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

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 19-1495

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

OWEN W. BARNABY,

Plaintiff-Appellant,

V.

BRET WITKOWSKI, County Treasurer, et al.,

Defendants-Appellees.

**NOT RECOMMENDED FOR FULL-TEXT PUBLICATION**

No. 19-1495

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Oct 08, 2019
DEBORAH S. HUNT, Clerk

| | | |
|---|---|---|
| OWEN W. BARNABY,<br><br>Plaintiff-Appellant,<br><br>v.<br><br>BRET WITKOWSKI, County Treasurer; COUNTY OF BERRIEN, named as Berrien County Government,<br><br>Defendants-Appellees. | ) | ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN |

ORDER

Before: SUHRHEINRICH, COOK, and READLER, Circuit Judges.

Owen W. Barnaby, a pro se Georgia resident, appeals a district court order denying his Federal Rule of Civil Procedure 60(b) and (d) motion for relief from the district court's prior judgment dismissing his civil complaint. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

In 2014, Barnaby filed this lawsuit against Berrien County, Michigan, and its Treasurer, Bret Witkowski, after the defendants foreclosed on and then sold Barnaby's real property in 2010, after he failed to pay property taxes. Approximately two years after the auction of his property, Barnaby filed a state court motion for a new foreclosure hearing, arguing that the defendants had

sold his property in violation of a partial-payment-plan agreement that he had allegedly entered into with Witkowski. Following an evidentiary hearing, the state court denied the motion, concluding that Barnaby failed to establish 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. During a hearing on the motion for reconsideration, Judge John E. Dewane recognized the defendants' error but still denied Barnaby's motion, concluding that: (1) under Michigan law, a sale of property can be set aside only if the sales procedure was so egregious that it violated due process; and (2) 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 procedure did not violate due process. Barnaby appealed, to no avail.

In his 2014 federal lawsuit, Barnaby 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 D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fid. Tr. Co.*, 263 U.S. 413 (1923). We vacated the district court's judgment and remanded the case to the district court, concluding that *Rooker-Feldman* did not bar Barnaby's claims. *Barnaby v. Witkowski*, No. 16-1207 (6th Cir. Feb. 17, 2017) (order).

On remand, the parties filed cross-motions for summary judgment. On January 12, 2018, the district court granted the defendants' motion, concluding that the principles of res judicata and collateral estoppel barred the majority of Barnaby's claims because he had already litigated those same issues in state court and could not relitigate them in a federal forum, and 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. Barnaby appealed and we affirmed. *Barnaby v. Witkowski*, 758 F. App'x 431 (6th Cir. 2018) (per curiam).

On March 1, 2019, Barnaby filed his current motion for relief from the district court's order granting the defendants' motion for summary judgment. Barnaby argued that the district court's order granting summary judgment for the defendants and this court's order affirming that judgment are "void" because the res judicata and issue-preclusion rulings were improperly based on "void" state court judgments. Barnaby argued that the defendants obtained these state court judgments by committing fraud on the court and by failing to provide him notice of the hearing that resulted in the order approving the sale of his property. Next, he argued that the state court judgments are void because state Judges John Dewane and Alfred Butzbaugh conspired with the defendants to deprive him of due process and that the judges should have recused themselves under 28 U.S.C. § 455(a) and Michigan law. Barnaby also moved to file an oversized brief and for "default" in light of the defendants' failure to respond to his Rule 60 motion. The district court granted Barnaby's motion to file an oversized brief, denied the motion for "default," and denied his request for relief from judgment because Barnaby's arguments had already been rejected by the district court and on appeal.

On appeal, Barnaby reasserts his arguments that the district court erred when it granted the defendants' motion for summary judgment because the ruling was based on "void" state court judgments. He continues to note that the defendants did not object to or challenge his Rule 60 motion. Barnaby moves to expedite the appeal.

Rule 60(b)

We review the denial of a Rule 60(b) motion only for abuse of discretion. *Yeschick v. Mineta*, 675 F.3d 622, 628 (6th Cir. 2012). We will reverse for an abuse of discretion only if we are firmly convinced that the trial court made a mistake by relying on clearly erroneous findings of fact, improperly applying the law, or using an erroneous legal standard. *Id.*; *Tucker v. City of Fairfield*, 398 F.3d 457, 461 (6th Cir. 2005). Rule 60(b) permits a district court to grant relief from judgment for the following reasons:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . ., misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has

> been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). "Rule 60(b) does not allow a defeated litigant a second chance to convince the court to rule in his or her favor by presenting new explanations, legal theories, or proof." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001).

Barnaby is not entitled to Rule 60(b) relief under subsections (b)(1), (b)(2), or (b)(3) because he filed the motion in March 2019, more than one year after the district court's January 2018 order granting summary judgment for the defendants. *See* Fed. R. Civ. P. 60(c)(1). In addition, despite Barnaby's arguments, he is not entitled to relief under subsections (b)(4) and (b)(5) because he failed to present any persuasive support for his assertions that the state court judgments concerning the foreclosure sale of his property were obtained by fraud on the court. Barnaby merely made conclusory allegations that the defendants engaged in fraudulent conduct and that the judges conspired with the defendants to deprive him of due process. And contrary to Barnaby's assertion, Judge Wiley's order denying his state-court motion to vacate the foreclosure sale as untimely *did not* include a determination that the prior state court judgments were void. Finally, relief under subsection (b)(6) is available "only in exceptional or extraordinary circumstances which are not addressed by the first five numbered clauses of the Rule." *Stokes v. Williams*, 475 F.3d 732, 735 (6th Cir. 2007) (per curiam) (quoting *Olle v. Henry & Wright Corp.*, 910 F.2d 357, 365 (6th Cir. 1990)). Barnaby's arguments are more properly characterized as a claim under subsection (b)(4) because he maintains that the state court judgments—and presumably, by extension, the federal court judgment—are void based on fraud allegedly committed during the state court foreclosure proceeding. Therefore, relief under subsection (b)(6) is unavailable.

Rule 60(d)

The district court also did not abuse its discretion in denying Barnaby's request for relief from judgment pursuant to Rule 60(d)(1) and (3). An independent action under Rule 60(d)(1) is "available only to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38,

47 (1998). Barnaby failed to present any persuasive arguments establishing that the order granting summary judgment should be vacated in order to "prevent a grave miscarriage of justice." *See id.* As for Rule 60(d)(3), fraud on the court involves conduct:

> 1) on the part of an officer of the court; that 2) is directed to the judicial machinery itself; 3) is intentionally false, willfully blind to the truth, or is in reckless disregard for the truth; 4) is a positive averment or a concealment when one is under a duty to disclose; and 5) deceives the court.

*Carter v. Anderson*, 585 F.3d 1007, 1011 (6th Cir. 2009). Barnaby's allegations of fraud are not directed at the district court proceeding involving his federal lawsuit. Rather, he is challenging fraud that allegedly occurred during the prior state court proceedings.

Recusal

Finally, Barnaby is not entitled to relief under Rule 60(b) or (d) based on the alleged disqualification and failure of certain state court judges to recuse themselves from the proceedings. Barnaby argued that his claims were not barred by res judicata and issue preclusion because the state court judgments were void, in part, because Judges Dewane and Butzbaugh were disqualified "as a matter of law" from issuing judgments in his case because they conspired with the defendants to deprive Barnaby of his due process rights.

Pursuant to 28 U.S.C. § 455(a), "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." A judge must recuse himself only "where a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Burley v. Gagacki*, 834 F.3d 606, 616 (6th Cir. 2016) (quoting *United States v. Adams*, 722 F.3d 788, 837 (6th Cir. 2013)). Pursuant to Michigan Court Rule 2.003, disqualification of a judge is warranted if the judge has "a serious risk of actual bias impacting the due process rights of a party." Mich. Ct. R. 2.003(C)(1)(b). Here, for the reasons expressed above, Barnaby's conclusory assertions that the judges conspired with the defendants are unfounded and constitute nothing more than challenges to the rulings issued with respect to the state-court forfeiture proceedings.

Accordingly, we **AFFIRM** the district court's order and **DENY** the motion to expedite the appeal as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

## 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.
_____/

**Order**

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

OWEN W. BARNABY,

Plaintiff,

v.

BRET WITKOWSKI, et al.,

Defendants.
_____/

Hon. Ellen S. Carmody

Case No. 1:14-cv-1279

**ORDER**

This matter is before the Court on Plaintiff's Motion for Relief from Judgment, (ECF No. 173), Plaintiff's Motion to File Lengthy Brief, (ECF No. 174), and Plaintiff's Motion to Grant Plaintiff's Motion, (ECF No. 178). As discussed herein, Plaintiff's motion to file lengthy brief is **granted** and Plaintiff's other two motions are **denied**.

Plaintiff initiated this action in 2014, challenging actions taken by Defendants in response to Plaintiff's failure to pay property taxes on certain real property. The Court entered judgment for Defendants on January 12, 2018. The Sixth Circuit subsequently affirmed this Court's determination in an order dated December 18, 2018. Plaintiff now returns to this Court seeking relief from this Court's judgment. Plaintiff also seeks leave to file a brief lengthier than allowed by local rule, which the Court hereby grants. Plaintiff also moves the Court to grant his motion for relief from judgment because Defendants have failed to respond thereto, which the Court hereby denies.

In his motion for relief from judgment, Plaintiff fails to present any argument that this Court and/or the Sixth Circuit has not already considered and rejected. Plaintiff has failed to

demonstrate any basis for relief pursuant to Federal Rule of Civil Procedure 60. Accordingly, Plaintiff's motion for relief from judgment is denied.

IT IS SO ORDERED.

Dated: April 9, 2019

/s/ Ellen S. Carmody
ELLEN S. CARMODY
U.S. 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.

No. 19-1495

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

**FILED**
Jan 07, 2020
DEBORAH S. HUNT, Clerk

OWEN W. BARNABY,

Plaintiff-Appellant,

v.

BRET WITKOWSKI, COUNTY TREASURER; COUNTY OF BERRIEN, NAMED AS BERRIEN COUNTY GOVERNMENT,

Defendants-Appellees.

ORDER

**BEFORE:** SUHRHEINRICH, COOK, and READLER, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

Further, the appellant's motion for clarification on [unauthorized practice of law], is denied.

**ENTERED BY ORDER OF THE COURT**

**Deborah S. Hunt, Clerk**