

No. \_\_\_\_\_

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IN THE  
SUPREME COURT OF THE UNITED STATES

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PIERRE ANDRE BASSON - Petitioner,

v.

MORTGAGE ELECTRONIC  
REGISTRATION SYSTEMS, INC.,  
CITIMORTGAGE INC., and  
FEDERAL NATIONAL  
MORTGAGE ASSOCIATION - Respondents.

**ON PETITION FOR WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT  
CASE NO.: 18-12110-AA**

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**PETITION FOR WRIT OF CERTIORARI**

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January 29, 2019

## QUESTION PRESENTED

When considering a Motion to Dismiss for Failure to State a Claim Upon which Relief May be Granted Pursuant to Federal Rules of Civil Procedure 12(b)(6) and 56(c), “the Court May Not consider facts outside the Record or must treat the Motion as a Motion for Summary Judgment and must inform a plaintiff who is proceeding pro se that it is considering more than the pleadings and must afford a reasonable opportunity to present all pertinent material.” *Lucas v. Department of Corrections*, 66 F.3d 245, 248 (9<sup>th</sup> Cir., 1995). (Cir., 1995). (citing *Garaux v. Pulley*, 739 F.3d 437(9<sup>th</sup> Cir. 1984). *The Pro Se Plaintiff should be advised of Rule 56 requirements, including the right to file counter-affidavits or other responsive materials and to alert [him]to the fact that his failure to so respond might result in the entry of summary judgment against him.*” *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n,8 (9<sup>th</sup> Cir. 1986).

The district court in this case provided no such advice or opportunity for Petitioner to submit counter-affidavits or other responsive material and the failure to do so deprived Petitioner of his due process rights of notice and opportunity to be heard. Alternatively, the Court should have treated the motion to dismiss as a motion for summary judgment and should have denied the motion to dismiss.

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

The opinion of the United States Court of Appeals appears at Appendix A to the petition.

**JURISDICTIONAL STATEMENT**

The date on which the United States Court of Appeals decided my case was 02 November 2018.

This court has jurisdiction over this matter pursuant to 28 U.S.C. 1254 (1).

**ISSUES ON APPEAL**

- I. The Circuit Court of Appeal erred in affirming the District Court's Granting of Defendant/Appellee's Motion to Dismiss pursuant to Fed. Rule Civ. Pro. 12 (b) (6) and 56 (c) because the Motion was unsupported by affidavits or depositions and is incomplete.
- II. The Circuit Court erred in affirming the District Court granting defendant/Appellant's Motion to Dismiss pursuant to Fed. Rule Civ. Pro. 12 (b)(6) and 56(c) because it asks the Court to consider facts outside the record which were not excluded by the Court and the motion must be treated as one for summary judgment.
- III. The Circuit Court of Appeal erred in affirming the District Court's opinion in not treating Defendant/Appellee's Motion to Dismiss as one for Summary Judgment. Statements of counsel in their briefs or argument are not sufficient for purposes of granting motions to dismiss or summary judgment.

## STANDARDS OF REVIEW

Rule 12 of the Federal Rules of Civil Procedure clearly states that if, on a Motion under Rule 12 (b) (6) or 12 (c) matters outside the pleadings are presented and not excluded by the Court, the motion **must** be treated as one for summary judgment. In the Case at Bar, matters outside the pleadings were presented and were not excluded by the Court and therefore Appellee's Motion to Dismiss must be treated as one for summary judgment. Summary Judgment is warranted when "the pleadings, depositions answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. Rule 56(c); *Raskin v. Wyatt Co.*, 125 F 3d 55 (2d Cir. 1997); *Cronin v. Aetna Life Insurance Co.*, 46 F3d 196 (2d Cir. 1995). In this case on appeal, there were no depositions, affidavits, answers to interrogatories or admissions on file. The file consisted of only the pleadings and briefs or argument of counsel, which are insufficient when treating the Motion as a Motion for Summary Judgment. Therefore, because the Motion was unsupported by affidavits or depositions it is incomplete and was not treated as a Motion for Summary Judgment as required by Rule 12 by either The Magistrate Judge or the district Judge. The standard for review is a *de novo* review. It is clear from the record of the case that movant utterly failed to meet the standard required by law for this motion pursuant to the applicable Rule

and Appellee's motion only considered pleadings, and a Brief and argument of Respondent's counsel. Statements of counsel in their briefs or argument while enlightening to the Court are **not sufficient** (emphasis added) for purposes of granting a motion to dismiss or summary judgment. *Trinsey v. Pagliaro*, 229 F. Supp. 647 (E.D. Pa. 1964). the Respondent's motion to dismiss for failure to state a claim is unsupported by affidavits or depositions is incomplete because it requests the Court to consider facts outside the record which have not been presented in the form required by Rules 12 (b) (6) and 56 (c). In granting Respondent's Motion to Dismiss, the Court used an incorrect standard and did not treat it as one for summary judgment as required by Rules 12 and 56. Further, "When the district court transforms a dismissal into a summary judgment proceeding, It **must** inform a plaintiff who is proceeding *pro se* that it is considering more than the pleadings and must afford a reasonable opportunity to present all pertinent material." *Lucas v. Department of Corrections*, 66 F. 3d 245, 248 (9<sup>th</sup> Cir., 1995). (citing *Garaux v. Pulley*, 739 F.3d 437 (9<sup>th</sup> Cir., 1984). The *Pro Se* Plaintiff should be advised of Rule 56 requirements, including the right to file counter-affidavits or other responsive materials and to alert [him] to the fact that his failure to so respond might result in the entry of summary judgment against him." *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.8(9<sup>th</sup> Cir, 1986). The district court in this case gave no such advice or opportunity.



## **FACTUAL AND PROCEDURAL BACKGROUND**

On or about December 30, 2005 Petitioner Pierre Andre Basson purchased the subject property at 5262 Keithwood Drive, Cumming, Georgia. Appellant executed a Security Deed in favor of E-Loan. MERS was listed as “nominee” for E-Loan. Appellant commenced making payments to “E-Loan” and continued to make payments for a substantial period of time. On September 13, 2012, almost seven (7) years later, MERS purportedly assigned Appellant’s Security Deed to CitiMortgage, Inc. Appellant disputes the validity of said assignment as a cloud against his title. Subsequently, on or about February 13, 2014, almost nine (9) years after the original closing and execution of the original Security Deed to E-Loan, CitiMortgage, Inc. purportedly assigned the Security Deed to Federal National Mortgage Association (“FNMA”) which assignment is disputed by Appellant as a cloud against his title. On or about August 7, 2017, Appellant filed a Complaint for Quiet Title, Mortgage Document Fraud and for Declaratory and Injunctive Relief In the Superior Court of Forsyth County. Defendants removed the case to Federal District Court citing diversity of citizenship. Defendants MERS and CitiMortgage, Inc. then filed their Motion to Dismiss pursuant to Fed, R. Civ. Pro 12(b)(6). On or about March 30, 2018, the Magistrate Judge issued a Final Report and Recommendation recommending that

Respondent's Motion to Dismiss pursuant to Fed. R. Civ. Pro. 12 (b) (6) be granted. On or about April 23, 2018, the District Court entered an Order adopting the Report and Recommendation of the Magistrate Judge and dismissing the Complaint with prejudice. Appellant filed a timely Notice of Appeal on May 17, 2018. The ruling of the District Court was affirmed by the Eleventh Circuit Court of Appeal on November 2, 2018. This Petition follows the entry of that Opinion.

### SUMMARY OF ARGUMENT

A summary of Petitioner's argument is as follows: Rule 12 of the Fed. R. Civ Pro. states that if, on a motion under Rule 12 (b) (6), or 12 (c), matters outside the pleadings are presented and not excluded by the Court, the Motion must be treated as one for Summary Judgment. Therefore, the issue before this court is whether Respondent's motion meets the requirements for a motion for Summary Judgment, which Petitioner states it does not. Therefore, it was error to grant the motion to dismiss and it should have been treated as a motion for summary judgment and should have been properly denied.

Respondent's motion to Dismiss was unsupported by affidavits or Depositions, requests for admissions, interrogatories, requests to produce or any Other discovery. No discovery had been done and there were no depositions, admissions or answers to Interrogatories in the file. The file consisted solely of pleadings and Briefs containing legal argument. It has been held that Statements of counsel in their briefs or legal arguments are not sufficient for purposes of granting motions to dismiss or summary judgment. The District Court was required by Rule 12 to treat Respondent's Motion to Dismiss under 12 (b) (6) as a motion for

summary judgment. Because of the lack of evidentiary support and consideration of facts outside of the record, such as legal argument contained in Respondent's counsel's brief, Respondent's Motion to Dismiss failed to meet the standard required for granting of summary judgment as required by Rules 12 and 56.

## **REASONS FOR GRANTING THE PETITION**

### **ARGUMENT—Point I**

The Circuit Court of Appeal erred in affirming the District Court decision in granting Respondent's motion to dismiss under Rule 12 (b) (6) where the motion was unsupported by affidavits or depositions, considered facts outside the pleadings and the record converting Appellee's motion to dismiss into a motion for summary judgment. As previously stated, Rule 12 provides that if the court considers matters and facts outside the pleadings, and record, such as briefs and arguments of counsel, that the motion to dismiss is treated as a motion for summary judgment. It has long been held that "Statements of counsel in brief or in argument are not facts before the court and are therefore insufficient for a motion to dismiss or summary judgment." *Trinsey v. Pagliaro*, 229 F. Supp. 647 (E.D. Pa 1964). Further, Petitioner is a *Pro Se* Plaintiff. "When the district court transforms a dismissal into a summary judgment proceeding, It **must** inform a plaintiff who is proceeding *pro se* that it is considering more than the pleadings and must afford a reasonable opportunity to present all pertinent material." *Lucas v. Department of Corrections*, 66 F. 3d 245, 248 (9<sup>th</sup> Cir., 1995). (citing *Garaux v. Pulley*, 739 F.3d 437 (9<sup>th</sup> Cir., 1984). *The Pro Se Plaintiff*

should be advised of Rule 56 requirements, including the right to file counter-affidavits or other responsive materials and to alert [him] to the fact that his failure to so respond might result in the entry of summary judgment against him.” *Jacobsen v. Filler*, 790 F.2d 1362, 1365 n.8(9<sup>th</sup> Cir, 1986). The district court in this case gave no such advice. Nor did the District Court provide the Pro Se Petitioner the notice specified in *Klinge v. Eikenberry*, 849 F. 2d 409, 411-12 (9<sup>th</sup> Cir. 1988).

### **ARGUMENT—POINT II**

The Circuit Court of Appeal erred in affirming the district court in granting Respondent’s motion to dismiss under Rule 12 (b) (6) because it only considered briefs and legal argument which were outside the facts and the record. Statements by counsel in their brief or argument are not sufficient for purposes of granting a motion to dismiss or motion for summary judgment. As a result the courts have held that a district court which must transform a motion to dismiss into a motion for summary judgment by relying on materials outside the pleadings must always provide a pro se litigant the notice specified in *Klinge v. Eikenberry*, 849 F 2d 409, 411-12(9<sup>th</sup> Cir. 1988). *This was not done by the district court.*

### **ARGUMENT—POINT III**

The Circuit Court of Appeal erred in affirming the district court opinion because it failed to consider Respondent’s motion to dismiss as a motion for summary judgment pursuant to Rules 12 and 56. A motion to dismiss made under

Federal Rule of Civil Procedure 12 (b) (6) must be treated as a motion for Summary Judgment under Federal Rule of Civil Procedure 56 if either party submits materials outside the pleadings in support or opposition to the motion, and if the district court relies on those materials, Fed. R. Civ. Pro. 12(b)(6). Here in the case at bar, Petitioner supplied a memorandum in opposition to Respondent's motion to dismiss and Respondent's counsel supplied a memorandum in support of Respondent's motion to dismiss. Since both sides submitted materials in support and in opposition to the motion, and since only the pleadings and memoranda were before the court, the court relied on those materials. Therefore, Respondent's motion must be treated as a motion for summary judgment *Lucas v, Department of Corrections* 66 F, 3d, 245, 248 (9<sup>th</sup> Cir. 1988) pursuant to Rule 56. As a motion for summary judgment, the motion fails because it was unsupported by affidavits or depositions. Legal argument alone cannot establish facts necessary to support a successful motion for summary judgment which must be done by affidavit or depositions because legal argument does not constitute facts and is insufficient for purposes of granting a motion to dismiss or for summary Judgment. *Trinsey v. Pagliaro*, 229 F. Supp. 647 (E.D. Pa. 1964).

Further, when the district court transforms a dismissal into a summary judgment proceeding, it must inform a plaintiff who is *pro se* that it is considering

more than the pleadings and must afford a reasonable opportunity to present all pertinent material. *Lucas v. Department of corrections*, 66 F3d 245, 248 (9<sup>th</sup> Cir. 1995), (citing *Garaux v. Pulley*, 739 F. 2d 437(9<sup>th</sup> Cir. 1984). *A pro se plaintiff should be told about his right to file counter-affidavits or other responsive materials [to] alert [him] to the fact that his failure to respond might result in the entry of summary judgment against him.* *Jacobsen v. Filler*, 790 F. 2d 1362, 1365, n.8 (9<sup>th</sup> Cir. 1986). The district court in this case gave no such advice.

**CONCLUSION**

Based upon the facts, the pleadings, the record of this case and the legal authorities submitted, the Circuit court of Appeal erred in affirming the District Court's granting of Respondent's motion to dismiss under Rule 12 (b) (6) where it was unsupported by affidavits, depositions and was therefore incomplete and insufficient to dismiss Petitioner's case and should have been treated as a motion for summary judgment under Rules 12 and 56. The Order of the district court should have been reversed and remanded and the court should have been directed to treat Respondent's motion to dismiss as a motion for summary judgment with directions to deny same as an improper motion for summary judgment.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of January, 2019.



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**Pierre Andre Basson, Petitioner  
Pro Se; Self Represented**

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