

No. 17-1653

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Petitioner waived the arguments raised in its Petition for Certiorari by failing to raise them in either the Bankruptcy Court, the District Court, or the United States Court of Appeals for the Sixth Circuit.

**RULE 29.6 CORPORATE
DISCLOSURE STATEMENT**

Respondent ECP Commercial II LLC (“ECP”) states that it is wholly owned by ECP Capital I LLC. ECP Capital I LLC is a wholly owned subsidiary of Excelsior Capital Partners LLC. No other known entity has a financial interest in the outcome of this litigation.

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INTRODUCTION

The petition for a writ of certiorari does not raise any question that warrants review by the Court. Petitioner, Town Center Flats, LLC (“Petitioner”), validly redeemed real property on which ECP holds a properly perfected first priority mortgage lien, and that real property is the property of Petitioner’s bankruptcy estate. In its petition for a writ of certiorari, Petitioner raises new arguments that were not before the Sixth Circuit Court of Appeals; these novel arguments were waived and should not be addressed by the Court. Accordingly, the Court should deny the petition for a writ of certiorari.

ECP’S STATEMENT OF THE CASE

I. Procedural History

Petitioner filed a voluntary petition under chapter 11 of the Bankruptcy Code on January 31, 2015 (the “Petition Date”), in the U.S. Bankruptcy Court for the Eastern District of Michigan (the “Bankruptcy Court”). On April 11, 2016, Petitioner filed Debtor’s Motion for Determination as to Property of the Estate (the “Motion”), which ECP opposed. The Bankruptcy Court held an evidentiary hearing on the Motion on June 14, 2016 and August 9-10, 2016, the transcripts of which are included in the record on appeal. At the hearing, the Bankruptcy Court took the matter under advisement. The Bankruptcy Court later scheduled a bench opinion hearing on September 28, 2016, to render its bench opinion to the parties.

That day, the Bankruptcy Court issued its Order Resolving Motion for Determination as to Property of

the Estate (Dkt. 130) (the “Order”), denying the Motion. Petitioner subsequently moved for reconsideration of the Order, which motion the Bankruptcy Court denied in its Order Denying Debtor’s Motion for Reconsideration (Dkt. 232) (the “Reconsideration Order”). Petitioner noted its appeal of the Bankruptcy Court’s decisions as announced in the Order and the Reconsideration Order on November 1, 2016.

The District Court entered its Opinion and Order Affirming the Decision of the Bankruptcy Court (the “District Court Order”) on April 11, 2017 (Dkt. 7). Petitioner timely noted an appeal of the District Court’s decision on May 11, 2017 (Dkt. 8).

The U.S. Court of Appeals for the Sixth Circuit entered its Opinion (Dkt. 26) (the “Sixth Circuit Opinion”) on March 7, 2018, upholding the Order and the District Court Order. Petitioner then filed a Motion to Extend Time to File Motion for Reconsideration on March 22, 2018 (Dkt. 29), which was denied on March 29, 2018 (Dkt. 30) without being briefed by ECP. Petitioner filed a Motion to Reopen and for Leave to Submit Reconsideration of the Sixth Circuit Opinion (Dkt. 31) (the “Motion to Reopen”) on April 26, 2018. The Motion to Reopen was denied one day later, on April 27, 2018 (Dkt. 32), again without any briefing from ECP. The Sixth Circuit entered its Mandate (Dkt. 33) on the same date.

Petitioner filed its Petition for Certiorari (the “Petition”) in this Court on June 5, 2018.

II. Factual Background

The Petition contains numerous arguments that were not raised in any earlier proceedings. In its Question Presented, Petitioner focuses the Court's attention on the fact that Petitioner and another entity, Town Centers Development, Inc. ("TCD") have the same principal, Vincent DiLorenzo ("DiLorenzo"). Even a cursory review of the underlying briefs and oral argument transcripts will make clear that this issue was never addressed by the lower courts and never raised by Petitioner. The issues that were raised and briefed by the lower courts focused on full faith and credit, the power of parties to extend redemption periods, and the impossibility that ECP's first-priority lien was extinguished in the underlying foreclosure litigation.

Any argument regarding the fact that DiLorenzo is the principal for both Petitioner and TCD is being raised for the first time. Most notably, Petitioner introduces an entirely new argument regarding the statute of frauds, M.C.L. §566.106 and M.C.L. §566.108. (Petition at 12-17). Petitioner did not cite the statute of frauds in any brief, other than in its Motion to Reopen, prior to this Petition. ECP was never given an opportunity to address the statute of frauds argument, and this Court should not consider it at this time.

REASONS FOR DENYING THE PETITION

I. PETITIONER WAIVED THE ARGUMENTS CONTAINED IN ITS PETITION BECAUSE SUCH ARGUMENTS WERE NOT RAISED BELOW.

Issues not raised or litigated by lower courts cannot be decided on a petition for certiorari to this Court. See, e.g., F.T.C. v. Simplicity Pattern Co., 360 U.S. 55, 61 n. 4, 79 S. Ct. 1005, 1009, 3 L. Ed. 2d 1079 (1959) (declining to address argument that was not raised in the Court of Appeals); Sonzinsky v. United States, 300 U.S. 506, 514, 57 S. Ct. 554, 556, 81 L. Ed. 772 (1937) (“We do not discuss petitioner’s contentions which he failed to assign as error below.”).

This Court has extended the waiver doctrine to allow appellate courts to hold that issues that were not raised in the trial court were waived on appeal. Exxon Shipping Co. v. Baker, 554 U.S. 471, 487, 128 S. Ct. 2605, 2618, 171 L. Ed. 2d 570 (2008) (quoting Singleton v. Wulff, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976) (“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.”)).

In this instance, Petitioner raises an entirely new argument related to the statute of frauds as the linchpin of its petition for certiorari. Although the statute of frauds issue was raised in Petitioner’s Motion to Reopen, ECP never had an opportunity to litigate the Motion to Reopen because the Sixth Circuit Court of Appeals denied the Motion to Reopen without further briefing from ECP. Petitioner has waived its argument regarding the statute of frauds under the Simplicity and Baker decisions, and it

should be ignored by this Court. Just because Petitioner came up with a novel argument long after the Sixth Circuit Opinion was issued does not mean that this Court should entertain that argument now.

The Petition also does not raise any issues that merit this Court's consideration under U.S. Sup. Ct. R. 10. There is no circuit split on the issue, or any similar issue. There is no federal question at all, not to mention one that has been decided by the Michigan Supreme Court in conflict with any other state supreme court or United States Court of Appeals decision.

II. THE SIXTH CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER VALIDLY REDEEMED THE PROPERTY AT ISSUE.

Regardless of the new issues raised by Petitioner, the Sixth Circuit Opinion is correctly decided, as were the Bankruptcy Court Opinion and the District Court Opinion. The facts and law are clear that Petitioner and Fox Brothers Company extended the redemption period during a construction lien foreclosure action and that such an extension is permitted under Michigan law. TCF validly redeemed the property on December 4, 2009. TCF admitted that the extension took place in a state court proceeding and cannot attempt to argue otherwise now. This Court should leave the Sixth Circuit Opinion in place by denying the Petition.

CONCLUSION

For all of the above reasons, the Court should deny the petition for a writ of certiorari.

Date: July 9, 2018

Respectfully submitted,

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