requirements of the Rule.

specifically requires *in personam* jurisdiction.⁷ Service on Dorothy Fauntroy who is not a “Borrower” within the meaning of D.C. Code Section 26-1101 does not fulfill the applicable legal requirements. The United States District Court for the District of Columbia in *Contant v. Wells Fargo Bank, N.A. et al.* (Civil Action No. 13-572), The Court in a Memorandum Opinion dated 14 February 2014, citing *Light v. Wolf*, 816 F.2d 746, 750 (D.C. Cir. 1987) noted that “[T]he party on whose behalf service is made has the burden of establishing its validity when challenged; to do so, he must demonstrate that the procedure employed satisfied the requirements of the relevant portions of [Federal Rule of Civil Procedure 4] and any other applicable provision of law.” The Court dismissed the foreclosure case.

Finally, a notation in the agency record to the effect that notice was mailed was constitutionally insufficient, *Thomas v. District of Columbia Dep’t of Employment Servs.*, 490 A.2d 1162 (D.C. 1985); *accord*, *Kidd Int’l Home Care, Inc. v. Dallas*, 901 A.2d 156, 159 (D.C. 2006); *Bobb v. Howard Univ. Hosp.*, 900 A.2d 166, 168 (D.C. 2006) (both quoting *Thomas*).

⁷ See D.C. Code Section 42-816.



REASONS FOR GRANTING THE PETITION

I. SUMMARY JUDGMENT IS NOT SUPPORTED

In addition to the defective and ineffective service of process of the Summons and Complaint upon Congressman Fauntroy, there are other at least equally compelling reasons which buttress the instant Petition.

A. Statute of Limitations

The statute of limitations in the District of Columbia for bringing a breach of contract claim is three years, D.C. Code § 12-301(7).⁸ Respondent admits that the relevant instruments were executed on 17 March 2006, Complaint ¶ 6. Respondent also admits that the Note and Deed of Trust was transferred to it by the original Lender.⁹ And, Respondent admits that the default on the Note was 1 July 2008, Complaint ¶ 9 and that it did not file a Demand Letter until on or about 15 February 2013, Complaint ¶ 10, some four and a half years later; and Respondent did not file

⁸ Respondent argued that the instant contract is one “Under Seal,” thereby extending the Statute of Limitations to twelve years under District of Columbia Law, D.C. Code § 12-301(6). However, in the District of Columbia and elsewhere, “[c]ourts have been reluctant to declare a document to be sealed in the absence of evidence that the parties intended it to be under seal.” Even the appearance of the word “seal” and the impression of the corporate seal on a document has been held insufficient to create a sealed document, *President and Directors of Georgetown College v. Madden*, 505 F. Supp. 557, 587 [(D.Md. 1980)], *aff’d*, 660 F.2d 91, 96 (4th Cir. 1981) [(per curiam)].

⁹ Respondent’s Exhibit D, annexed to the Complaint.

the instant lawsuit until 14 May 2014, more than five years later.

The preliminary question to be resolved is whether Respondent's claim is time barred, and this turns on the question of when the statute of limitations started to run. Under the District of Columbia's discovery rule, the statute of limitations begins to run when a party becomes aware that he has suffered harm which has been caused by another, *Diamond v. Davis*, 680 A.2d 364, 372 (D.C. 1996). Other courts in this district, as well as District of Columbia courts, have held that a breach of contract claim accrues when the plaintiff is notified of his or her termination or nonrenewal. *See Allison v. Howard Univ.*, 209 F. Supp. 2d 55, 60 (D.D.C. 2002); *Harris v. Ladner*, 828 A.2d 203, 206 (D.C. 2003); *Stephenson v. American Dental Ass'n*, 789 A.2d 1248, 1251–52 (D.C. 2002). If the clock begins to run when a party has been made aware that the other is refusing to perform, it is clear from the face of the Complaint that Respondent knew that Petitioner and her co-Defendant would no longer perform the contract on or about 1 March 2008. Thus, the statute of limitations for all of the claims began to run on 1 July 2008. Under the three-year statute of limitations, Appellee had until 30 June 2008 to file its Complaint and did not file its Complaint by that time. Thus the Complaint is time-barred.

B. Laches

While the application of a statute of limitations is less rigid, laches is more free-form. A defendant can prevail if he can show on a particular set of facts that the plaintiff's delay was unreasonable and that the delay worked to the defendant's detriment,

Abraham v. Ordway, 158 U.S. 416, 420 (1895); *Major v. Shaver*, 187 F.2d 211, 212 (D.C. Cir. 1951).

C. Contracts Under Seal as Relates to Petitioner

Here, the record contains no evidence that either Petitioner or Congressman Fauntroy intended the Deed of Trust, the note or the extension of the note to be a sealed instrument. *See Huntley v. Bortolussi*, 667 A.2d 1362, 1365 (D.C. 1995), where the Court considered whether a suit brought on an unsealed promissory note acknowledged in and secured by a contemporaneously executed and sealed deed of trust constituted an action on “an instrument under seal” for § 12-301(6) purposes. The Court in *Huntley* held that the twelve year statute of limitations did not apply because the promissory note and a subsequent extension were not under seal, and the sealed deed of trust did not contain “an independent undertaking or covenant to pay the indebtedness.” *Madden*, cited in *Huntley*, did indeed hold that the appearance of the word “seal” and the impression of corporate seals on a document was insufficient to create a sealed instrument, *Madden*, footnote *supra*, 505 F. Supp. at 587. The Court went on to conclude in *Madden* that the combined use of the word “(Seal)” and of impressions should be considered insufficient by themselves to manifest an intent to render the contract under seal, particularly where such use of the word and of such impressions would serve no purpose other than to extend the statute of limitations, *Id.* at 587. In a 1997 Case before the District of Columbia Court of Appeals, *Richard A. Burgess, Appellant, v. Square 3324 Hampshire Gardens Apartments, Inc., Appellee.*, 691 A.2d 1153 (1997), the Court cited numerous author-

ities for the proposition that the presence of a corporate seal may not by itself make a document an instrument under seal for § 12-301(6) purposes, *Simonson v. International Bank of Washington*, 114 U.S. App. D.C. 160, 160, 312 F.2d 887, 887 (1963) (per curiam); *Sigler v. Mount Vernon Bottling Co.*, 158 F. Supp. 234, 235-36 (D.D.C.), *aff'd*, 104 U.S. App. D.C. 260, 261-62, 261 F.2d 378, 379-80 (1958) (per curiam). *See also A.I. Trade Fin., Inc. v. Petra Int'l Banking Corp.*, 314 U.S. App. D.C. 122, 135, 62 F.3d 1454, 1467 (1995); *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 147 U.S. App. D.C. 14, 25 n. 68, 452 F.2d 1346, 1357 n. 68 (1971). That is the case because corporate seals are routinely employed “for identification and as a mark of genuineness,” a use which does not necessarily evince an intention to create an instrument under seal. *Sigler, supra*, 158 F. Supp. at 236, 104 U.S. App. D.C. at 262, 261 F.2d at 380. *See also Fox-Greenwald, supra*, 147 U.S. App. D.C. at 25 n. 68, 452 F.2d at 1357 n. 68. Thus, in order for a document to be an instrument under seal for statute of limitations purposes, something more than a corporate seal, such as, for example, a recitation that the document is “signed and sealed,” is required.

D. State Law in the Eastern Region of the United States Supports the Position of Appellant

In Maryland and Virginia, adding the word “Seal” does not itself extend the statute of limitations, the so-called “enforcement period.” If “(Seal)” appears next to the signatures, courts in both states will look to whether the parties knowingly and willingly intended the contract to be subject to the longer limitations period. *See Rouse-Teachers Properties, Inc. v. Maryland*

Cas. Co., 358 Md. 575 (2000); and *School Board of Fairfax County v. M.L. Whitlow, Inc.*, 223 Va. 157 (1982).

In Maryland¹⁰, if a corporate seal is impressed on an agreement it will remain a simple contract unless either the body of the contract itself indicates that the parties intended to establish an agreement under seal, or sufficient extrinsic evidence, in the nature of how and when and under what circumstances the corporate seal was affixed,⁷ establishes the parties desire to create a specialty, *Mayor & Council of Federalburg v. Allied Contractors, Inc.*, 275 Md. 151, 155-56; 338 A.2d 275 (1975) (citing *General Petroleum Corp. v. Seaboard Terminals Corp.*, 23 F. Supp. 137, 139 (D.Md.1938)). See also *Gildenhorn*, 271 Md. at 398, 317 A.2d at 842; *Levin v. Friedman*, 271 Md. 438, 443, 317 A.2d 831, 834 (1974). See also *President and Dirs. of Georgetown Coll. v. Madden*, 505 F. Supp.

¹⁰ In general, the decisions of nearby jurisdictions are the most persuasive indication of how a particular state will decide a common law issue, and, at least with respect to Maryland law, that rule has been elevated into a formal principle. Because the District of Columbia was created from land ceded by Maryland and Virginia, statutory language incorporates Maryland's common law as it stood on 27 February 1801. See D.C. Code § 49-301 (1990). Consequently, the D.C. Court of Appeals has found Maryland law to be "especially persuasive authority." *Napoleon v. Heard*, 455 A.2d 901, 903 (D.C. 1983); accord *Watkins v. Rives*, 125 F.2d 33, 35 (D.C. Cir. 1941) (noting that the D.C. Circuit, when it sat as the court of last resort in the District of Columbia, "customarily, looked to later decisions of the Court of Appeals of Maryland for assistance"). Indeed, the D.C. Court of Appeals may have a statutory obligation to "look to the laws of Maryland for guidance when a question novel to our law is before us," *White v. Parnell*, 397 F.2d 709, 710 n. 1 (D.C. Cir. 1968).

557, 585 (D.Md.1980) *aff'd*, 660 F.2d 91, 96 (4th Cir. 1981) [(per curiam)], (explaining that “[a] sealed instrument is not created by accident” and “the intent of the parties is what controls.”)

The decision in *Rouse* from Maryland’s highest Court is mirrored in Virginia, the state that contributed the balance of land in 1800 to create the District of Columbia, *School Board of Fairfax County v. M.L. Whitlow, Inc.*, 223 Va. 157 (1982). In the District of Columbia too, “Courts have been reluctant to declare a document to be sealed in the absence of evidence that the parties intended it to be under seal,” *Huntley v. Bortolussi*, 667 A.2d 1362, 1365 (D.C. 1995). And, as indicated, very recently courts in New York and New Jersey have adopted the Maryland, Virginia and District of Columbia’s rulings and reasoning on purported sealed instruments, *Soroush v. Citimortgage, Inc.*, Index No. 706506/2015 (Queens County Sup. Ct., January 11, 2016), ruling because the Mortgagor failed to bring a foreclosure action within the six year Statute of Limitations, the Court 1) granted the Mortgagee Summary Judgment; 2) declared that the mortgage held by Citimortgage was invalid; 3) directed the Real Estate Clerk of the County to discharge the recorded mortgage; and 4) extinguished the underlying promissory note; and *Washington v. Specialized Loan Servicing, LLC (In re Washington)*, 2014 Bankr. LEXIS 4649 (Nov. 5, 2014).

Finally, Respondent relies heavily on the Case of *Winston Murray v. Wells Fargo Home Mortg.*, 953 A.2d 308, 323 (D.C. 2008) (a Case actually cited by Petitioner), without revealing that the D.C. Court of Appeals in that Case found that the statute of limita-

tions period would not be extended to twelve years and was subject to the three-year limitations period, concluding that D.C. Code § 12-301(8) (2001) provides that a three-year statute of limitations applies when no other period of limitation is specified for an action, *Murray, Id.* (citing *Obelisk Corp. v. Riggs Nat'l Bank*, 668 A.2d 847, 852 (1995)). And, *see Logan v. LaSalle National Bank*, 80 A.3d 1014 (2013).

Most importantly, Petitioner's Sworn, uncontested Declarations, Exhibits A and G (made a part of the Trial Court's Record), clearly indicate that she did not intend to extend the Statute of Limitations to 12 years and that such an extension was never even discussed or brought to her attention. Neither Respondent's Complaint nor any pleading submitted by Appellee contains any claim or factual assertion to the contrary.

It goes without saying that there is no contract with Petitioner, no obligation owed to Respondent from Petitioner and, because Petitioner is indisputably the Co-Record Owner, no basis for the instant lawsuit and no ability to foreclose on the subject property.

II. CAPACITY OF CONGRESSMAN FAUNTROY

Contracts entered into by mentally incapacitated persons are voidable, *Hernandez v. Bryant Banks and Sheillia Banks*, D.C. Court of Appeals, Nos. 08-CV-1571 & 09-CV-744, Decided: May 2, 2013. *See also* 5 WILLISTON ON CONTRACTS § 10:3, at 296. *See, e.g., Pappert v. Sargent*, 847 P.2d 66, 69-70 (Alaska 1993); *Young v. Lujan*, 461 P.2d 691, 693 (Ariz. Ct. App. 1969); *Neale v. Sterling*, 4 P.2d 250, 250 (Cal. Dist. Ct. App. 1931) (observing that contracts made by incom-

petent persons before a judicial determination of incompetency are voidable by statute); *Green v. Hulse*, 142 P. 416, 418 (Colo. 1914); *Doris v. McFarland*, 156 A. 52, 56 (Conn. 1931); *Pepper v. Edell*, 35 So.2d 387, 390 (Fla. 1948); *Holcomb v. Garcia*, 143 S.E.2d 184, 187 (Ga. 1965) is subject to possible avoidance by the mentally incapacitated party, who must manifest an election to do so.¹¹

The many media reports; the affidavits, declarations and statements by persons who have worked with and known Congressman Fauntroy for more than a half century, including Family members; and the photographic progression, graphically demonstrating the deterioration of the Congressman, at the very least gives rise to a genuine issue of material fact concerning the capacity of the Congressman to enter into the subject Contract and to his current ability to effectively represent himself in the instant case. Is it ordinary behavior for an individual to be inexplicably away from his home, out of the Country for roughly four years, and has communicated very little with no one, including his wife and Family and friends. He is now 85 and was 74 years old at the time he allegedly signed this 30-year, \$694,000 Adjustable Rate Note, a Note that was not signed by Petitioner. Under its terms, he would be 104 years old when it was repaid. Mrs. Fauntroy would be 100.

¹¹ RESTATEMENT (SECOND) OF CONTRACTS § 7 (1981) (“A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.”).

A. Respondent Lacked Standing to Foreclose or Show That It Could Pursue This Litigation

Petitioner in her pleadings alleged predatory lending on the part of Respondent. Yet, because of their summary dispositions, the lower courts did not allow Petitioner to demonstrate such predatory lending and did not require Appellee to demonstrate that its lending in the instant matter was not predatory. There are several prerequisites in Federal and District of Columbia Law that must be met before a Plaintiff is allowed to bring a Foreclosure lawsuit. The decisions by the lower courts did not take into account whether Appellee could withstand the scrutiny of these laws and thus have access to the courts.

1. The Truth in Lending Act (TILA)

The Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq., was enacted on May 29, 1968, as title I of the Consumer Credit Protection Act (Pub. L. 90-321). The TILA, implemented by Regulation Z (12 C.F.R. 1026), became effective July 1, 1969. The TILA was first amended in 1970 to prohibit unsolicited credit cards. Additional major amendments to the TILA and Regulation Z were made by the Fair Credit Billing Act of 1974, the Consumer Leasing Act of 1976, the Truth in Lending Simplification and Reform Act of 1980, the Fair Credit and Charge Card Disclosure Act of 1988, the Home Equity Loan Consumer Protection Act of 1988. Regulation Z also was amended to implement section 1204 of the Competitive Equality Banking Act of 1987, and in 1988, to include adjustable rate mortgage loan disclosure requirements. Sanctions for violation of TILA include Attorneys' fees and court

costs for successful enforcement and, most importantly, rescission actions.

2. The Home Ownership and Equity Protection Act (HOEPA)

The Home Ownership and Equity Protection Act of 1994 (HOEPA) amended the TILA. The law imposed new disclosure requirements and substantive limitations on certain closed-end mortgage loans bearing rates or fees above a certain percentage or amount. The law also included new disclosure requirements to assist consumers in comparing the costs and other material considerations involved in a reverse mortgage transaction and authorized the Federal Reserve Board to prohibit specific acts and practices in connection with mortgage transactions. The Act prohibits certain loan terms and lending practices for high-cost loans.

3. The Real Estate Settlement Procedures Act of 1974 (RESPA)

The Real Estate Settlement Procedures Act of 1974 (RESPA) (12 U.S.C. 2601 et seq.) (the Act) became effective on June 20, 1975. The Act requires lenders, mortgage brokers, or servicers of home loans to provide borrowers with pertinent and timely disclosures regarding the nature and costs of the real estate settlement process. The Act also prohibits specific practices, such as kickbacks, and places limitations upon the use of escrow accounts. The Department of Housing and Urban Development (HUD) originally promulgated Regulation X which implements RESPA. Congress has amended RESPA significantly since its enactment. The National Affordable Housing Act of 1990 amended RESPA to require detailed disclosures

concerning the transfer, sale, or assignment of mortgage servicing. It also requires disclosures for mortgage escrow accounts at closing and annually thereafter, itemizing the charges to be paid by the borrower and what is paid out of the account by the servicer. The Commissioner or Attorney General may bring an action in a court of competent jurisdiction to enjoin or seek remedies for violations of RESPA.

4. The Contents of Any Pooling and Services Agreement (PSA) Are Unknown

There is typically a Pooling and Services Agreement (PSA) with these type of loans. A PSA is a contract that is created when mortgage loans are bundled into a mortgage-based security, as here, and sold to investors. The PSA in which a loan has been bundled, will govern the powers and responsibilities of the Trustees, especially during foreclosure proceedings. The absence of the governing PSA and its contents in the instant matter calls into question whether the Trustees are acting within their powers.

5. PETE-Strict Statutory Prerequisite for Standing in Foreclosure Cases

In paragraph numbered 3, of Appellee's Statement of Material Facts Not in Dispute, Appellee asserts that it is the "holder of the subject note" and therefore automatically entitled to foreclose.

The subject Note is a negotiable instrument. The Uniform Commercial Code governs negotiable instruments. All of the states and the District of Columbia have adopted, with some minor differences, the Uniform Commercial Code ("UCC"). The UCC is statutory, is

part of the D.C. Code and its provisions dictate who can enforce negotiable instruments. Statutory law in the District of Columbia is clear, plain and unambiguous. As a Plaintiff, it must show by firm requirements that it is the Holder of the Note, a “person entitled to enforce” the note (a “PETE”). On Appeal, Respondent sought to shift this unequivocal mandate by asserting that Petitioner did not prove that Respondent is not a PETE. That is not what the Statute mandates. It is not the responsibility of Appellant. *See* D.C. Code § 28:3-301. Person entitled to enforce instrument. The D.C. Code makes clear that of the three categories of PETE, the first two (2) involve having physical possession of the note, and further still only one of those is deemed a “holder of the note.” The 3rd category involves lost notes—notes which are not in one’s possession. Given the clear position taken by the current Appellee in this case that it is the “holder of the note” it must have physical possession of the Note. There is no ambiguity in the relevant D.C. Code section. It makes the definition of “holder” very clear: § 28:1-201(b)(21). General definitions “Holder” means:

(A) The person in possession of a negotiable instrument that is payable either to bearer or to an identified person that is the person in possession; or [(B) N/A; (C) N/A—dealing with different types of negotiable instruments; actual possession also required].

Because Respondent does not appear to be a PETE, the decision of the D.C. Court of Appeals should be reversed. This issue of legal standing based on a “show me the note’ theory’ invoked by mortgagors across

the United States since the mortgage/foreclosure crisis began, has involved Appellee in the instant Case, the Bank of New York, and has recently resulted in the United States Supreme Court issuing a Writ of Certiorari in a case contesting this very issue by a Florida resident, Paula Perez-Rodriguez (Petitioner), against the Bank of New York Mellon, *et al.* The question presented to the Supreme Court as stated in its Writ is “Whether borrowers have the right under the Due Process Clause of the Fourteenth Amendment to contest residential foreclosures that use the same fraudulent documentation numerous branches of the federal government and 49 state Attorneys General condemned and prohibited through various multibillion dollar settlements? The Court’s opinion, referencing the “mortgage meltdown” takes note of the rampant practice that led to this crisis, that is, “Instead of lenders issuing mortgages under their names, mortgages would be issued (and recorded) under “MERS” acting as a “nominee” for the lenders, thereby allowing the mortgages to be “pooled” together and marketed as securities using unrecorded notes and assignments. *See Pub. Emps.’ Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 277 F.R.D. 97, 102-03 (S.D.N.Y. 2011). By 2007, approximately 60 percent of mortgage loan originations had been recorded under MERS’s name. Peterson, 78 U. CIN. L. REV. at 1373-74 (citations omitted).” This case fits squarely into this mortgage category.

In a judicial foreclosure proceeding, the D.C. Superior Court is the first shield in safeguarding its residents due process rights. The risk of an erroneous deprivation when the decision rests on fraudulent evidence manufactured by the opposing party should be self-evident. Using false or fraudulent evidence

“involve[s] a corruption of the truth-seeking function of the trial process,” the Supreme Court Concluded

B. Petitioner’s Counterclaims Were Largely Ignored by the Trial Court, Although They Raise Serious and Significant Questions Based Upon the Predatory Nature of the Purported Loan

Whether Respondent acted with malice or for an improper purpose is a factual question. “Proof of fraud or malice ‘need not be by direct evidence but may appear from all the facts and circumstances of the case,’ ” *Bay General Industries, Inc. v. Johnson*, 418 A.2d 1050, 1058 (D.C. 1980) (quoting *Franklin Inv. Co., Inc. v. Smith*, 383 A.2d 355, 359 (D.C. 1978) (citations omitted)). In addition, the “evidence that [the agent] acted with malice [need] not [be] overwhelming,” *Sorrells v. Garfinckel’s, Brooks Bros., Miller & Rhoads, Inc.*, 565 A.2d 285, 292 (D.C. 1989) (allowing question of malice to go to jury when supervisor interfered with employee’s ability to perform her job). D.C. Code § 26-1114 (2015) specifically prohibits a mortgage broker, mortgage lender, mortgage loan originator, or loan officer from making, directly or indirectly, any mortgage loan with the intent to foreclose on the borrower’s property. For purposes of this paragraph, any of the following factors may be considered in determining whether a mortgage loan was made with the intent to foreclose on the borrower’s property:

- (A) Lack of the probability of full repayment of the loan by the borrower; and
- (B) A significant proportion of similarly foreclosed loans by the lender.

With Co-Defendant Walter E. Fauntroy's age, income and circumstances at the time of the loan as averred in Appellant's Answer, the probability of repayment of an escalation ARM loan with a thirty year maturity to 2036 was very slim. Another Lender was involved in a similar case. In *Matthew Rogers, Appellant, v. Advance Bank, Appellee*. (D.C. Court of Appeals No. 13-CV-1473, Decided March 5, 2015). The Court's Ruling is instructive. On January 25, 2013, that Court stated that Judicial sales under § 42-816 are "wholly different from non-judicial foreclosures because of the court's involvement in the process, which reduces the risk of error and predatory foreclosure practices. The Court further stated that, "Thus it is clear to us that the Council understandingly intended to protect District residents from predatory practices by mortgagees because of the lack of oversight during the non-judicial foreclosure process.

C. Respondent Took No Action to Mitigate Its Damages as Required by Law and by Court Rule

A Plaintiff must avoid damages which the plaintiff "should have foreseen and could have avoided by reasonable effort without undue risk, expense or humiliation," *Edward M. Crough, Inc. v. Dept. of Gen. Services*, 572 A.2d 457, 466 (D.C. 1990). The extreme delay in bringing this action is inexcusable. These failures and delays have caused the claims against Appellant to be inexcusably higher than the claims would have been had Respondent acted promptly. This is a common occurrence as can be seen in the more than 3,000 foreclosure cases filed in 2016 in Washington, D.C. alone. Respondent's own Complaint, on its

face, is illustrative of this point; with claims at Paragraphs 12 and 13 likely totaling close to \$200,000.00 (as of 3 February 2014) for interest at \$130,189.09; escrow advances at \$37,649.59; other charges in excess of \$8,000.00; and unspecified charges for attorney's fees, undefined costs, taxes and insurance. These charges would not have accrued if Respondent had not delayed, to the extreme, in bringing this Case. The failures and delays of Respondent have also caused Defendant to lose income from the subject property, including rental income.

III. SUMMARY AFFIRMANCE IS AN EXTRAORDINARY REMEDY

Appropriately, courts have constructed stumbling blocks for those who seek summary disposition of cases on appeal. These stumbling blocks serve to erect important principles that courts must consider before granting summary disposition. First, there must be a clear indication from the moving party that it is entitled to relief on the merits. An appeal need not be frivolous to satisfy this standard, but there must be no "substantial" question for the court to decide, *Joshua v. United States*, 17 F.3d 378, 380 (Fed. Cir. 1994). Second, summary disposition should not be granted when the case turns upon a complicated legal question, *D.C. Cir. Handbook of Practice & Internal Procedures* at 36. Third, the record before the court must be sufficient to allow meaningful consideration of the appeal, *Cascade Broad. Group, Ltd. v. FCC*, 822 F.2d 1172, 1174 (D.C. Cir. 1987) (summary disposition is appropriate "only where the moving party has carried the heavy burden of demonstrating that the record and the motion papers comprise a basis

adequate to allow the fullest consideration necessary to a just determination”) (internal quotation marks and citation omitted). And finally, the courts are more likely to grant summary disposition in cases in which a delay will substantially harm the moving party, and where an expedited schedule for briefing an oral argument will be insufficient to prevent that harm, *United States v. Fortner*, 455 F.3d 752, 754 (7th Cir. 2006). Respondent did not meet any prong of this four-part test.

IV. SUMMARY AFFIRMANCE PRE-EMPTS DUE PROCESS PROTECTION

The potential loss of one’s housing is a sufficiently significant private interest that gives rise to Due Process Protection, *Covey v. Sommers*, 351 U.S. 141 (1956); *Lindsey v. Normet*, 405 U.S. 56 (1972); and *Green v Lindsey*, 456 U.S. 444 (1982). The District of Columbia Court of Appeals of course has followed this principle, *Frank Emmet Realty v. Monroe*, 562 A.2d 134 (1989).

As former Law Professor points Cunningham points out, “The property interests at stake in evictions actions both for landlords and for tenants are considerable and undisputable.” Professor Cunningham further notes that the Decision by the United States Supreme Court *Doehr* sets up a three part test for due process compliance by court and agency procedures where actions may result in the taking of property. The three part test as stated in *Doehr*, according to the Professor is . . . first, consideration of the private interest that will be affected by the prejudgment measure; second, an examination of the risk of erroneous deprivation; and third . . . principal attention to

the interest of the party seeking the prejudgment remedy, with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections, *Connecticut v. Doeher*, 501 U.S. 1 (1991).

Respondent did not assert and the DCCA did not pronounce any good reason to pre-empt the Due Process Protection of Petitioner.

V. THE PREFERENCE TO MAKE DECISIONS ON THE MERITS

It has long been established in courts that litigation should be decided on the merits of a case. Here, no discovery was allowed to take place by Petitioner; other than the Motion for Summary Judgment, no dispositive motions were considered, and there was no trial preparation whatsoever. The instant effort by Respondent to summarily prevail in the Case runs counter to that long-standing “judicial preference for the resolution of disputes on the merits rather than by the harsh sanction of dismissal,” *Bond v. Wilson*, App. D.C., 398 A.2d 21 (1979); *Schwab v. Bullock’s Inc.*, 508 F.2d 353, 355 (9th Cir. 1974); *Tolson v. Hodge*, 411 F.2d 123, 130 (4th Cir. 1969); *Rooks v. American Brass Co.*, 263 F.2d 166, 169 (6th Cir. 1959) (per curiam); *Hiern v. St.Paul-Mercur’ Indem. Co.*, 262 F.2d 526, 530 (5th Cir. 1959); *Tozer v. Charles A. Krause Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951); and see 6 J. Moore, Federal Practice 55.10[1], at 55-235 to 236 (2d ed. 1976).



CONCLUSION

A cause of action generally accrues for statute-of-limitations purposes when the plaintiff knows or by the exercise of reasonable diligence should know of its injury, *Ray v. Queen*, 747 A.2d 1137, 1141 (D.C. 2000). Here the facts are clear. This action is time barred.

A blind eye was turned by the Trial Judge to fundamental, hard fought Common Law, Statutory and Constitutional rights. No citizen, no matter his or her status or how he or she is regarded, should ever be forced to shred rights at the Courthouse Gates as is demonstrated here. As one who walked arm in arm with Dr. Martin Luther King, Jr. and served as Dr. King's Emissary in Washington, D.C.; as one who has been a loving Husband, a dedicated Father and Grandfather; a dutiful 50 year Church Pastor and a public servant whose remarkable career spans more than a half century,¹² the key to his current behavior can only be found deep within the recesses of his mind.

Respondent's Motion for Summary Judgment was premature and should have been denied. The D.C. Court of Appeals Summary Affirmance of the Summary

¹² Since graduating from Yale University Divinity School in 1958, the Congressman had led a stellar life; elected to the 92nd Congress on March 23, 1971; reelected to 9 succeeding Congresses he resided in a far away, distant land, without rational reason. He is the only living individual in that famous photo of President Lyndon B. Johnson signing the Civil Rights Act of 1964, with Dr. Martin Luther King, Jr. by the President's side and Attorney General Bobby Kennedy in the background.

Judgment rattles the notion of due process in a way unimaginable by any treatment of the subject. As stated by the Court in *Wilburn v. Robinson*, 480 F.3d 1140, 1143 n.2 (D.C. Cir. 2007) (quoting *Gleklen v. Democratic Cong. Campaign*, “a non-movant is not required . . . to produce evidence in a form that would be admissible at trial,” 199 F.3d 1365, 1369 (D.C. Cir. 2000).

Respectfully submitted,

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MARCH 21, 2018