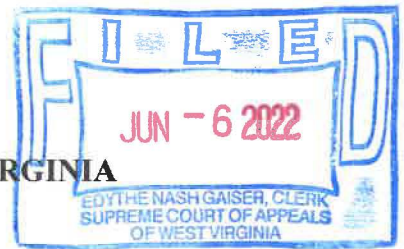


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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA ex rel.
21ST MORTGAGE CORPORATION,

Petitioner,

FILE COPY

v.

No. 22-0334

HONORABLE PHILLIP M. STOWERS,
Judge in the Circuit Court of Putnam County
and MARSHA LYNNE HOPKINS,

Respondents.

SUMMARY RESPONSE TO PETITION FOR WRIT OF MANDAMUS

Respondent,
MARSHA LYNNE HOPKINS
By Counsel:

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INTRODUCTION

In November 2019, Petitioner 21st Mortgage Corporation and Respondent Marsha Lynne Hopkins reached a settlement resolving the underlying civil action. Pursuant to the terms of that settlement agreement, the parties submitted an agreed order to the circuit court directing that Ms. Hopkins make certain payments and upon successfully making those payments, Petitioner 21st Mortgage would rescind the foreclosure sale that it previously conducted on Ms. Hopkins home and reinstate and modify her mortgage loan. Petitioner 21st Mortgage now argues that because Ms. Hopkins did not comply with the terms of their agreement, it is entitled to possession of her home. However, neither the parties' agreed order nor any order of the circuit court grants Petitioner 21st Mortgage a clear legal right to possession of Ms. Hopkins's home. Therefore, Petitioner cannot and has not demonstrated that a writ of mandamus should issue and its petition must be denied.

ARGUMENT

A. Standard for Issuing a Writ of Mandamus

This Court has repeatedly counseled that mandamus is a “drastic remedy to be invoked only in extraordinary situations.” See State ex rel. Sowards v. County Com’n of Lincoln Co., 196 W. Va. 739, 745, 474 S.E. 2d 919, 926 (1996) (quoting McComas v. Bd. of Educ. of Fayette Co., 197 W. Va. 188, 192 475 S.E. 2d 280, 284 (1996)). As an extraordinary remedy, mandamus is to be “invoked sparingly.” See State ex rel. Billings v. City of Point Pleasant, 194 W. Va. 301, 203, 460 S.E. 2d 436, 438 (1995). To obtain a writ of mandamus, three conditions must be met: “(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate

remedy.” See id. (citing Syl. pt. 2, State ex rel. Kucera v. City of Wheeling, 153 W. Va. 538, 170 S.E. 2d 367 (1969)).

In its petition, 21st Mortgage seeks an order granting it possession of Ms. Hopkins’s home. However, because 21st Mortgage cannot establish that it has a clear legal right to an order of possession, it has not carried its burden of establishing entitlement to the drastic and rare remedy of a writ of mandamus.

B. Petitioner Does Not Have a Clear Legal Right to Possession of Ms. Hopkins’s Home

Petitioner 21st Mortgage appears to assert two grounds on which it is entitled to possession of Ms. Hopkins’s home: first, that Ms. Hopkins has failed to comply with the parties’ agreed order of November 30, 2020, and second, that Ms. Hopkins failed to comply with the circuit court’s order of October 27, 2021. (Pet. at 5.) Neither order gives 21st Mortgage any right to possession of Ms. Hopkins’s home—let alone a clear legal right supporting issuance of the extraordinary remedy of a writ of mandamus.

First, the agreed order entered on November 30, 2020 expressly states that it is submitted to the circuit court jointly as a result of a settlement between the parties. See 21st000080-82 (“This day came Plaintiff, 21st Mortgage Corporation ... and Defendant, Marsha Lynne Hopkins, ... to jointly advise the Court that a settlement has been reached between Plaintiff and Defendant, and that pursuant to the terms of such settlement, the parties hereby agree to jointly submit to the Court this stipulated Agreed Order ...”). The agreed order is silent as to the remedy for either parties’ failure to comply with the terms of the settlement. In no potential interpretation of the language of the agreed order is Petitioner 21st Mortgage entitled to possession of the home if Ms. Hopkins failed to make the required payments. See id. Therefore, the agreed order entered November 30,

2020 cannot form the basis of a clear legal right for 21st Mortgage to obtain possession of the home.

On October 27, 2021, the circuit court entered an order following hearing on Petitioner 21st Mortgage's second renewed motion to lift stay. See 21st000126-128. In that order, the circuit court orders Ms. Hopkins to pay 21st Mortgage \$3,608.96 on or before November 15, 2021, a sum that includes three of the monthly payments required by the parties' agreed order as well as an additional monthly payment for October 2021. See id. at ¶¶ 1-2. The October 27, 2021 order further requires that Ms. Hopkins continue to make monthly payments to 21st Mortgage in the amount set by the parties' agreed order. See id. at ¶ 3. The circuit court directed that if Ms. Hopkins fails to make either the \$3,608.96 payment by November 15, 2021, or the next monthly installment of \$902.24 by November 20, 2021, 21st Mortgage "shall submit and this Court shall enter an Order granting possession of the Real Estate to [21st Mortgage] and directing that [Ms. Hopkins] vacate the real estate located at 131 Barrington Woods, Scott Depot, West Virginia within twenty (20) days." See id. at ¶ 4.

Despite this language, this October 27, 2021 order of the circuit court cannot form the basis of a clear legal right for Petitioner 21st Mortgage to obtain possession of Ms. Hopkins's home. Tellingly, 21st Mortgage never provided the circuit court with the directed order granting it possession of the real estate because Ms. Hopkins made the payments required by the circuit court's October 27, 2021 order. See 21st000132-136 (including bank statements evidencing negotiation of the required payments). Therefore, the October 27, 2021 order does not provide 21st Mortgage with the clear legal right to possession of Ms. Hopkins's home as it is required to demonstrate to obtain a writ of mandamus from this Court.

Nor has 21st Mortgage demonstrated its entitlement to possession of Ms. Hopkins's home as relief for its initial complaint filed in this action. At the time the parties reached the settlement agreement memorialized in the agreed order, Petitioner 21st Mortgage had a pending motion for summary judgment. See 21st000005-10. Ms. Hopkins filed a *pro se* response to the motion, denying that 21st Mortgage was entitled to relief. See 21st000011-32. In response to 21st Mortgage's motion for summary judgment and Ms. Hopkins's response, the circuit court entered an order finding that Ms. Hopkins's claims and defenses raise issues separate from 21st Mortgage's claim for possession of the real estate and directing that Ms. Hopkins make monthly payments to 21st Mortgage to remain in possession of the home during the pendency of the action. See 21st000035-36. The circuit court later ordered that Ms. Hopkins make these monthly payments to the clerk of the circuit court of Putnam County and directed that if Ms. Hopkins failed to make any full monthly payment, she would be required to vacate the property and possession would be granted to 21st Mortgage. See 21st000033-34. However, the parties' agreed order entered by the court in connection with the parties' settlement expressly vacates the August 21, 2020 order containing the requirement that payments be made or possession granted to 21st Mortgage. See 21st000080-81 ("It is further ORDERED that this Agreed Order supersedes the Court's August 21, 2020 Order ...").

Because no order of the circuit court provides 21st Mortgage with clear legal right to possession of Ms. Hopkins's home and the circuit court has not considered the merits of 21st Mortgage's complaint for possession, Petitioner 21st Mortgage cannot establish that it is entitled to the extraordinary remedy of a writ of mandamus granting it possession of Ms. Hopkins's home.

C. The Circuit Court did not Abuse its Discretion in failing to Lift the Stay

Petitioner 21st Mortgage Corporation argues that the circuit court abused its discretion in denying its motions to lift stay. The parties agreed to stay the underlying civil action as part of their settlement agreement, as reflected in the agreed order. See 21st000080-82. This Court reviews a circuit court's orders enforcing a settlement agreement for abuse of discretion. See, e.g., Triad Energy Corp. of West Virginia, Inc. v. Renner, 215 W. Va. 573, 576, 600 S.E. 2d 285, 288 (2004).

The circuit court soundly exercised its discretion in denying Petitioner 21st Mortgage Corporation's motions to lift stay, given the course of conduct of the parties following entry of the agreed order. The circuit court considered that Ms. Hopkins made payments pursuant to the agreed order—indeed, by the filing of 21st Mortgage's most recent motion in circuit court, Ms. Hopkins had made ten payments of \$902.24. See 21st000080-82 (requiring ten payments of \$902.24 prior to rescission and modification), 132-136 (outlining installment payments made and providing evidence of negotiated payments).

The circuit court also considered testimony and evidence on Ms. Hopkins's efforts to draw down funds from her Thrift Savings Fund account to satisfy the lump sum payment, as well as her efforts to obtain the required property insurance. See 21st000080-82 (requiring a lump sum payment and for Ms. Hopkins to obtain insurance), 111-112 ("Mrs. Hopkins provided a copy of her application to withdraw funds seeking to withdraw \$8,000.00 and her hardship request for expedited withdrawal."), 121-125 (providing paycheck stub evidencing withholdings from pay with United States Postal Service to fund a thrift savings plan).

Given the evidence before it related to the parties' compliance with the terms of the agreed order, the circuit court did not clearly abuse its discretion in failing to lift the stay. Therefore,

Petitioner has not established that it is entitled to a writ of mandamus for possession of Ms. Hopkins's property.

CONCLUSION

Petitioner 21st Mortgage Corporation has entirely failed to demonstrate that the extraordinary relief of a writ of mandamus is appropriate in the instant matter. Neither the agreed order of the parties nor the October 2021 order of the circuit court grants Petitioner an automatic right to possession of Ms. Hopkins's home. Additionally, the circuit court did not abuse its discretion in failing to lift the stay as part of the parties' settlement agreement. Should this Court determine that the circuit court abused its discretion in failing to lift the stay, granting possession of Ms. Hopkins's home to 21st Mortgage is not the appropriate remedy. Instead, the circuit court should proceed to consider whether the parties have a binding settlement agreement, and if there is no agreement, proceed to consider the merits of the motion for summary judgment. Petitioner 21st Mortgage simply has not established that it has a clear legal right to possession of Ms. Hopkins's home and this Court should refuse to grant its petition for the same.

WHEREFORE, Respondent respectfully requests that this Court decline to issue a writ of mandamus and that this Court award Respondent the reasonable attorney fees and costs incurred in responding to 21st Mortgage's petition.

Respondent
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By Counsel:



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CERTIFICATE OF SERVICE

I, Sarah K. Brown, counsel for Respondent, do hereby certify that on this 6th day of June, 2022, I have served a true and exact copy of the foregoing *Summary Response to Petition for Writ of Mandamus* upon the following, by depositing the same into the U.S. mail, first class, postage pre-paid:

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