

No. _____

**In The
Supreme Court of the United States**

—◆—
TOWN CENTER FLATS, LLC,

Petitioner,

v.

ECP COMMERCIAL II LLC,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

—◆—
PETITION FOR A WRIT OF CERTIORARI

—◆—
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QUESTION PRESENTED

Whether a grant of a writ of certiorari is warranted where, if left without review, the decision of the United States Court of Appeals for the Sixth Circuit will allow courts to deem a non-party to a foreclosure proceeding, who purchases the foreclosed property after the redemption period expired, to have redeemed the property for the foreclosed party, thereby converting a sale of the foreclosed property into a redemption, where the non-party has a common principal with the entity that had its property foreclosed.

PARTIES TO THE PROCEEDINGS

Petitioner Town Center Flats, LLC was the debtor/appellant below.

Respondent ECP Commercial II, LLC was the appellee below.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Town Center Falls, L.L.C. is a privately held Michigan Limited Liability Company. No publicly held entity owns ten percent or more of Town Center Falls, L.L.C.

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DECISIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit affirming the District Court's decision affirming the Bankruptcy Court's order is unreported and is reproduced in the Appendix, App. A1-A10. The decision of the United States District Court for the Eastern District of Michigan affirming the decision of the Bankruptcy Court is unreported and is reproduced in the Appendix, App. A11-A19. The Order Resolving Motion for Determination as to Property of the Estate entered by the United States Bankruptcy Court for the Eastern District of Michigan is unreported and is reproduced in the Appendix, App. A20-A21.

STATEMENT OF JURISDICTION

The order of the United States Court of Appeals for the Sixth Circuit affirming the District Court's affirmation of the order of the Bankruptcy Court was filed on March 7, 2018. This Court has jurisdiction to review this decision under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of Article III of the United States Constitution provides as follows, in pertinent part, that the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 1 of Article IV of the United States Constitution provides as follows: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

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STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit affirming the decision of the United States District Court for the Eastern District of Michigan, which affirmed the decision of the United States Bankruptcy Court for the Eastern District of Michigan, regarding a motion to determine property of a bankruptcy estate. The claims raised by petitioner against respondent involve novel legal theories which no court, state or federal, have ever decided, and therefore the parties and the courts were left to guess at which law to apply and how to analyze the claims. Furthermore, the conclusions that the lower courts did make were based on erroneous facts and conclusions of law which are contrary to other appellate court decisions. This decision, if left standing, would allow courts to deem a non-party to a foreclosure proceeding, who purchases the foreclosed property after the redemption period expired, to have redeemed the property for the foreclosed party, thereby converting a sale of the foreclosed property into a redemption, where the non-party has a

common principal with the entity that had its property foreclosed.

A. Facts of the Case

The property that is the subject of this matter is located in Shelby Township, Macomb County, Michigan. The owner of the property was Town Centers Development, Company, Inc. (hereinafter, "TCD"). The subject property contains three separate parcels. In 2006, TCD transferred ownership of Parcel B to Town Center Flats, LLC (hereinafter, "TCF"). TCD and TCF are both owned by Vincent DiLorenzo. At the time of purchase, TCF granted a mortgage on the property to KeyBank.

The subject property was developed as a 53-unit apartment complex. One of the contractors who constructed the complex was Fox Brothers Company (hereinafter, "Fox"). In 2008, Fox filed a construction lien against a portion of the property. Later in 2008, Fox filed a foreclosure action in the Macomb County (Michigan) Circuit Court, naming both TCD and TCF as defendants. KeyBank was later added as a defendant, but did not appear or otherwise defend in the action.

In 2009, the Macomb County Circuit Court entered a Judgment of Foreclosure, which found that there was no mortgage or other interest in the subject property that had priority over Fox's construction lien. The Judgment of Foreclosure gave Fox entitlement to foreclose on the subject property, setting a redemption

period of 30 days. Both TCD and TCF filed a motion for reconsideration with the Macomb County Circuit Court, which was denied.

In October, 2009, Fox purchased the property at a foreclosure auction, and was provided with a Sheriff's Deed. The Deed was then recorded in the Macomb County Register of Deeds.

On November 2, 2009, the Macomb County Circuit Court entered an Order confirming the sale. According to the November 2, 2009 Order, the redemption period would expire on December 2, 2009, at which time title to the property would vest with Fox. There was no redemption by December 2, 2009, and there was no order by the Macomb County Circuit Court to extend the redemption deadline.

On December 4, 2009, both TCD and TCF filed a motion for relief from judgment with the Macomb County Circuit Court, which was denied that same day. Later on December 4, 2009, TCD purchased the property from Fox for \$35,000. Respondent asserts that it was TCF that redeemed the property. It is not disputed that on December 4, 2009, Fox transferred title to the property by Quit Claim Deed to TCD.

In September, 2013, KeyBank assigned its mortgage interest to Respondent ECP Commercial II, LLC (hereinafter, "ECP").

In 2015, both TCD and TCF filed for Chapter 11 bankruptcy protection in the United States Bankruptcy Court for the Eastern District of Michigan.

During the bankruptcy proceedings, the dispute over who owned the property was one of the main points of contention. TCF argued that it had failed to redeem the property by the December 2, 2009 deadline, so that the property had vested with Fox, and Fox subsequently sold the property to TCD, as evidenced by the Quit Claim Deed. TCD concurred with this conclusion. Because TCD purchased the property from Fox, it was argued that ECP's assigned mortgage interest was extinguished. However, ECP argued that Fox and TCF had agreed to extend the redemption deadline, and that when Vincent DiLorenzo paid Fox \$35,000 on December 4, 2009, it was for the purpose of redeeming the property. Thus, according to ECP, its assigned mortgage interest remained intact.

On September 28, 2016, the Bankruptcy Court entered its decision, stating, in relevant part:

The real property at issue that was subject to the construction lien foreclosure was redeemed from that foreclosure and was not validly transferred to Development; and therefore such is property of the Debtor's bankruptcy estate, subject to the mortgage interests of ECP Commercial II, LLC, as assignee of KeyBank, NA.

TCF appealed this decision to the United States District Court for the Eastern District of Michigan, which affirmed the Bankruptcy Court's ruling on April 11, 2017. TCF then appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed

the District Court in an unpublished opinion dated March 7, 2018.

B. Proceedings Below

This appeal stems from the September 28, 2016 decision from the Bankruptcy Court, which found that the subject property was redeemed after the expiration deadline set forth in order of the Macomb County (Michigan) Circuit Court.

On April 11, 2017, the United States District Court for the Eastern District of Michigan affirmed the Bankruptcy Court's decision. The District Court held that Michigan law allows parties in foreclosure actions to privately extend redemption deadlines, even though no Michigan court had ever concluded this with regard to judicial foreclosures.

The United States Court of Appeals for the Sixth Circuit affirmed the district court's decisions in an unpublished opinion dated March 7, 2018.



REASONS FOR GRANTING THE WRIT

This Court should grant review of this petition because the ruling of the Sixth Circuit in this matter clearly decides important questions of property law which have never been addressed in any court, state or federal. The Sixth Circuit has held that courts are allowed to deem a non-party to a foreclosure proceeding, who purchases the foreclosed property after the

redemption period expired, to have redeemed the property for the foreclosed party, thereby converting a sale of the foreclosed property into a redemption, where the non-party has a common principal with the entity that had its property foreclosed. If the ruling of the Sixth Circuit is not reversed, it will allow mortgagors to have their interests remain intact where those interests would otherwise have been extinguished. Purchasers of foreclosed property should be allowed to take ownership of the property after foreclosure, free and clear of all pre-mortgage mortgage interest.

THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE DECISION BELOW ALLOWS COURTS TO CONSIDER NON-PARTIES TO JUDICIAL FORECLOSURES WHO PURCHASE FORECLOSED PROPERTY TO HAVE REDEEMED THE PROPERTY FOR A FORECLOSED ENTITY, THEREBY LEAVING INTACT MORTGAGES THAT WOULD OTHERWISE BE EXTINGUISHED

In the opening paragraph of the Sixth Circuit's decision in this case, the appellate court stated:

Town Center Flats asks us to find that it failed to redeem property in 2009 because the parties, by agreement, redeemed the property after the deadline set by the judgment of a Michigan state court. But Michigan courts have found that parties may extend the redemption deadline for foreclosures in other

contexts, and we see no reason why a judicial foreclosure should be treated differently.

The difference between a statutory foreclosure and a judicial foreclosure is immediately obvious. In a statutory foreclosure, the redemption period is controlled pursuant to the applicable statute. In a judicial foreclosure, the redemption period is set by the court.

Non judicial foreclosures, or foreclosures-by-advertisement, are governed by statute under Michigan law. *See* M.C.L. §600.3204 *et seq.*; *see also Senters v. Ottawa Sav. Bank, FSB*, 443 Mich. 45, 50, 503 N.W.2d 639, 641 (1993). While the statutory scheme provides certain steps that the mortgagee must go through to validly foreclose, *id.*, it also controls the rights of both the mortgagee and the mortgagor once the sale is completed. *Senters*, 443 Mich. at 50, 503 N.W.2d 639. In relevant part, the statute provides that the mortgagor has six months after the sheriff's sale in which to redeem the property. M.C.L. §600.3204(8). Once the redemption period following the foreclosure of a property expired, a mortgagor's rights in, and title to, the property are extinguished, and he loses all standing to bring claims with respect to the property. This principle is well established in Michigan law.

Judicial foreclosures are governed by M.C.L. §600.3101 *et seq.*, and are "equitable in nature." M.C.L. §600.3180. Unlike statutory foreclosures, in a judicial foreclosure, a court can exercise its discretion to allow or not allow a sale. *Calvert Assoc. v. Harris*, 469 F. Supp. 922, 927 (E.D. Mich. 1979) (citing *United*

States v. Stadium Apartments, Inc., 425 F.2d 358 (9th Cir. 1970)). In *Stadium Apartments*, the Court held that in a judicial foreclosure proceeding, state law regarding redemption was not applicable.

Construction liens in Michigan are governed by statute. M.C.L. §570.1121(1) provides as follows:

If the court finds that a lien claimant is entitled to a construction lien upon the real property to which he or she furnished an improvement, and the amount adjudged to be due has not been paid, the court may enter a judgment ordering the sale of any interest in the real property, or a part of the real property, to which the construction lien attaches. If the construction lien attaches only to the improvement furnished, the court may order a sale of the improvement. If the court finds that there is an interest in or encumbrance against the real property which is superior to the construction lien being foreclosed, the order for sale shall indicate that fact. The court may order a construction lien satisfied out of the rents, profits, and income from the real property to which the construction lien has attached.

Additionally, M.C.L. §570.1121(3) provides:

In the order for the foreclosure sale, the court shall fix a period for redemption. The period of redemption shall not exceed 4 months. The sale shall be conducted in the same manner as a sale on execution. The sale shall become final, subject to the period of redemption,

upon the entry of an order of confirmation by the court.

As can be seen by the statutory language cited above, the court sets the period for redemption on a construction lien foreclosure, not to exceed four months. This is in contrast to the redemption period fixed by statute, such as foreclosure-by-advertisement. M.C.L. §600.3240(7) would be applicable if the subject property in this case would have been foreclosed upon in this manner:

Subject to section 3238, for a mortgage executed on or after January 1, 1965, of commercial or industrial property, or multifamily residential property in excess of 4 units, the redemption period is 6 months from the date of the sale.

The statutory redemption periods set forth in M.C.L. §600.3240(7)-(12) do not require any court involvement. The Sixth Circuit relied on a 100-year-old case from Michigan to find that “the execution creditor and the execution debtor may bind themselves by an agreement to extend the time for redemption.” *Pellston Planing Mill & Lumber Co. v. Van Wormer*, 198 Mich. 648, 653; 165 N.W. 724, 726 (1917). But the holding in this case has rarely been cited, even in statutory foreclosures. The only cases cited by the Sixth Circuit relate to statutory foreclosures. The Sixth Circuit saw no reason why the holding in *Pellston Planing Mill* was not equally applicable in a judicial foreclosure.

However, even if parties to a judicial foreclosure are allowed to extend the redemption period by mutual agreement between themselves, there must be clear evidence of that agreement. In this instant case, the Sixth Circuit relied on alleged admissions by the Town Center entities that the subject property had been redeemed. However, other than this alleged admission, there is no evidence of a writing that would memorialize the agreement.

In *Hazime v. Martin Oil of Indiana, Inc.*, 792 F. Supp. 1067 (E.D. Mich. 1992), the defendant held a mortgage on a gasoline station owned by Ahmed Hazime (not the plaintiff). Ahmed Hazime failed to meet his obligations under the mortgage, and a judgment of foreclosure was entered by the court, giving Ahmed Hazime a six-month period in which to redeem. Martin Oil acquired ownership through a judicial foreclosure sale which occurred on December 11, 1990, triggering the six-month redemption period.

One day before the expiration of the redemption period, Ahmed Hazime delivered to plaintiff a quit claim deed. On the expiration date, Martin Oil and plaintiff entered into an oral agreement in which plaintiff would purchase the gas station after the redemption expiration date. It was also agreed that plaintiff would remain in possession, and make rental payments to Martin Oil until the time of purchase.

When plaintiff failed to make the lease payments, he filed a breach of contract action in the state court, which was later removed to the federal court. Martin

Oil moved for summary judgment, arguing that the oral agreement was voided under the Michigan Statute of Frauds, M.C.L. §566.106 and M.C.L. §566.108. In response, plaintiff argued that under the circumstances of this case, the doctrine of promissory estoppel effectively renders the agreement enforceable notwithstanding the statute of frauds. In particular, plaintiff argued: (1) Martin Oil promised to sell the station to him for \$250,000.00, (2) he reasonably relied on the promise and as a result did not redeem the station within the six-month statutory period, and (3) therefore, he lost the right to redeem.

The District Court rejected plaintiff's argument, stating as follows:

A survey of Michigan cases involving doctrine of promissory estoppel reveals that there has never been a decision that addresses whether it may be applied to a statute of frauds case, like this one, involving a real estate transaction. Nevertheless, the Court is satisfied that if the Michigan Supreme Court looked at the issue today, it would rule that, under the circumstances of this case, the doctrine of promissory estoppel may not be applied to a statute of frauds case involving the sale of real estate. *See Orfield v. International Harvester Co.*, 535 F.2d 959, 965 (6th Cir. 1976) (in diversity cases, federal court must make educated guess what state Supreme Court would decide if question was present to it).

It is true that Michigan Court of Appeals has adopted the doctrine of promissory estoppel as

a means of avoiding the statute of frauds in some instances. *See Nygard v. Nygard*, 156 Mich. App. 94, 99; 401 N.W.2d 323 (1986) (if statute of frauds prevents enforcement of child support contract, defendant may be held liable under the doctrine of promissory estoppel); *Pursell v. Wolverine-Pentronix, Inc.*, 44 Mich. App. 416, 419; 205 N.W.2d 504 (1973) (promissory estoppel doctrine may overcome defense of the statute of frauds to an action to seek enforcement of an oral contract of employment); *Clark v. Coats & Suits Unlimited*, 135 Mich. App. 87, 98; 352 N.W.2d 349 (1984) (same).

However, these decisions are not persuasive authority for the proposition that the Supreme Court of Michigan would treat employment and other types of personal contracts and contracts for real estate transactions the same way. In *Seale v. Citizens Savings & Loans Association*, 806 F.2d 99, 104 (6th Cir. 1986) (applying Ohio law), the Court of Appeals for the Sixth Circuit stated that real estate contracts are generally regarded as more deserving of protection than employment contracts and as a result, in the absence of any case law to the contrary, refused to apply the doctrine of promissory estoppel to abrogate the clear and explicit intent of an applicable statute of frauds requiring a writing in a real estate transaction. In so holding, the Court of Appeals stated:

Real estate transactions are usually formal undertakings involving significant

sums of money. Because they have the potential to affect the actions and interests of third parties, these transactions need to be made public. The statute of frauds is thus necessary “to ensure that transactions involving a transfer of realty interests are commemorated with sufficient solemnity. A signed writing provides greater assurance that the parties and the public can reliably know when such a transactions [sic] occurs. It supports the public policy favoring clarity in determining real estate interests and discourages indefinite or fraudulent claims about such interests.” *North Coast Cookies, Inc. v. Sweet Temptations, Inc.*, 16 Ohio App.3d 342, 348; 476 N.E.2d 388 (1984).

Seale, 806 F.2d at 104. *Seale* amply illustrates the important policy considerations underlying the statute of frauds in the real estate context. Thus, in light of the policy considerations, and in the absence of a strong indication of its position, there is no reason to believe that the Michigan Supreme Court would, if it addressed the issue, hold that, under the circumstances of this case, the doctrine of promissory estoppel applies to a contract for the sale of real estate.

Hazime, 792 F. Supp. at 1069 (E.D. Mich. 1992)

Hazime provides persuasive authority that without a signed writing, oral agreements which relate to real estate transactions are void under the Michigan Statute of Frauds. Thus, the Sixth Circuit’s reliance on

an alleged oral agreement between the parties to redeem the property after the expiration of the court-ordered redemption period was contrary to Michigan law, and the oral agreement should have been considered void.

The Sixth Circuit, in reviewing the facts of this case, determined that TCF had redeemed the property from Fox, and that TCF and Fox had an agreement to extend the redemption deadline. However, there is no evidence that TCF and Fox had an agreement, or that TCF redeemed the property. As noted above, oral agreements such as the one purportedly made in this case to extend the redemption period are void pursuant to the Statute of Frauds. Therefore, even if the Sixth Circuit was correct that there was an oral agreement to extend the redemption period, it had no legal effect on the redemption expiration date.

There was also no modification or amendment of the circuit court's order which set the redemption expiration deadline. Both TCD and TCF attempted to obtain relief from judgment from the circuit court on December 4, 2009, but the circuit court denied the request. Thus, at 12:01 a.m. on December 3, 2009, the property vested with Fox, and the mortgage interest held by KeyBank, later assigned to ECP, was extinguished.

Under Michigan law, by timely paying the required amount to redeem a property after a foreclosure sale, the redeeming party voids the deed obtained by the purchaser at a foreclosure sale. M.C.L. §600.3240(1).

After a foreclosure sale, equitable title to the property vests in the purchaser, but the mortgagor retains legal title until the expiration of the redemption period. *Ruby & Assoc., P.C. v. Shore Financial Services*, 276 Mich. App. 110, 118; 741 N.W.2d 72 (2007), *vacated not in relevant part*, 480 Mich. 1107 (2008).

The right to redeem from a foreclosure at law is a legal right, is created by the statute, and can neither be enlarged nor abridged by courts. A redemption is complete when one having the right to redeem pays in proper time, to a proper person. *Gordon Grossman Bldg. Co. v. Elliott*, 382 Mich. 596, 603; 171 N.W.2d 441, 444 (1969). Under M.C.L. §600.3240(1), only the mortgagor, the mortgagor's heirs or personal representative, or any person that has a recorded interest in the property may redeem the property following a foreclosure sale, thereby making the purchaser's deed void. Thus, under Michigan law, third-parties may not redeem property. Only those who have a recorded interest in the property may redeem.

In this case, the Sixth Circuit noted that Vincent DiLorenzo, on December 4, 2009, gave Fox \$32,500 in checks and cash, though some of the checks appeared to have come from DiLorenzo's relatives. However, neither DiLorenzo nor his relatives had a recorded interest in the property. At the time of foreclosure, it was owned by a corporate entity, TCF. Therefore, only TCF could redeem the property after Fox purchased it at the foreclosure sale.

It is not disputed that the Quit Claim Deed executed by Fox on December 4, 2009, conveyed the property then wholly owned by Fox to TCD, not TCF. Since Fox was the entity that originally filed the construction lien, it certainly knew that TCF was the owner of the property. While the lower court considered it absurd that Fox would sell property worth \$2 Million for \$35,000, once title of the property vested with Fox, it could sell the property for whatever it wanted. If Fox just wanted to get its money back, and not have the headache of managing an apartment complex, which was not its core business, then its action in selling the property at that price should be commended, not ridiculed by the court.

Thus, the evidence and law as presented in this case leads to the conclusion that TCD purchased the property from Fox. The redemption period had expired, there was no court order entered that extended the redemption period, and in fact the court denied a request to extend the redemption period, any purported oral agreement to extend the redemption period would be void under the Statute of Frauds. DiLorenzo and his family were not recorded owners of the property, and could not lawfully redeem the property. A Quit Claim Deed was executed by Fox to TCD, an entity different from the one against which the judgment of foreclosure had been entered. Since KeyBank had notice of the foreclosure proceedings, but for whatever reason, failed to participate in those proceedings, its mortgage interest was extinguished as of December 3, 2009. When KeyBank assigned its mortgage interest in

September, 2013, to ECP, ECP knew or should have known that the mortgage interest had been extinguished. Instead, ECP has been using the judicial system to correct its own bad business decision.

Subsequent purchasers of foreclosed property should not have to worry about extinguished mortgage holders coming back years later and using the judicial system to revive mortgages, particularly when the mortgage holder had notice of the foreclosure proceedings, but failed to protect its mortgage interest.

In this case, the only common denominator is that TCF and TCD both had Vincent DiLorenzo as a principal. However, that factor should not be relevant. If DiLorenzo was a principal in ABC Company that owned a parcel of land, and ABC Company could no longer meet its obligations and defaulted on its mortgage, allowed the property to be foreclosed and did not redeem within the redemption period, and then DiLorenzo joined XYZ Company, who then purchased the property, what would it matter if DiLorenzo was associated with XYZ Company?

The holding of the Sixth Circuit that DiLorenzo redeemed the property on behalf of TCF, thereby reviving the mortgage interest now held by ECP, is contrary to the unique facts of this case, as well as established law. This holding will impact all subsequent purchasers of foreclosed properties, and provides a means for mortgage holders to revive extinguished mortgages. Therefore, petitioner submits that for these reasons, review and reversal by this Supreme Court is

warranted. Accordingly, petitioner respectfully requests that this Supreme Court grant its petition.



CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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