

No.

In the
Supreme Court of the United States

Beth A. Riley,
Petitioner,

v.

America's Wholesale Lender; Countrywide Home
Loans, Inc.; and Bank of America Corporation,
Respondents.

*On Petition for Writ of Certiorari to the California
Court of Appeal, Fourth District, Division One*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

California courts do not permit a borrower to challenge the authority of the entity foreclosing on her loan once nonjudicial foreclosure begins. Does the California courts' refusal to allow a borrower to sue for declaratory relief to challenge the foreclosing entity's authority *before* foreclosure begins thus constitute a violation of the borrower's right to due process of law?

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OPINIONS BELOW

The opinion of the California Court of Appeal, Fourth Appellate District, Division One, unpublished, was filed July 28, 2011. (Appendix,¹ page A1) The California Supreme Court denied review, without opinion, on October 12, 2011. (A10)

JURISDICTION

The Court of Appeal entered its judgment on July 28, 2011. The California Supreme Court denied review on October 12, 2011. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction

¹ References to the Appendix are given in parentheses, with page numbers preceded by the letter "A."

the equal protection of the laws.

United States Constitution, Amendment
14, Section 1.

In a case of actual controversy within its
jurisdiction . . . any court of the United
States . . . may declare the rights and
other legal relations of any interested
party seeking such declaration, whether
or not further relief is or could be sought.

28 U.S.C. § 2201(a).

Any person interested under a written
instrument, . . . or under a contract, or
who desires a declaration of his or her
rights or duties with respect to another,
or in respect to, in, over or upon property,
. . . may, in cases of actual controversy
relating to the legal rights and duties of
the respective parties, bring an original
action or cross-complaint in the superior
court for a declaration of his or her rights
and duties in the premises, including a
determination of any question of
construction or validity arising under the
instrument or contract. He or she may
ask for a declaration of rights or duties,
either alone or with other relief; and the
court may make a binding declaration of
these rights or duties, whether or not
further relief is or could be claimed at the

time. The declaration may be either affirmative or negative in form and effect, and the declaration shall have the force of a final judgment. The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.

California Code of Civil Procedure,
§ 1060

The trustee, mortgagee, or beneficiary, or any of their authorized agents shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default.

California Civil Code § 2924(a)(1)
(specifying contents of that notice).

A beneficiary, or his or her authorized agent, shall, within 21 days of the receipt of a written demand by an entitled person or his or her authorized agent, prepare and deliver to the person demanding it a true, correct, and complete copy of the note or other evidence of indebtedness with any modification thereto, and a beneficiary statement.

California Civil Code § 2943(b)(1).

INTRODUCTION

This case tests whether, under the due process clause of the Fourteenth Amendment to the Constitution of the United States, the judgment of the California courts deprived Petitioner of her property by denying her the only remedy she had available to prevent foreclosure. The case implicates both the due process clause and the Declaratory Judgment Act.

Since the 2008 meltdown, financial institutions have seized millions of homes across the United States through foreclosures. But state and federal law enforcement agencies, real estate professionals, and consumer advocates have now awakened to the existence of a nationwide epidemic of foreclosure fraud.

Last year the Attorneys General of all fifty states launched a joint investigation into the mortgage practices of lenders, including Bank of America (Countrywide's successor) among others. Investigations by state agencies, journalists, and attorneys representing borrowers continue to uncover a morass of negligence and fraud, such as missing promissory notes, backdated assignments, forgeries of signatures on assignments and deeds of trust ("robosigning"), and the false notarizing of recorded documents. This malfeasance contributes to the processing of thousands of foreclosures by companies making

billions of dollars with little oversight or inquiry as to the foreclosures' legality. Misconduct has been found or suspected in both judicial and non-judicial foreclosures. On December 1, 2011, the Massachusetts Attorney General sued multiple banks, including Bank of America, charging them with rampant unfair and deceptive conduct throughout the foreclosure crisis. *Commonwealth v. Bank of America, et al.* (Mass.Super.Ct., Civ. A. No. 11-4363, 12/01/11).

In California, most foreclosures are nonjudicial. A promissory note for the money to buy real property may be secured by a lien in the form of a deed of trust. That deed of trust grants the trustee the power of sale if a homeowner such as Petitioner defaults on a loan. The lender may foreclose using a nonjudicial scheme established by the state legislature and embodied in California Civil Code § 2924 et seq. Nonjudicial foreclosure is also available to lenders in twenty-eight other states. These statutes have permitted much of the foreclosure abuse, typically leaving the defrauded homeowner with little or no recourse.

One of the contributing factors is lenders' common practice of assigning tasks such as collection of payments to a "loan servicer," usually large financial institution such as Bank of America. The loan servicer acts as the lender's ostensible agent, and not

only manages accounts but, in the event of a default, may have the power to authorize the trustee to foreclose.

Lenders and assignees find it convenient to use a loan servicer, but the practice creates insurmountable problems for borrowers in financial straits. Loan servicers collect fees for a wide range of services, including overseeing foreclosures, and a large servicer may manage hundreds of thousands or even millions of loans. Trying to renegotiate the terms of a loan with a servicer—or simply to determine whether the servicer actually represents the current beneficiary of the loan—becomes a frustrating tale of unreturned phone calls, lost documents, misrepresentations, and eventual foreclosure despite borrowers’ best efforts to avoid losing their homes. Yet in *Gomes v. Countrywide Home Loans, Inc.*, 192 Cal.App.4th 1149 (2011), cert. denied, the California Court of Appeal held that *once a loan is in non-judicial foreclosure*, the “comprehensive scheme” that governs the process precludes the borrower from questioning whether the foreclosing entity is in fact, as it purports to be, the loan’s beneficial owner, the trustee, or an authorized agent of either. *Id.* at 1154.

In the present case, Petitioner Riley began receiving statements regarding her loan from a stranger to the original transaction. More than once,

she requested a copy of her Note (with all modifications) and a beneficiary statement, as required by California Civil Code § 2943(b)(1), together with documents evidencing any sale, transfer or assignment of the Note. No such information was provided, which led Petitioner to believe that the bank sending the statements was not the beneficial owner of the Note or its authorized agent. When she sued for declaratory relief, however, her case was dismissed on the ground that it did not allege an “actual controversy.”

That holding, which is contrary to California and federal decisions concerning the nature of an “actual controversy,” applies a valid declaratory relief statute in such a way as to leave Petitioner with no remedy. She cannot challenge the stranger’s right to collect loan payments before default and foreclosure. Yet if she refuses to pay the stranger and foreclosure proceedings are commenced, the *Gomes* decision will prevent her from challenging the stranger’s authority at that time. Petitioner thus stands to lose her property without any opportunity for a hearing regarding the stranger’s authority to collect loan payments and foreclose upon default. This misapplication of California law permits purported but unproved creditors, backed by the power of the state to enforce foreclosures, to deprive borrowers of their property without due process of law.

STATEMENT

A. The parties' dealings

On December 19, 2005, Riley borrowed \$476,000 to buy a house in Lakeside, California, executing a promissory Note in favor of the lender, AWL. The Note was secured by a Deed of Trust that identifies Riley as the Borrower, AWL as the Lender, California Land Title as the Trustee, and Mortgage Electronic Registration Service ("MERS") "acting solely as a nominee for Lender and Lender's successors and assigns" as the beneficiary.

In February 2008, Riley began to receive statements regarding her loan from Countrywide and Bank of America Corporation (BAC)². She later received statements from BAC in May and June 2009.

On June 1, 2009, Riley's counsel asked BAC under Civil Code § 2943 for copies of documents related to her loan and to the Note's sale, transfer, or assignment. BAC did not respond. On June 25, 2009, counsel again asked BAC for those documents. On July 1, 2009, BAC replied that it would respond in due time. It never did.

² BAC acquired Countrywide in 2008.

B. Proceedings in the California courts

Riley sued for a declaration as to her rights regarding her loan and to determine the ownership of the promissory note she signed. The trial court dismissed the case after sustaining a demurrer without leave to amend on the ground that Riley had failed to allege an actual controversy. The California Court of Appeal affirmed (A1), and the California Supreme Court denied review (A10).

Riley's petition to the California Supreme Court (A12) argued that the combined effect of the *Gomes* decision (barring any challenge to the forecloser's authority once a loan is in nonjudicial foreclosure) and the present decision (barring a pre-foreclosure challenge despite the failure to provide any evidence of the claimed authority) is to permit purported but unproved creditors, backed by the power of the state, to deprive borrowers of their property without due process of law (A13).

REASONS FOR GRANTING THE PETITION

A. Petitioner alleged an actual controversy.

Under California law, declaratory relief is available to

[a]ny person interested under a written

instrument . . . or under a contract, or who desires a declaration of his or her rights or duties with respect to another, or in respect to . . . property, in cases of actual controversy relating to the legal rights and duties of the respective parties.

Code Civ. Proc. § 1060.

Similarly under federal law, the Declaratory Judgment Act provides that,

[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.

28 U.S.C. § 2201(a).

Declaratory relief statutes were enacted to remedy an inadequacy of the common law:

It was a defect of the judicial procedure which developed under the common law that the doors of the courts were invitingly opened to a plaintiff whose legal rights had already been violated, but were rigidly closed upon a party who did not wish to violate the rights of another nor to have his own rights violated, thus compelling him, where a

controversy arose with his fellow, to run the risk of a violation of his fellow's rights or to wait until the anticipated wrong had been done to himself before an adjudication of their differences could be obtained.

Tolle v. Struve, 124 Cal.App. 263, 271 (1932).

Declaratory relief “serves to set controversies at rest before they lead to repudiation of obligations, invasion of rights or commission of wrongs.” *Travers v. Loudon*, 254 Cal.App.2d 926, 931 (1967). To qualify as an “actual controversy,” the dispute must be

definite and concrete, touching the legal relations of parties having adverse legal interests. [Citation.] It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.

Pacific Legal Foundation v. California Coastal Comm., 33 Cal.3d 158, 171 (1982), quoting from *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-241 (1937).

Courts have long held that, where payment of money or other compliance with a contract is coerced

by threat of legal action, declaratory relief is proper. In *Hess v. Country Club Park*, 213 Cal. 613 (1931), the plaintiffs sought to avoid the effect of building restrictions contained in certain deeds on the ground that the property was no longer useful for residential purposes. The court held that the case presented an actual controversy within the meaning of the declaratory relief statute:

If the lot owner can obtain a declaration in his favor, he may safely proceed to improve his property as he wishes. If such a declaration is refused, he is put in the hazardous position of being obliged to violate the terms of the restrictions before he can know whether or not he must suffer the penalties mentioned. It is inconceivable that he must run the risk of forfeiting any further investment, or even his title to the land, in order to obtain an adjudication of his rights. It seems clear that the declaratory relief statute was intended to relieve a party from exactly such a dilemma.

Id., at 616.

This Court recognized the same principle in *Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118 (2007), which involved a dispute over a party's duty to make royalty payments under a patent-licensing

agreement. The payor was making regular payments under threat of an action to enjoin sales of its products if it stopped paying. The payee argued that the payments negated the claim of an actual, existing controversy, but this Court disagreed. It held that the requirement of an actual controversy is met where payment of a claim is demanded as of right and is exacted by threat of legal action. *Id.*, at 130.

Similarly here, Petitioner was making mortgage payments under an implied threat of foreclosure if she stopped.³ An actual controversy arose from Bank of America's claim to be the present owner of Petitioner's loan. Petitioner disputed this claim on the ground that the bank has to this day failed to provide any evidence that it owns her loan, even though California Civil Code § 2943 mandates such disclosure, and even though providing it might have avoided or curtailed this lawsuit.

The Court of Appeal observed that Petitioner did not plead a § 2943 cause of action or accept the

³ Petitioner is no longer making payments and a Notice of Default and Election to Sell has been recorded against her property. Further, on December 15, 2011, she received a letter from Select Portfolio Servicing, Inc., stating that it is now the servicer of her loan, and that the "investor" that currently owns it is Harbor View Mortgage.

court's offer to allow her to add it by amendment. (A8) But that would not have secured the relief she sought. An award of actual damages, if any, plus a penalty of \$300 is the only remedy the statute provides if the creditor fails to deliver a copy of the note and a beneficiary statement. Civ. Code § 2943(e)(4). Petitioner sought a declaration of her rights and obligations vis-à-vis Bank of America, *i.e.*, whether it was the owner of her Note with authority to demand payment and foreclose upon default. The threat of a \$300 wrist slap did not move Bank of America to provide the evidence to settle that issue.

In a telling footnote, the court of appeal observed that although the bank complained to the trial court that Riley had forced them to engage in lengthy litigation and “use a Howitzer to address what should have been a gnat,” it could easily have ended the case or avoided being sued in the first place. “While Riley’s declaratory relief claim was unsound, we wonder why Bank of America did not curtail the litigation by simply providing Riley with the basic information she requested.” (A8–A9, n.5)

Most likely, the bank did not respond to Petitioner’s § 2943 request because it could not. The loan has been securitized and atomized into a secondary market, and the documents no longer exist. Or if they do exist, they may show a defect in the putative lender’s chain of title that might jeopardize the

bank's supposed right to payment or foreclosure. See, e.g., *Castillo v. Skoba*, No. 10cv1838 BTM (S.D.Cal., Oct. 8, 2010) 2010 U.S. Dist. LEXIS 108432 (recipient of backdated assignment may not have had authority to record notice of default); *Ohlendorf v. Am. Home Mortg. Servicing*, CIV. S-09-2081 LKK/EFB, (E.D.Cal., Mar. 30, 2010) 2010 U.S. Dist. LEXIS 31098 (same). That probable lack of authority to foreclose is what Petitioner was asking the California courts to address.

B. The California courts deprived Petitioner of her right to due process under the Fourteenth Amendment to the United States Constitution.

Petitioner does not challenge the constitutionality of California's declaratory relief or nonjudicial foreclosure statutes. Rather, she contends that the California courts' construction of those otherwise valid statutes has deprived her of due process: it left her without a remedy to protect her home from foreclosure by persons acting without authority.

“That the action of state courts and of judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this court.” *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948). Speci-

fically, a state appellate court decision can itself deny a litigant due process of law. *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 803-05 (1996) (Alabama Supreme Court's extreme application of state-law res judicata principles was a denial of due process).

In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), the plaintiff bank sued to enjoin a county treasurer from collecting a portion of certain taxes assessed against its shareholders on the ground that the assessor denied them equal protection by assessing their shares at full value, while other classes of property were assessed at 75% of value or less. An earlier Missouri Supreme Court decision had held that no administrative board, including the state tax commission, could grant the relief the plaintiff sought, and that a bill in equity such as the plaintiff's complaint for injunctive relief was the appropriate and only remedy. Nevertheless, the trial court refused to grant the injunction and dismissed the action. The plaintiff appealed. But contrary to its prior decision, the Missouri Supreme Court held that the state tax commission could have granted the requested relief if the plaintiff had complained to it in a timely manner. It then affirmed the trial court's judgment because the plaintiff had an adequate legal remedy that it failed to pursue (complaint to the state tax commission), and thus

was not entitled to equitable relief in the form of an injunction.

The United States Supreme Court reversed the Missouri Supreme Court decision. Writing for the Court, Justice Brandeis emphasized that it is for the state courts to determine the law of the state, and that the U.S. Supreme Court was not concerned with the plaintiff's rights on the merits. Rather, its concern was that the Missouri Supreme Court decision, reversing its prior holding regarding the powers of the state tax commission, deprived the plaintiff of due process by denying it an opportunity to be heard.

By denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property. . . . [¶] If the result above stated were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious. [Citation.] The violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid [citation] state statute. The federal guaranty of due process extends to state action through its judicial as well as through its legislative,

executive, or administrative branch of government.

Id., at 679-80.

As in *Brinkerhoff-Faris*, the California courts' decisions in *Gomes* and in the present case leave Petitioner with no remedy to prevent the seizure of her property. A stranger claimed the right to collect payments on her Note while refusing to present any evidence of its authority. Yet Petitioner was afforded no remedy to determine whether that bare claim of right was true. Petitioner does not seek to add a requirement not already present in the statutes. Rather, she contends that the statutes must be construed and applied so as to afford her a meaningful opportunity to learn who owns her Note *before* her home is seized. The California courts' construction of the statutory scheme as barring relief both *before and after* foreclosure proceedings begin denies her any such opportunity, and thereby deprives her of due process in violation of the Fourteenth Amendment.

CONCLUSION

Review and reversal of the decision below is warranted. The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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