Appendix A: The Decision of the United States Court of appeals Opinion

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
File Name: 18a0627n.06
Nos. 18-1121/1128

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OWEN W. BARNABY,

Plaintiff-Appellant,

V.

BRET WITKOWSKI, County Treasurer, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN BEFORE: DONALD, LARSEN, and NALBANDIAN, Circuit Judges. PER CURIAM. Owen W. Barnaby, a pro se litigant from Michigan, appeals the district court's judgment dismissing his civil suit after granting summary judgment to the defendants— Berrien County, Michigan, and its Treasurer, Bret Witkowski. In a consolidated case, he also appeals the district court's order denying his motion for reconsideration of several discovery orders.1. As set forth below, we **AFFIRM**.

In 2010, the defendants foreclosed on and then sold Barnaby's real property when he failed to pay property taxes. Two years after the sale at auction, Barnaby moved for a new foreclosure hearing. He claimed that the sale violated a partial-payment plan that he and the country treasurer

1 Barnaby first filed a timely notice of appeal of the district court's order granting summary judgment to the Defendants. That led to the opening of case number 18-1121 in this court. Dayslater, he filed an "Amended and or Supplemental Notice of Appeal" to appeal not only that order, but also the district court's order resolving various discovery matters. That appeal is case number 18-1128. The cases were then consolidated for review. Nos. 18-1121/1128, *Barnaby v. Witkowski, et al.*

had orally agreed upon to keep his property out of foreclosure. The state court denied Barnaby's motion after an evidentiary hearing, finding that he had not established that an agreement existed. In one of several post-judgment filings, Barnaby argued that the defendants sold his property in violation of state law because they did not first obtain a foreclosure judgment. At a hearing, the state court recognized defendants' error but still denied Barnaby's motion. The court held that, under Michigan law, a sale of property can be set aside only if the sales procedure was so egregious that it violated due process. Because Barnaby had notice of the auction, was present for it, and understood that his property had been sold, and because he then waited several years before suing to protect his rights, the state court held that the procedure did not violate due process. Barnaby appealed, to no avail.

Barnaby eventually filed this suit in federal court. His complaint asserted claims of fraudulent misrepresentation and omission against each defendant; claims for negligence, unconscionability, and theft against the treasurer only; a due-process claim against both defendants; and claims against each defendant for breach of contract and breach of the duty of good faith and fair dealing. The district court dismissed Barnaby's complaint under the *Rooker- Feldman* doctrine. *See Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). Barnaby appealed. We vacated the district court's decision and remanded the case to the district court, concluding that *Rooker-Feldman* did not bar Barnaby's claims because he was not asserting "that the state-court judgment itself caused his injuries, but that the defendants' actions in procuring that state-court judgment did." *Barnaby v. Witkowski*, No. 16-1207, 2017 WL 3701727, at *2 (6th Cir. Feb. 17, 2017).

On remand, the district court granted the defendants' motion for summary judgment and denied Barnaby's. *Barnaby v. Witkowski*, No. 1:14-CV-1279, 2018 WL 387961 (W.D. Mich. Nos. 18-1121/1128, *Barnaby v. Witkowski, et al.*

Jan. 12, 2018). The court determined that principles of res judicata and collateral estoppel barred the majority of Barnaby's claims; he had already litigated those same issues in state court and could not relitigate them in a federal forum. *Id.* at *3-6. The court also held that Barnaby's unconscionability claim failed because unconscionability is a defense to a breach-of-contract claim and not itself a cause of action under state law. *Id.* at *5.

Barnaby appeals the district court's grant of summary judgment. He also appeals the court's denial of several of his interlocutory motions, including numerous discovery motions and motions for reconsideration.

We review decisions on discovery matters and motions for reconsideration under an abuseof- discretion standard. *See Pittman v. Experian Info. Sols., Inc.*, 901 F.3d 619, 642 (6th Cir. 2018); *Barry v. Lyon*, 834 F.3d 706, 722-33 (6th Cir. 2016). "We 'will find an abuse of discretion only where there is a definite and firm conviction that the trial court committed a clear error of judgment.'" *Luna v. Bell*, 887 F.3d 290, 294 (6th Cir. 2018) (quoting *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998)).

Barnaby appealed only one discovery order: a construed motion for reconsideration. That one order, though, concerned two separate matters. And those two matters each involved several other district court orders. The first matter concerned Barnaby's motion to strike the defendants' brief and for sanctions. Barnaby moved to strike the defendants' response in opposition to his motion for summary judgment because it was one page too long under the court's local rules. He also moved for sanctions because the defendants, he alleged, continued to fraudulently misrepresent the date of a particular judgment of foreclosure. The district court granted Barnaby's motion to strike in part, but rather than strike defendants' entire filing, the court merely ordered the last page of the defendants' response stricken. The court also denied Barnaby's request for sanctions because his complaint asserted claims for fraudulent misrepresentation and omission and thus those were issues to be decided on the merits and not at the discovery stage. Barnaby moved for reconsideration, arguing that, without the last page, the defendants' brief was inadmissible because it lacked signatures. He also maintained

that the district court should decide the sanctions issue at that time rather than wait for the matter to be litigated. The court denied that reconsideration motion. Undeterred, Barnaby filed yet another motion to reconsider both the court's original order and its order denying reconsideration. The district court denied that motion as frivolous and warned Barnaby that more frivolous filings would merit sanctions. Barnaby filed an "objection" to that order. The district court construed it as another motion for reconsideration and denied it in the order from which Barnaby now appeals.

The second discovery matter that was part of that appealed order came out of Barnaby's motion to compel. The district court granted that motion in part and denied it in part, directing the defendants to answer some of Barnaby's discovery requests. After the defendants attempted to comply, Barnaby filed a motion for sanctions, asserting that the defendants had violated the district court's order in two ways. First, the district court had ordered the treasurer to file an affidavit attesting to his efforts to find a certain email that Barnaby had requested, but, while the defendants filed a pertinent response, Barnaby noted that it was not in the form of an affidavit from the treasurer. Second, Barnaby asserted that the defendants did not produce contracts that they had allegedly entered into in 2010 about property taxes, despite the district court's order that they respond to Barnaby's request for them. The district court determined that Barnaby was correct on the first issue. But because the treasurer had since filed an affidavit containing the same information as that in the defendants' original response, the court held that Barnaby had not suffered prejudice and was therefore not entitled to relief. On the second issue, the district court noted that the defendants had responded that no such contracts existed. Barnaby protested that their response was inaccurate, but the district court denied his motion because he had no evidence to support his claim. Barnaby filed another "objection" to that order. The district court construed it as a motion for reconsideration and denied it, too, in the order from which Barnaby appeals.

On appeal, Barnaby argues that the district court erred by not sanctioning the defendants. He maintains that defendants' response brief was inadmissible, that they disobeyed the district court's discovery order. He also faults the district court for construing his "objections" as motions for reconsideration.

The district court did not err in so construing Barnaby's "objections." Parties may file objections to some decisions by a magistrate judge. *See* Fed. R. Civ. P. 72(b)(2). But here, the parties had consented to the magistrate judge's jurisdiction. *See* 28 U.S.C. § 636(c); Fed. R. Civ. P. 73. Thus, the magistrate judge was exercising the jurisdiction of the district court when she issued her order, and there is no such thing as an "objection" to a district court's order. The court, then, construed Barnaby's "objections" as motions for reconsideration for his benefit, as it appropriately held him to the less exacting standards afforded pro se litigants. *See Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 676 (6th Cir. 2018).

We also find no error in the district court's handling of the defendants' response brief. "The interpretation and application of local rules 'are matters within the district court's discretion.'" *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 451 (6th Cir. 2008) (quoting *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 714 (6th Cir. 2006)). The district court did not abuse its discretion by striking the last page of the brief but considering it otherwise properly filed.

The district court likewise did not abuse its discretion by declining to sanction the defendants. As the district court held, Barnaby's request for sanctions was based on his belief that the defendants flouted the discovery order with fraudulent misrepresentations, but that was merely his unsupported belief, and the issues were central to the merits of the case. Moreover, the discovery issues ended up being irrelevant to resolving the litigation, which turned on principles of res judicata and collateral estoppel. The district court acted within its discretion here.

As for the dismissal of Barnaby's complaint, we review a decision to grant summary judgment de novo. *Libertarian Party of Ohio v. Husted*, 831 F.3d 382, 394 (6th Cir. 2016). Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

On appeal, Barnaby raises many arguments that he presented both below about the merits of his claims and in his appeal of the discovery matters. He asserts that the partial-payment-plan agreement existed, that the defendants violated it, and that they fraudulently misled the district court about it. He also argues that the law-of-the-case doctrine applies.

But the district court correctly determined that Barnaby's claims were barred by res judicata and collateral estoppel. Under those doctrines, also called claim and issue preclusion, federal courts must give state-court judgments the same preclusive effect to which they are entitled under the laws of that state. *See AuSable River Trading Post, LLC v. Dovetail Sols., Inc.*, 874 F.3d 271, 274 (6th Cir. 2017). In Michigan, "a 'second, subsequent action' is barred by res judicata when '(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first.'" *Id.* (quoting *Adair v. State*, 680 N.W.2d 386, 396 (Mich. 2004)). And "[r]es judicata is applied broadly by Michigan courts, barring 'not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not.'" *Id.* (quoting *Adair*, 680 N.W.2d at 396). Collateral estoppel applies in a subsequent case when: (1) the parties are the same in both cases; (2) there was a valid, final judgment in the first case; (3) the same issue was actually litigated and necessarily determined in that first case; and (4) the parties had a full and fair opportunity to litigate the issue in that earlier case. *Darrah v. City of Oak Park*, 255 F.3d 301, 311 (6th Cir. 2001) (citing *People v. Gates*, 452 N.W.2d 627, 630-31 (Mich. 1990)).

Barnaby's claims for fraudulent misrepresentation, fraudulent omission, negligence, theft, breach of contract, and breach of the duty of good faith and fair dealing all rely on his assertion that he and the treasurer entered into a partial-payment agreement that the treasurer violated by selling his property at auction. But Barnaby litigated that issue in state court against the county and the treasurer, and the Michigan trial court determined that he did not prove that the agreement existed. He cannot try to prove in federal court what he failed to prove in state court. Similarly, the state court rejected Barnaby's motion to rescind the property sale because the court determined that the sales procedure did not violate Barnaby's due process rights. That ruling bars Barnaby's due-process claim here on the same grounds.

Barnaby also invokes the law-of-the-case doctrine, which prevents a court from reconsidering issues that it had already decided at an earlier stage of a case. *Vander Boegh v. EnergySolutions, Inc.*, 772 F.3d 1056, 1071 (6th Cir. 2014). Barnaby observes that when the district court originally dismissed his claims under the *Rooker-Feldman* doctrine, the defendants had also argued that principles of res judicata barred them. He concludes, then, that the law-of the- case doctrine should have prohibited the district court from holding on remand that his claims were barred under res judicata principles. "But the [law-of-the-case] doctrine applies only if the appellate court 'either expressly or by necessary implication decides an issue.'" *Haddad v. Alexander, Zelmanski, Danner & Fioritto, PLLC*, 758 F.3d 777, 781 (6th Cir. 2014) (quoting *Bowles v. Russell*, 432 F.3d 668, 676 (6th Cir. 2005), *aff'd*, 551 U.S. 205 (2007)). Our prior decision held only that *Rooker-Feldman* did not apply; we said nothing about issue and claim preclusion, which were not part of the district court's ruling and thus not before us.

For these reasons, we **AFFIRM** the district court's judgment.

Appendix B: The Decision of the United District Court Opinion

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OWEN BARNABY,
Plaintiff,
v. Case No. 1:14-cv-1279

Hon. Ellen S. Carmody

BRET WITKOWSKI, et al.,
Defendants.
_____/

OPINION

This matter is before the Court on Plaintiff's Motion for Summary Judgment, (ECF No. 85), and Defendants' Motion to Dismiss and/for Summary Judgment, (ECF No. 124). The parties have consented to proceed in this Court for all further proceedings, including trial and an order of final judgment. 28 U.S.C. ' 636(c)(1). By Order of Reference, the Honorable Janet T. Neff referred this case to the undersigned. For the reasons discussed herein, Plaintiff's motion is **denied**, Defendants= motion is **granted**, and this matter is **terminated**.

BACKGROUND

In 2005, Plaintiff purchased from Berrien County a foreclosed parcel of property for five thousand two hundred fifty dollars and zero cents ($5,250.00). (Dkt. #125, Exhibit A). Plaintiff failed to timely pay the 2005 and 2006 property taxes on this parcel, but satisfied each delinquency before such resulted in foreclosure. (Dkt. #125, Exhibit A). Plaintiff failed to timely pay the 2007 and 2008 property taxes, but unlike previous years did not satisfy the delinquency. (Dkt. #125, Exhibit A). Berrien County subsequently initiated foreclosure proceedings and the property was eventually sold at auction. (Dkt. #125, Exhibit A).

LEGAL STANDARD

I. Motion to Dismiss

A Rule 12(b)(6) motion to dismiss for failure to state a claim on which relief may be granted tests the legal sufficiency of a complaint by evaluating the assertions therein in a light most favorable to Plaintiff to determine whether such states a valid claim for relief. *See In re NM Holdings Co., LLC*, 622 F.3d 613, 618 (6th Cir. 2000).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim must be dismissed for failure to state a claim on which relief may be granted unless the A[f]actual allegations [are] enough to raise a right for relief above the speculative level on the assumption that all of the complaint=s allegations are true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). As the Supreme Court subsequently held, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). This plausibility standard Ais not akin to a probability requirement,= but it asks for more than a sheer possibility that a defendant has acted unlawfully. If the complaint simply pleads facts that are Amerely consistent with a defendant=s liability, it Astops short of the line between possibility and plausibility of entitlement to relief. *Id.* As the Court further observed:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than

> conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss .Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the wellpleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not show[n] that the pleader is entitled to relief.

Id. at 678-79 (internal citations omitted).

When resolving a motion to dismiss pursuant to Rule 12(b)(6), the Court may consider the complaint and any exhibits attached thereto, public records, items appearing in the record of the case, and exhibits attached to the defendant=s motion to dismiss provided such are referenced in the complaint and central to the claims therein. *See Bassett v. National Collegiate Athletic Assoc.*, 528 F.3d 426, 430 (6th Cir. 2008); *see also, Continental Identification Products, Inc. v. EnterMarket, Corp.*, 2008 WL 51610 at *1, n.1 (W.D. Mich., Jan. 2, 2008) (Aan exhibit to a pleading is considered part of the pleading@ and Athe Court may properly consider the exhibits in determining whether the complaint fail[s] to state a claim upon which relief may be granted without converting the motion to a Rule 56 motion; *Stringfield v. Graham*, 212 Fed. Appx. 530,535 (6th Cir. 2007) (documents Aattached to and cited by@ the complaint are Aconsidered parts thereof under Federal Rule of Civil Procedure 10(c).

II. Summary Judgment

Summary judgment Ashall@ be granted Aif the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.@ Fed. R. Civ. P. 56(a). A party moving for summary judgment can satisfy its burden by demonstrating that the respondent, having had sufficient opportunity for discovery, has no evidence to supportan essential element of his or her case. *Minadeo v. ICI Paints*, 398 F.3d 751, 761 (6th Cir. 2005). Once the moving party demonstrates that Athere is an absence of evidence to support the nonmoving party case,@ the non-moving party Amust identify specific facts that can be established by admissible evidence, which demonstrate a genuine issue for trial.@ *mini v. Oberlin College*, 440 F.3d 350, 357 (6th Cir. 2006).

While the Court must view the evidence in the light most favorable to the nonmoving party, the party opposing the summary judgment motion Amust do more than simply show that there is some metaphysical doubt as to the material facts.@ *Amini*, 440 F.3d at 357. The existence of a mere Ascintilla of evidence@ in support of the non-moving party=s position is insufficient. *Daniels v. Woodside*, 396 F.3d 730, 734-35 (6th Cir. 2005). The non-moving party may not rest upon [his] mere allegations,@ but must instead present significant probative evidence@ establishing that Athere is a genuine issue for trial.@ *Pack v. Damon Corp.*, 434 F.3d 810, 813-14 (6th Cir. 2006).

Moreover, the non-moving party cannot defeat a properly supported motion for summary judgment by "simply arguing that it relies solely or in part upon credibility Determination *Fogerty v. MGM Group Holdings Corp., Inc.*, 379 F.3d 348, 353 (6th Cir. 2004). Rather, the non-moving party "must be able to point to some facts which may or will entitle him to judgment, or refute the proof of the moving party in some material portion, and may not merely recite the incantation, Credibility, and have a trial on the hope that a jury may disbelieve factually uncontested proof.@ *Id.* at 353-54. In sum, summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to that party case, and on which that party will bear the burden of proof at trial. *Daniels*, 396 F.3d at 735.

While a moving party without the burden of proof need only show that the opponent cannot sustain his burden at trial, a moving party with the burden of proof faces a substantially higher hurdle.*Arnett v. Myers*, 281 F.3d 552, 561 (6th Cir. 2002). Where the moving party has the burden, Ahis showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). The Sixth Circuit has emphasized that the party with the burden of proof must show the record contains evidence satisfying the burden of persuasion and that the evidence is so powerful that no reasonable jury would be free to disbelieve it. *Arnett*, 281 F.3d at 561. Accordingly, summary judgment in favor of the party with the burden of persuasion is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact. Hunt v. Cromartie, 526 U.S. 541, 553 (1999).

ANALYSIS

I. Fraudulent Misrepresentation and Omission (Counts I and II)

As noted above, Plaintiff failed to timely pay the 2005, 2006, 2007, and 2008 property taxes on the subject property. With respect to the 2005 and 2006 property taxes, Plaintiff satisfied the delinquency before the initiation of foreclosure proceedings. However, with respect to the 2007 and 2008 property taxes, Plaintiff did not satisfy the delinquency. Plaintiff alleges that "[a]fter the 2008 national recession, the Berrien County Treasurer, Mr. Bret Witkowski, entered into partial payment agreements for less than the amount to stop property foreclosure for delinquent property taxes." (ECF No. 1 at ¶ 7). As previously noted, Plaintiff pursued legal action in state court to enforce his rights in the subject property. (ECF No. 1 at ¶ 12). Plaintiff concedes that during the course of this state court litigation, the question of whether Defendant Witkowski entered into the aforementioned partial payment agreement was litigated and that the state court concluded that no such agreement existed. (ECF No. 1 at ¶¶ 13-20). In Count I of his complaint, Plaintiff alleges that Defendant Witkowski's denial, throughout the state court litigation, of the existence of this alleged partial payment agreement constituted fraudulent misrepresentation and omission. (ECF No. 1 at PageID.12-14). In Count II of his complaint, Plaintiff alleges that Defendant Berrien County likewise

committed fraudulent misrepresentation and omission on the ground that it employs Witkowski and, moreover, benefits from Witkowski's wrongful conduct. (ECF No. 1 at PageID.12-15). Plaintiff's claims are barred by res judicata and collateral estoppel.

Federal courts must afford to state court judgments the same preclusive effect as such would receive in that state's courts. *See Buck v. Thomas M. Cooley Law School*, 597 F.3d 812, 816-17 (6th Cir. 2010). Under Michigan law, res judicata "is employed to prevent multiple suits litigating the same cause of action." *Washington v. Sinai Hospital of Greater Detroit*, 733 N.W.2d 755, 759 (Mich. 2007). Res judicata bars a second cause of action when: (1) the prior action was decided on the merits; (2) both actions involve the same parties or their privies; and (3) the matter in the second case was, or could have been, resolved in the first. *Id.*

The related preclusion doctrine of collateral estoppel applies where: (1) a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment; (2) the same parties must have had a full and fair opportunity to litigate the issue; (3) there must be mutuality of estoppel. *See Monat v. State Farm Ins. Co.*, 677 N.W.2d 843, 845- 46 (Mich. 2004). Estoppel is mutual "if the one taking advantage of the earlier adjudication would have been bound by it, had it gone against him." *Id.* at 846-47. Defendants bear the burden to demonstrate the applicability of res judicata and collateral estoppel. *See Richards v. Tibaldi*, 726 N.W.2d 770, 776 (Mich. Ct. App. 2006) (res judicata); *Solomon v. Smith*, 2016 WL 594373 at *2 (Mich. Ct. App., Feb. 9, 2016) (collateral estoppel).

The record clearly establishes that Plaintiff's claim that he entered into a partial payment agreement with Defendant Witkowski to prevent the foreclosure of the subject property for failure to pay property taxes was litigated in the aforementioned state court action. This particular issue was raised by Plaintiff at multiple state court hearings. (ECF No. 125, Exhibit E; ECF No. 125, Exhibit H). In its decision granting a judgment of foreclosure to Berrien County, the state court specifically addressed the issue and found that no such partial payment agreement existed. (ECF No. 125, Exhibit K). Specifically, the court made the following findings of fact: (1) Witkowski "did not make a written agreement with Barnaby to withhold the property from sale upon payment of less than the full amount required to redeem" and (2) Witkowski "did not make an oral agreement with Barnaby to withhold the property from sale upon payment of less than the full amount required to redeem" (ECF No. 125, Exhibit K). Based upon these factual findings, the court concluded that "Barnaby is not entitled to relief." (ECF No. 125, Exhibit K). There is nothing in record indicating that this determination was overturned, vacated, or modified on appeal. In sum, the requirements of res judicata and collateral estoppel are both satisfied. Accordingly, as to Plaintiff's claim for fraudulent misrepresentation and omission, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted.

II. Negligence (Count III)

In Count III of his complaint, Plaintiff alleges that Defendant Witkowski committed negligence. (ECF No. 1 at PageID.15-16). The basis for this particular claim is not entirely clear. Plaintiff articulates the basis for this claim as follows:

> Defendant Treasurer Bret Witkowski is liable for negligence for his failure to return Plaintiff's money before he sold the Plaintiff's property per Michigan state law and the Berrien County policy and procedure, causing harm to plaintiff as described in paragraphs above.

(ECF No.1 at PageID.16).

A review of Plaintiff's complaint, however, fails to adequately describe or identify the money which Plaintiff alleges Defendant Witkowski was obligated to return. It appears that the money in question is the amounts Plaintiff allegedly paid to Berrien County pursuant to the aforementioned partial payment agreement into which Plaintiff and Witkowski allegedly entered. Plaintiff's claim fails for at least three reasons.

First, to the extent that Plaintiff's negligence claims is premised upon the existence of the alleged partial payment agreement, as discussed immediately above, that particular issue has already been litigated to Plaintiff's detriment. Thus, this claim is barred by collateral estoppel and res judicata. Second, Plaintiff's allegations fail to state a claim for negligence. Under Michigan law, a negligence claim consists of four elements: (1) duty owed by the defendant to the plaintiff; (2) breach of that duty; (3) causation; and (4) damages. *See Cawood v. Rainbow Rehabilitation Centers, Inc.*, 711 N.W.2d 754, 757 (Mich. Ct. App. 2005). Plaintiff makes no allegations which, even if accepted as true, satisfy the first three elements.

Finally, Defendant Witkowski is entitled to governmental immunity from this claim. Under Michigan law, "an employee of a governmental agency acting within the scope of his or her authority is immune from tort liability unless the employee's conduct amounts to gross negligence that is the proximate cause of the injury." *Kendricks v. Rehfield*, 716 N.W.2d 623, 625 (Mich. Ct. App. 2006) (quoting Mich. Comp. Laws § 691.1407(2)). Michigan law defines gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Mich. Comp. Laws § 691.1407(7)(a). Plaintiff does not allege that Defendant Witkowski was not acting within the scope of his employment nor does Plaintiff allege that Defendant Witkowski's conduct amounted to gross negligence. Accordingly, with respect to Plaintiff's negligence claim, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted.

III. Unconscionability (Count IV)

In Count IV of his complaint, Plaintiff alleges that Defendant Witkowski committed the tort of "unconscionability." (ECF No. 1 at PageID.16-17). As Defendant correctly notes, unconscionability is not a cause of action under Michigan law, but is instead a traditional defense to an action to enforce a contract. *See, e.g., Liparoto Construction, Inc. v. General Shale Brick, Inc.*, 772 N.W.2d 801, 805 (Mich. Ct. App. 2009). Accordingly, as

to Plaintiff's unconscionability claim, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted.

IV. Theft (Count V)

In Count V of his complaint, Plaintiff alleges that Defendant Witkowski committed theft by failing to "follow through" on the aforementioned partial payment agreement Plaintiff allegedly negotiated with Witkowski. As previously discussed, the issue of whether Plaintiff and Defendant Witkowski entered into any such agreement has already been litigated in state court with a finding that no such agreement existed. This matter cannot be re-litigated in this forum. Plaintiff's theft claim is barred by the doctrines of res judicata and claim preclusion. With respect to Plaintiff's theft claim, therefore, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted.

V. Due Process (Count VI)

In Count VI of his complaint, Plaintiff alleges that Defendants violated his due process rights "when they sold the property without court Order." (ECF No. 1 at PageID.18). This claim concerns a procedural irregularity that occurred relative to the foreclosure and sale of the property in question. The factual specifics concerning this matter are as follows.

On March 1, 2010, the Berrien County Trial Court held a hearing concerning the petition filed by Berrien County seeking foreclosure of the property in question for failure to pay the property taxes. (ECF No. 125, Exhibit B). The Berrien County Trial Court subsequently entered a Judgment of Foreclosure, dated August 18, 2010. (ECF No. 125, Exhibit B). As Plaintiff correctly notes, however, by this time the property had already been sold at auction. Specifically, the property had been sold at auction the previous month. (ECF No. 89, Exhibit O at PageID.988-91). Thus, as Plaintiff asserts, the property was sold "without Court order." However, Plaintiff's claim that this violated his due process rights has already been litigated in state court and is, therefore, barred by the doctrines of res judicata and collateral estoppel.

Plaintiff raised this particular issue in state court and a hearing concerning this issue was conducted on December 17, 2012. (ECF No. 89, Exhibit O). With respect to this particular issue, the court observed that despite the fact that Plaintiff "knew this property was sold on the day it was sold," Plaintiff waited more than two years to raise any argument that the sale of his property was improper because the sale occurred prior to the entry of the Judgment of Foreclosure. (ECF No. 89, Exhibit O at PageID.991-97). The court rejected Plaintiff's request to set aside the sale of his property on the ground that, absent a violation of due process, a property owner's rights in a parcel of property are extinguished upon the entry of a judgment of foreclosure. (ECF No. 89, Exhibit O at PageID.998-99). With respect to Plaintiff's argument that the circumstance violated his due process rights, the court stated:

> I find the violations in this case were procedural, they did not rise to the level of a constitution – constitutional deprivation of due process, because, Mr. Barnaby had notice; he was at the sale; he knew what was going on; he had notice of the

> proceedings prior to that time. What didn't happen here, was that, the judgment didn't get entered. That's a procedural effect, not a constitutional defect.

(ECF No. 89, Exhibit O at PageID.999).[1]

Plaintiff's due process claim has already been adjudicated by the Michigan courts. Plaintiff's due process claim in this Court, therefore, is barred by the doctrines of res judicata and collateral estoppel. Accordingly, with respect to Plaintiff's due process claims, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted.

VI. Breach of Contract (Counts VII and VIII)

In Count VII of his complaint, Plaintiff alleges that Defendant Witkowski breached the partial payment agreement the two allegedly negotiated. (ECF No. 1 at PageID.18-19). In Count VIII of his complaint, Plaintiff alleges that Berrien County, as Witkowski's employer, is likewise liable for breach of contract. (ECF No. 1 at PageID.19-20). As previously discussed, the question whether Plaintiff and Witkowski entered into a partial payment agreement regarding Plaintiff's property tax obligations has already been litigated in state court. These claims are barred by res judicata and collateral estoppel. Accordingly, with respect to Plaintiff's breach of claims, Plaintiff's motion for summary judgment is denied and Defendants' motion for summary judgment is granted.

[1] The court also informed Plaintiff that while the sale of his property could not be set aside, he could pursue in the Michigan Court of Claims an action for damages resulting from the circumstances in question. (ECF No. 89, Exhibit O at PageID.999). There is no indication that Plaintiff ever pursued any such relief.

CONCLUSION

For the reasons articulated herein, Plaintiff's Motion for Summary Judgment, (ECF No. 85), is **denied**; Defendants' Motion to Dismiss and/for Summary Judgment, (ECF No. 124), is **granted**; and this matter is **terminated**. An Order consistent with this Opinion will enter.

Date: January 12, 2018

/s/ Ellen S. Carmody
ELLEN S. CARMODY
United States Magistrate Judge

Appendix C: United States Court of appeals denying of Timely Rehearing.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OWEN W. BARNABY,
Plaintiff-Appellant,
v.
BRET WITKOWSKI, County Treasurer;
COUNTY OF BERRIEN, named as Berrien
County Government,
Defendants-Appellees.

O R D E R
Before: DONALD, LARSEN, and NALBANDIAN, Circuit Judges.

Upon consideration of the Petition for Rehearing filed by the Appellant. It is ORDERED that the petition be and is hereby DENIED.

January 14, 2019

ENTERED BY ORDER OF THE COURT
/S/ Deborah S. Hunt
Deborah S. Hunt, Clerk