

No. 17-1653

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

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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**

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**REPLY BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI**

—◆—
CINDY RHODES VICTOR
KUS RYAN, PLLC
2851 High Meadow Circle, Suite 120
Auburn Hills, Michigan 48326
(248) 364-3090
cvictor@kusryan.com
Attorneys for Petitioner

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INTRODUCTION

Respondent opposes the petition on the grounds that Petitioner raises facts and arguments for the first time in this petition, and thus argues that the doctrine of waiver should preclude this Supreme Court from considering the petition. As Petitioner will discuss below, Respondent's claims of new facts and new arguments being raised for the first time in this petition are incorrect.

Both the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit stated in their respective opinions that Vincent DiLorenzo was the principal of both Petitioner and another entity, Town Centers Development Company, Inc. Therefore, Respondent's assertion that this is an entirely new fact presented for the first time in this petition is without merit.

Respondent also argues that the statute of frauds was never raised in any of the lower courts. However, Respondent then defeats its own argument by stating that this issue was raised before the Sixth Circuit, but that Respondent did not have the opportunity to litigate the issue because the Sixth Circuit denied Respondent's motion. Simply because a court decides an issue without having Respondent litigate the issue does not constitute a waiver on the part of Petitioner. Therefore, Respondent's assertion that Petitioner has raised an entirely new argument for the first time in this petition is without merit.

As Respondent does not oppose the petition on the merits of the questions presented, Petitioner respectfully requests that this Supreme Court grant the writ of certiorari.

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ARGUMENT

Respondent opposes the instant petition on the basis that Petitioner has raised for the first time in this petition new facts and new arguments that were not raised in the lower courts. Respondent asserts that these new facts and new arguments constitute a waiver, and therefore this Supreme Court should not consider the petition.

In its Factual Background, Respondent asserts that Petitioner focuses this Supreme Court's attention on the fact that Petitioner and another entity, Town Centers Development Company, Inc. ("TCD") have the same principal, Vincent DiLorenzo. Respondent asserts that even a cursory review of the record will make clear that this fact was never raised by Petitioner.

However, a cursory review of the Appendix submitted with this Petition shows that Respondent's assertion is incorrect. In the Opinion by the United States Court of Appeals for the Sixth Circuit, in the section entitled "Background," the third sentence states:

Fox Brothers filed the claim against Town Center Flats, Town Center Development, and Vincent DiLorenzo, the manager and principal for both entities.

(Appendix to Petition for Writ of Certiorari, A3).

Likewise, in the Opinion from the United States District Court for the Eastern District of Michigan, the Honorable Bernard Friedman, in the very first sentence of the factual narrative of the Opinion, stated:

In 2009, the Fox Brothers Company (“Fox”) filed a construction lien claim against Town Center Development, Inc., Town Center Flats, LLC, and their shared principal, Mr. DiLorenzo, in Macomb County Court with respect to unpaid-for materials and labor. Appellee’s Br. p. 5.

(Appendix to Petition for Writ of Certiorari, A12).

In fact, as Judge Friedman noted in his Opinion, it was Respondent, as appellee in that case, who advised the court that DiLorenzo was the principal for both entities.

The assertion by Respondent that the lower courts were never advised that DiLorenzo was a principal for both entities is entirely without merit. Therefore, Respondent’s argument that this Supreme Court should deny the petition for writ of certiorari on this basis should be rejected by this Supreme Court.

The second reason Respondent opposes the instant petition is that Respondent alleges that

Petitioner raised an entirely new argument related to the statute of frauds for the first time in this petition. However, Respondent then countered its own argument by stating:

Although the statute of frauds issue was raised in Petitioner's Motion to Reopen, [Respondent] never had an opportunity to litigate the Motion to Reopen because the Sixth Circuit denied the Motion to Reopen without further briefing from [Respondent]

(Respondent's Brief in Opposition, page 4).

Respondent thus admits that the issue of the statute of frauds was indeed raised by Petitioner, but that Respondent merely did not get the opportunity to litigate the issue.

This Supreme Court has long held that a waiver is the 'intentional relinquishment or abandonment of a known right.' *United States v. Olano*, 507 U.S. 725, 733, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). It logically follows from this definition that as long as a party asserts a known right, it is neither relinquished nor abandoned. Whether Respondent had the opportunity to actually litigate the issue is immaterial as to whether Petitioner waived the issue. Respondent admits that Petitioner raised the issue in a motion, and the Sixth Circuit denied the motion. Therefore, the assertion that Petitioner waived any right to argue the statute of frauds in this Petition is without merit.

The cases cited by Respondent do not support Respondent's position. In *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55 (1959), this Supreme Court, in a footnote, made note of statements of facts that were raised by Simplicity, but stated that the parties did not explore a legal issue related to those facts before this Supreme Court or the Court of Appeals. It was because the parties did not explore the legal issue before this Supreme Court that this Supreme Court passed on deciding the issue.

Respondent also relies on *Sonzinsky v. United States*, 300 U.S. 506 (1937), in which this Supreme Court stated at the very end of its decision: “[w]e do not discuss petitioner’s contentions which he failed to assign as error below.” 300 U.S. at 514. This statement, of course, does not mean that this Supreme Court will not consider issues that were not raised at the Court of Appeals, but instead means that this Supreme Court will not consider questions that a petitioner does not assert in its pleadings before this Supreme Court were erroneously decided by lower courts.

The only other authority on which Respondent relies is *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). However, Respondent’s quote from that case was incomplete. This Supreme Court stated the following as it relates to the doctrine of waiver:

It is true that “[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they

made below.” *Yee v. Escondido*, 503 U.S. 519, 534, 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992).

* * *

“It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below,” *Singleton v. Wulff*, 428 U.S. 106, 120, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1976), when to deviate from this rule being a matter “left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases,” *id.*, at 121, 96 S.Ct. 2868. We have previously stopped short of stating a general principle to contain appellate courts’ discretion, see *ibid.*, and we exercise the same restraint today.

554 U.S. at 487. Thus, contrary to Respondent’s assertion, *Baker* does not stand for the proposition that a federal appellate court may never consider an issue that was not raised before the district court. Instead, this Supreme Court gave federal appellate courts discretion to consider any issue germane to the facts of a particular case.

Further, Respondent has not cited any authority that this Supreme Court may not consider an issue not raised in a lower court. Petitioner was unable to find any case from this Supreme Court that so limited this Supreme Court’s discretion to decide any question that a party has raised in a petition for writ of certiorari before this Supreme Court. Therefore, Petitioner believes that this Supreme Court has the authority to

decide any question related to a dispute that the parties have litigated in the lower courts.

Respondent does not make any argument that the questions presented by the instant petition should not be reviewed by this Supreme Court. While Respondent asserts that the Sixth Circuit correctly decided this matter, this is a routine statement by a prevailing party, and not a reason for denial of the petition. Since Respondent has presented no legitimate reason for denying the petition, Petitioners respectfully request that this Supreme Court grant its petition for writ of certiorari.



CONCLUSION

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

Respectfully submitted,

CINDY RHODES VICTOR
KUS RYAN, PLLC
2851 High Meadow Circle, Suite 120
Auburn Hills, Michigan 48326
(248) 364-3090
cvictor@kusryan.com

Attorneys for Petitioner

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