

FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 22-0334



21ST MORTGAGE CORPORATION

Petitioner

v.

HONORABLE PHILLIP M. STOWERS

Judge of the Circuit Court of Putnam County, WV

and MARSHA LYNNE HOPKINS,

Respondents.

**DO NOT REMOVE
FROM FILE**

PETITION FOR WRIT OF MANDAMUS

21ST Mortgage Corporation v. Marsha Lynne Hopkins

Circuit Court Putnam County, WV

Civil Action No. CC-2019-C-236

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QUESTION PRESENTED

- 1. Whether the Circuit Court abused its discretion in denying Plaintiff's Motions to Lift Stay and then relatedly failed to comply with its Order that if Defendant failed to comply with the Court's Orders, it would grant Plaintiff's Motion for Summary Judgment and provide the relief requested in Plaintiff's Complaint?**

STATEMENT OF THE CASE

21st Mortgage Corporation (hereinafter "21st", "Petitioner" or "Plaintiff") is a mortgage lender and/or loan servicer. On or about July 26, 2000, non-party First Consolidated Mortgage Company loaned Marsha Lynne Hopkins (hereinafter "Hopkins", "Respondent" or "Defendant") \$128,000.00 to allow her to finance the purchase of real estate located at 131 Barrington Woods, Scott Depot, WV. An applicable deed of trust was recorded in the office of the county clerk of Putnam County. Under the terms of the promissory note, Hopkins agreed to make monthly payments of \$1,336.36 over 30 years to repay the loan. In August 2008, after Hopkins fell behind on her payments, the loan was modified by agreement of the parties whereby Hopkins agreed to make 360 payments of \$767.42. Ultimately, Hopkins defaulted on the loan agreement and failed to cure the default in 2016 resulting in a foreclosure sale with 21st purchasing the property in October 2016 after being the only bidder. The transfer of ownership of the property was completed and the requisite documents filed with the clerk of the Court. However, Hopkins refused to vacate the property forcing 21st to file a Complaint for eviction in the Putnam County Circuit Court (Civil Action No. 16-C-280). The parties engaged in a mediation and agreed to settle the claims resulting in another modification of the terms of the loan, evidenced by the execution of a Settlement Agreement and Release. Under the terms of this agreement, 21st agreed to bring the loan current and Plaintiff agreed to make monthly mortgage loan payments starting in March 2018 including 24 past due payments. The parties agreed to void the foreclosure sale and convey the property back to Hopkins. Hopkins failed to comply with the terms of the settlement agreement by failing to make monthly payments on the loan and 21st was again forced to cause a second foreclosure

sale to be conducted in September 2019. Again, 21st purchased the property as the only bidder, and caused the necessary legal documents to be filed with the clerk's office. Hopkins again refused to vacate the property which resulted in 21st filing a second Complaint seeking eviction; the Complaint which is currently pending before Judge Stowers in Putnam County.

In February 2020, Plaintiff filed a Motion for Summary Judgment seeking an Order from the Court requiring Defendant to vacate the property it owned. Defendant filed a pro-se response to the Complaint and asserted various claims against Plaintiff for improper servicing of the loan. Defendant also opposed the Motion for Summary Judgment. On August 21, 2020, Judge Stowers entered an Order ruling that the issue of Plaintiff's entitlement to an eviction of Defendant from the property was separate from the issues raised by Defendant's counterclaims. Judge Stowers ordered that in order for Defendant to remain in possession of the property, she was required to make monthly payments to the Court in the amounts required by the loan. Defendant failed to make the required monthly payments.

Defendant retained Mountain State Justice to represent her. Her counsel appeared in September 2020 and also filed a Motion for Relief from the August 21, 2020, Order. The Court entered an Order quashing a writ of possession, on September 10, 2020, but upheld its prior ruling in its August Order requiring Defendant to make monthly payments into the Court, over the exception of Plaintiff. After Defendant failed to comply with the trial Court's Order, Plaintiff renewed its Motion for Summary Judgment in October 2020, and the Court entered a November 30, 2020, Order staying the case for twelve months but also requiring Defendant to immediately pay Plaintiff \$3,386.37; cooperate with Plaintiff to obtain insurance on the property; to make ten monthly payments of \$902.24 directly to Plaintiff starting December 20, 2020 and running through September 20, 2021 (the period of the length of the stay of the case), and the balance of the account held by the clerk at that time would be paid to 21st. The Order stated that if Defendant complied with these payment requirements, the foreclosure sale would be rescinded; the loan and deed of trust reinstated; and the loan modified by capitalizing any

outstanding arrearage. Defendant, through counsel, agreed to the rulings in this Order as it was filed as an Agreed Order.

Defendant again failed to comply with the Court's November Order and Plaintiff filed a Motion to lift the twelve- month stay four times between November 30, 2020, and January 10, 2022, requesting a ruling on the previously filed Motions for Summary Judgment because of Defendant's repeated failure to comply with the agreed-to payment arrangements that the Court fashioned into its various orders. However, the Court never lifted the stay nor ruled upon Plaintiff's Motion for Summary Judgment despite the fact that it held in its October 27, 2021 Order that Defendant failed to comply with the Court's prior Orders. In this order, the Court stated that if Defendant failed to make a payment of \$3,608.96 by November 15, 2021, or a monthly payment of \$902.24 by November 20, 2021, it would enter an Order granting possession of the property to 21st. Defendant failed to comply with this Order of the Court and Plaintiff filed a Motion to Lift the Stay requesting relief from the prior agreed Order and grant it possession of the property. Defendant's position as to her noncompliance with the various agreements and orders requiring certain payments to be made to 21st, in response to the last Motion to Lift Stay, was simply that she had been unable to comply with the Orders because she was unable to procure the funds from a very old Thrift Savings Account which she has represented to the Court and 21st, maintains funds that would permit her to comply with the orders. Despite the fact that Defendant has represented to the Court and Plaintiff that she has a savings account with enough funds to comply with the Court's Orders and that she has the ability to access these funds; she has failed to comply with the trial Court's Orders both requiring that she provide verification of the existence of this account and the funds contained therein and her ability to access the funds. In conclusion, even with the acknowledgement of Defendant that she has not been able to comply with the trial court's various orders, the Court has failed to enter an Order consistent with its specific ruling in its October 27, 2021, Order. Petitioner requests relief from this Court mandating that the trial Court enter an Order lifting

the stay and granting possession of the property in question to Petitioner based upon Defendant's repeated failure to comply with Orders of the trial Court and the trial Court having ruled that it would grant Plaintiff the relief sought if Defendant did not comply with her obligations.

SUMMARY OF ARGUMENT

The trial Court has presided over the instant matter for almost a year and half and, during that period of time, has entered a number of Orders mandating that Defendant comply with agreements reached between Plaintiff and her in order to resolve the instant litigation and repayment terms imposed by the trial Court itself contained in various Orders. These agreements have been facilitated by discussions with the Court at various status conferences and hearings on Plaintiff's motions to lift the stay, all of which have been designed to bring a closure to this litigation by allowing Plaintiff to gain possession of the property it owns or permitting the parties to enter into a new loan. However, it can't be disputed that Defendant has failed to comply with a number of successive Orders of the trial court, whether intentionally or not; and, as a result of her inability to comply; or lack of effort; all of which has left 21st in the unenviable position of owning a piece of real estate that it can neither possess or sell and for which it has reluctantly become a defacto landlord over. And, as of the date of the filing of this Petition, there is no end in sight as to a resolution of the issues between the parties as Defendant has failed to provide any evidence of her ability to comply with the Court's October 27, 2021 Order even though her last representation to the Court as to her ability to access the funds in her "thrift account" was that she should been able to access the funds within 120 days of February 2021. It has been over a year since that representation was made and Hopkins has failed to provide any verification to the Court or 21st that she actually maintained a certain amount of funds in this thrift savings account or the ability to access the funds. Petitioner requests that this Court mandate that the trial Court enforce its prior Order in this case; lift the stay of the case which, by its terms, should have been automatically lifted in November 2021; and enter an Order that Defendant is required to vacate the property.

STATEMENT REGARDING ORAL ARGUMENT

Petitioner states that an oral argument is necessary in this case and request an oral argument on this Petition under Rule 19 of the Rules of Appellate Procedure

ARGUMENT

This Court should exercise its original jurisdiction over this case and issue the Writ requested because the Circuit Court committed error by not complying with its own orders in the case; by not lifting the stay of the case; and, by not granting Petitioner the relief sought after Respondent's repeated failure to comply with the court's orders and her agreements as to the payment arrangements to permit her to retain possession of the property.

A Writ of Mandamus can be entered where three elements coexist:(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of respondent (Judge Stowers) to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. *State ex rel. Kucera v. Wheeling*, 153 W. Va. 538, 170 S.E.2d 367, 1969 W. Va. LEXIS 195. "Mandamus is a proper remedy to compel tribunals and officers exercising discretionary and judicial powers to act, when they refuse so to do, in violation of their duty, but it is never employed to prescribe in what manner they shall act, or to correct errors they have made." *State ex rel. Justice v. King*, 244 W. Va. 225, 852 S.E.2d 292, 2020 W. Va. LEXIS 815, 2020 WL 7223535, citing *Syllabus Point 1, State ex rel. Buxton v. O'Brien*, 97 W. Va. 343, 125 S.E. 154 (1924). Here, the Court should exercise jurisdiction over this matter and mandate that the trial Court enter an Order granting possession of the property in question to Petitioner consistent with the trial Court's October 27, 2021, order.

After the Complaint and response was filed in the case, Petitioner filed a Motion for Summary Judgment. The trial Court held a number of status conferences with the goal of attempting to resolve the matter between the parties without the necessity of formally ruling on the Motion for Summary

Judgment and finding as a matter of fact and law that Plaintiff was entitled to possession of the property as the legal owner. As a result, the trial Court stayed the case pending Respondent's compliance with her own agreement to make timely loan payments (paying said sums into court) and to provide a lump-sum payment to bring the loan current. By Order entered August 21, 2020, Judge Stowers held that if Defendant did not comply with the Order to make payments to the Court, "Defendant shall be required to vacate, and Plaintiff will be granted possession" of the real estate. Hopkins did not attend this hearing from which this Order was derived and requested a second status conference after she failed to comply with the Order as to making payments. Thereafter, Hopkins retained Mountain State Justice to represent her, and her counsel filed a Motion for relief from the Court's August 21, 2020, Order. Thereafter, the parties represented to the Court that they had agreed to a settlement of the issues between them and submitted an Agreed Order staying the case for 12 months while Hopkins made monthly payments and a lump-sum payment to 21st. The trial Court entered this Order on November 30, 2020. Hopkins failed to comply with the terms of the agreement and the Order, resulting in Petitioner asking Judge Stowers to lift the stay in December 2020 and rule on the previously filed Motion for Summary Judgment. Hopkins' response to the Motion was to agree that she had failed to comply with the settlement agreement and the Order of the Court but to ask for additional time to comply. A hearing was held on February 5, 2021, wherein the trial Court refused to lift the stay of the case based upon Hopkin's representation that she intended to satisfy her obligations imposed by the prior order.

After Respondent's continued failure to comply with her agreement and the trial Court's orders, Petitioner was again forced to Motion the Court to lift the stay in July 2021: Hopkins had failed to pay the \$3,386.37 lump sum required and she had failed to make the first 4 of 10 monthly payments required by the November 30, 2020, Order. Finally, it was noted that Hopkins had failed to provide verification of the existence of a savings account from which it had been represented for months held the funds from which the \$3,386.37 would be obtained. Respondent responded to the Motion, again,

agreeing that she had failed to make the payments required by her agreement with 21st and approved by the Court and asking the trial Court for additional time to comply with her obligations. It is important to state that Plaintiff continually had no recourse for Hopkins' continued failure to comply with the trial Court's Orders regarding the timing and amounts of payments to be made other than to request a lift of the stay of the case to proceed with its Motion for Summary Judgment; and, at no time did Hopkins dispute that she had failed to comply with the Court's Orders or that the Orders were not an accurate reflection of her agreement as to the terms.

In response to the Second Renewed Motion to Lift Stay, the Court held a hearing and ruled that Defendant had failed to comply with the prior Orders; and again, required Hopkins to make a lump-sum payment to 21st and monthly payments, along with a requirement to verify the existence and availability of funds from her thrift savings account Hopkins continued to represent she could access to satisfy her obligations. In addition, the trial Court finally held that if Hopkins failed to comply with the payment terms, the Plaintiff **"shall submit and the Court shall enter an order granting possession"** of the property to 21st. Defendant's counsel agreed to the entry of this Order. This is the second time that the trial Judge held that it would lift the stay and grant the relief requested by 21st if Hopkins failed to satisfy the terms of its orders. Unfortunately, with the past being an indicator of the future, Hopkins failed to comply with the terms of her agreement and the Court's Order, but the trial Court refused to lift the stay and grant possession of the property to 21st; choosing again to extend the deadlines for Hopkins' compliance with the requirement to provide verification of funds in a savings account; extending deadlines for the continued monthly payments and to make "additional payments to Plaintiff for the arrearage caused by her failure to make all of the monthly payments. The status of the case as of the filing of this Writ is that Hopkins has still not provided verification of her ability to obtain funds from her "thrift savings account" nor has she been able to make payments to cover the arrearage caused by her repeated failure to comply with her representations to the Court and the Court's orders.

However, the trial Court has refused to lift the stay and to grant 21st possession of the real property in direct contravention of its November 30, 2020 Order. Plaintiff has not failed to comply with any Order of the Court; there is no reason to believe that Hopkins will be able to comply with the many requirements placed upon her by the Court at any set time in the future which results in an ever-increasing arrearage created by Hopkins' inability to comply with the payment terms she has agreed to for over a year.

Defendant can't dispute that a settlement agreement was reached between the parties, adopted, and approved by the trial Court. Defendant has admitted that she has failed to comply with at least three orders of the Court since the parties caused the Court to enter the November 2020 Agreed Order Staying the Case. There can be no dispute that Judge Stowers held in his October 27, 2021, Order that 21st was entitled to possession of the real property if Hopkins did not comply with the terms of the Order; to which the trial Court has failed to enforce. The trial Court's refusal to grant the relief it has held 21st is entitled to is not based upon new facts or developments that has impacted Hopkins' failure to comply with her obligations to 21st: Hopkins has not presented any evidence of changed circumstances that supports a reversal of the Court's Order; she has simply provided continued and the same excuses for why she cannot make the payments she has promised to make to 21st. The trial Court has not made any finding of fact or conclusion of law supporting its reversal of its holding in the October 27, 2021, Order that Plaintiff was/is entitled to possession of the real property upon Defendant's failure to comply. And, at this point, all reasonable inferences from the record as a whole, support the conclusion that more likely than not she will not be able to comply with the obligations required by the Court and the agreement reached between the parties. Hopkin's explanations of her admitted failure to comply with the Court's orders has been the same explanation in each opposition to Plaintiff's Motions to Lift the Stay.

The trial Court's refusal to grant the relief requested by Plaintiff that it specifically stated it would grant, has left Plaintiff in a perpetual position of a landlord over a piece of real property that Defendant continues to reside in without any recourse for the failure of Defendant to make agreed upon and Court ordered payments required to permit her to remain in the property. Hopkin's failure to make required payments to 21st has created issues of who pays for homeowner's insurance; who maintains maintenance of the property; potentially negatively impacted the FMV of the home; etc., that have become practical problems for both parties. Defendant will undoubtedly oppose the relief sought in this Writ asserting that the primary excuse for her inability to have complied with the trial Court's orders is that she is awaiting receipt of funds from her thrift savings account and that the process of her obtaining these funds has simply taken longer than expected. However, if we look at the history of the case, we can see that her representations to the Court concerning both verification of the existence of these funds and the availability of these funds cannot support an expectation of her ability to obtain those funds at any time in the future.

First, while Defendant has been order many times to provide verification of the existence of these funds, she has never produced any evidence of same. In Defendant's February 3, 2021, Response to Plaintiff's Renewed Motion to Life Stay, it was represented to the trial Court that Defendant agreed to make payments to 21st with the understanding that she could withdraw funds from her Thrift Savings Plan stemming from her past employment with the postal service. It was stated that in December 2020, Hopkins learned that the process to withdraw the funds "could take up to 120 days". As a result, Hopkins immediately submitted a form to request the withdraw. Then, in Defendant's April 15, 2021, Response to Plaintiff's next Motion to Lift Stay, it was represented to the Court that Hopkins "was unable to obtain verification of the current funds available" in this saving account. Judge Stowers then ordered that Hopkins provide verification of these funds which she has not done. In Defendant's October 14, 2021 Opposition to Plaintiff's Motion to Lift Stay, Defendant stated that that she was unable

to obtain verification of the funds available in the savings account. It has been 16 months since Defendant represented to Plaintiff and the Court that she would receive funds from her savings account within 120 days, and now six months has passed since Defendant stated that she couldn't verify the availability of the funds. Defendant's last statement to the trial Court and 21st about the ability to verify the existence of these funds was her counsel's representation in Defendant's February 15, 2022, Response to Plaintiff's Motion to Lift Stay which simply stated that: "Ms. Hopkins has not received her disbursement of funds from her Thrift Saving Account. . .". The record of the case clearly does NOT contain any verification that Hopkins has the funds available to withdraw from this thrift savings plan that she states she participated in over 20 years ago when she left employment with the post office. There is no evidence supporting a finding of when Hopkins can reasonably be able to obtain these funds or the exact amount of the funds available to be withdrawn. Without the ability of Hopkins to obtain the unspecified funds at an unknown date from this alleged savings account, she has made no representation that she has any other ability to pay the lump sum owed to 21st per agreement and court order or the additional arrearage caused by the missed monthly payments over the last couple of years. Simply stated, Hopkins represents that she has been trying to comply with her obligations to satisfy her agreement with 21st and the trial Court's orders now for almost a year and a half, and she is no closer to being able to provide confirmation that she will be able to meet these obligations today than she was when the Agreed Order staying the case was entered. In fact, it would appear that the more time passes, the less likely Hopkins will ever be able to comply with the agreement.

Based upon the above, Petitioner is entitled to the entry of a Writ mandating that Judge Stowers comply with his prior Order lifting the stay of the case and awarding 21st possession of the real property. Judge Stowers has already entered an Order declaring that 21st has a right to possession of the property that it has now purchased twice since 2016. Respondent has not and cannot dispute this right or that she has failed to comply with a number of orders from the Court. Respondent cannot dispute the fact

that she has failed to comply with the numerous trial Court orders requiring her to 1) make timely, monthly payment toward a new loan; 2) pay 21st a lump-sum required by the Court; 3) provide verification of funds available to pay the lump-sum; and 4) provide verification of the ability to obtain the funds available to satisfy the lump-sum payment to 21st. Given the record in the case, Judge Stowers has a duty to comply with his prior October 27, 2021, Order because there has been no finding in the record that supports a reversal of that Order nor has Judge Stowers attempted to provide such support. There is no legal support for an argument that an owner of real estate lawfully purchased through a foreclosure sale can be required to permit a borrower to remain in the property as a tenant indefinitely while failing to comply with settlement agreements and court orders intended to re-create a lender/borrower relationship. Finally, Petitioner has no other adequate remedy that it can exercise to obtain possession of the real property it owns other than to request that Judge Stowers lift the stay and to provide the relief promised. 21st can't file a direct appeal of any ruling in the case if the stay is never lifted and final judgment entered. 21st can't file any other Motion with the trial Court seeking the relief that Judge Stowers has already ruled it is entitled to. Simply stated, If the trial Judge refuses to enforce its prior orders, 21st will continue in a perpetual state of limbo as an owner of property it cannot possess, maintain, or sell which creates harm to Petitioner. There have already been a number of findings by Judge Stowers that Hopkins has breached the agreement she has reached with 21st, more than once, as reflected by the orders entered in the case with agreement by Defendant's counsel. Petitioner has no option at this time other than to request relief from this Court through this extraordinary writ.

CONCLUSION

Wherefore, Petitioner 21st Mortgage Corporation requests that this Court exercise jurisdiction over this matter and accept this Writ of Mandamus; that the Court enter an Order mandating that trial Court Judge Stowers comply with his October 27, 2021 Order by lifting the stay in this case and grant Petitioner the relief sought in its November 2019 Complaint requiring Respondent to vacate the real property located at 131 Barrington Woods, Scott Depot, WV, within a reasonable time from the entry of the trial Court's Order.

VERIFICATION

I, Albert C. Dunn, Jr. on behalf of the Petitioner 21st Mortgage Corporation, after first being duly sworn upon oath, state that I have read the foregoing Petition for Writ of Mandamus, and that all facts and allegations contained therein are true and correct to the best of my knowledge and belief.



Albert C. Dunn, Jr. (WV Bar No. 5670)

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, to-wit:

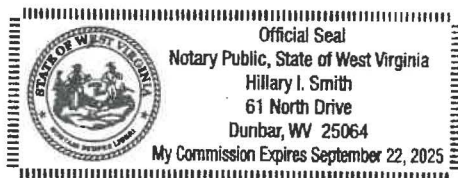
Taken, subscribed, and sworn to before me, the undersigned Notary Public, this date,
April 29, 2022.

My commission expires: 9-22-2025.



{SEAL}

Notary Public



BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS
From Putnam County Circuit Court, Civil Action No. 19-C-213

21ST MORTGAGE CORPORATION,

Plaintiff/Petitioner,

v.

HONORABLE PHILLIP M. STOWERS

**Judge of the Circuit Court of Putnam County,
WV and MARSHA LYNNE HOPKINS,**


Respondents.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing **"PETITION FOR WRIT OF MANDAMUS"** was served upon the following parties by U.S. Mail on this day, April 29, 2022:

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