UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WAYSIDE CHURCH, et al.,

Plaintiffs,

-v-

COUNTY OF VAN BUREN and KAREN MAKAY,

Defendants.

No. 1:14-cv-1274

Honorable Paul L. Maloney

PLAINTIFFS' MOTION FOR LEAVE TO FILE REPLY TO VAN BUREN COUNTY AND KAREN MAKAY'S BRIEF IN OPPOSITION

Pursuant to Local Rule 7.3(c), Plaintiffs Wayside Church, Henderson Hodgens, and Myron Stahl (Plaintiffs) hereby move the Court for leave to file the attached reply to Defendant Van Buren County and Karen Makay's (County) Brief in Opposition to Plaintiffs' Rule 60(b) Motion to Reopen Case.

On March 28, 2018, Plaintiffs Wayside Church, Myron Stahl, and Henderson Hodgens filed a Rule 60(b) motion seeking relief from this Court's March 28, 2017, judgment dismissing their case for lack of jurisdiction. That dismissal was based on the Sixth Circuit's holding in this case that federal courts lack jurisdiction over Plaintiffs' claims, because Michigan courts offer an inverse condemnation remedy for the uncompensated taking of their property. *See Wayside Church v. Van Buren County*, 847 F.3d 812, 822-23 (6th Cir. 2017). After the dismissal of this case, the Michigan Court of Appeals issued a decision that shows Michigan courts do not currently provide a remedy for the Plaintiffs. *See Rafaeli, LLC v. Oakland County*, No. 330696, 2017 WL

4803570, at *1 (Mich. Ct. App. Oct. 24, 2017). Accordingly, the Sixth Circuit was wrong to send Plaintiffs to litigate their takings claims in state court.

The County filed its response on April 10, 2018. In the Response, the County raises two new arguments: (1) that the Supreme Court's summary affirmance in *Balthazar v. Mari Ltd.*, 396 U.S. 114 (1969), controls this case, and (2) that Plaintiffs' Rule 60(b) motion is untimely, under *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983). Plaintiffs seek leave to file a short reply explaining why *Steinhoff* actually supports Plaintiffs' claim and *Balthazar* is neither controlling nor persuasive.

DATED: April 20, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States District Court Western District of Michigan Southern Division by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ CHRISTINA M. MARTIN
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UNITED STATES DISTRICT COURT
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PLAINTIFFS' REPLY TO VAN BUREN COUNTY AND KAREN MAKAY'S BRIEF IN OPPOSITION

On March 28, 2018, Plaintiffs Wayside Church, Myron Stahl, and Henderson Hodgens (Plaintiffs) filed a Rule 60(b) motion asking for relief from this Court's March 28, 2017, judgment dismissing their Fifth Amendment takings claims for lack of jurisdiction. Plaintiffs allege that Van Buren County and Karen Makay (County) violated the Takings Clause when the County sold Plaintiffs' properties to pay taxes, penalties, and fees, and then failed to refund them the remaining money. This remaining money was their equity and cannot be converted into public money, without triggering the protections of the Takings Clause.

This Court dismissed Plaintiffs' claims after the Sixth Circuit held in this case that the Plaintiffs must bring their federal takings claims in Michigan's circuit court, since Michigan courts provide a remedy for takings claims. A subsequent decision in the Michigan Court of Appeals has revealed the Sixth Circuit was incorrect about state court remedies. Plaintiffs ask this Court to relieve them from the March 28, 2018, judgment and reach the merits of their takings claims.

On April 10, 2018, the County filed its response to Plaintiffs' motion. The County responds to Plaintiffs' arguments and adds two new arguments that Plaintiffs' motion is not timely under *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983), and that Supreme Court precedent in *Balthazar v. Mari Ltd.*, 396 U.S. 114 (1969), controls disposition of the merits of Plaintiffs' claims. The County is wrong.

I. Plaintiffs' motion is timely under *Steinhoff*

The County argues that the Sixth Circuit in *Steinhoff*, 698 F.2d at 275, held that Rule 60(b) motions seeking relief from a trial court decision must be filed before the deadline for appeal from a trial court decision has run. *See* Response at 8-9. But the court did not make such a broad rule. In *Steinhoff*, after losing in the trial court, the Secretary of Health, Education and Welfare chose to forego a motion for rehearing or an appeal. 698 F.2d at 272. After the time to appeal passed, the agency filed a Rule 60(b) motion. The Sixth Circuit held that a losing party in a trial court cannot use Rule 60(b) as an alternative remedy when the party opts not to pursue relief from an adverse judgment via Rule 59(e) or an appeal. *Id.* at 275. "A motion under Rule 60(b) cannot be used to avoid the consequences of a party's decision to settle the litigation or to forego an appeal from an adverse ruling." *Id.* (internal quote omitted).

Steinhoff actually approved of Rule 60(b) motions filed after the time for appeal runs, provided they are not used to avoid the consequences of a party's prior decision to forego an appeal or settle a case: the *Steinhoff* court applauded the decisions in *Lairsey v. Advance Abrasives Co.* 542 F.2d 928 (5th Cir. 1976) and *Pierce v. Cook & Co., Inc.*, 518 F.2d 720 (10th Cir.1976), (en banc), which were both filed after the time for appeal had run. *Steinhoff*, 698 F.2d at 275-76. The court explained that the Rule 60(b) motions in both cases were still timely because they were not being used as a substitute for an appeal. *Id.*

Moreover, the Sixth Circuit in *Steinhoff* also highlighted the importance of weighing the equities whenever entertaining a Rule 60(b) motion. The court recognized that the equities in *Lairsey* and *Pierce* weighed in favor of reopening the cases and providing the movants with relief in light of the change in controlling law. *See id.* at 275-76. In contrast, "the equities" in *Steinhoff* weighed against reopening the case: the plaintiff had already spent five years in the "rigamarole" of appealing the agency's decision to deny her disability benefits and won a final decision in her favor. *Id.* at 273. The agency "made a conscious decision not to appeal." *Id.* at 275.

Here, the equities weigh in favor of reopening the case. First, Plaintiffs are not using the Rule 60(b) motion to escape from a decision to settle or forego an appeal. To the contrary, Plaintiffs pursued every possible recourse to get their federal constitutional claim heard in federal court, even seeking a writ of certiorari from the Supreme Court.[1] Plaintiffs are being denied relief—just compensation—because a federal court rejected jurisdiction based on the mistaken belief that state courts provide a remedy for the underlying takings claims. Plaintiffs should not be forced to file a *new* lawsuit in state court, when it is clear that state courts do not currently provide any remedy.

II. The County misconstrues Supreme Court precedent

Rather than address the numerous Supreme Court precedents that show the Fifth Amendment protects Plaintiffs' equity—regardless of what state law says—the County argues simplistically that Plaintiffs' claims are controlled by *Nelson v. City of New York*, 352 U.S. 103 (1956), and *Balthazar v. Mari Ltd.*, 396 U.S. 114 (1969). Plaintiffs already dispelled any illusion

[1] The County argues that denial of Plaintiffs' petition for writ of certiorari is evidence that the Supreme Court agrees with the constitutionality of the County's confiscation of Plaintiffs' property. But "[t]he denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver*, 260 U.S. 482, 490 (1923); *Teague v. Lane*, 489 U.S. 288, 296 (1989).

that *Nelson* answered the question presented in this case.[2] Similarly, *Balthazar* is not controlling, nor does it provide any insight into the merits of the takings claims in this case. In *Balthazar*, the plaintiffs sued a private party alleging a violation of the Due Process and Takings Clauses when their property was foreclosed and sold for less than market value—for only the unpaid taxes owed. *See Balthazar v. Mari LTD.*, 301 F. Supp. 103, 104-05 (N.D. Ill. 1969). The district court denied their claims, but only addressed the takings claim in a footnote, offering no substantive analysis of the claim. *Id.* at 105 n.6. The Supreme Court affirmed without opinion. *Balthazar*, 396 U.S. 114.

Such a summary affirmance "carrie[s] little more weight than denials of certiorari." *Hohn v. United States*, 524 U.S. 236, 260 (1998) (Scalia, J., dissenting); *Coleman v. D.C.*, 70 F. Supp. 3d 58, 79 (D.D.C. 2014); *see also Morse v. Republican Party of Virginia*, 517 U.S. 186, 203 (1996) ("a summary affirmance by this Court is a 'rather slender reed' on which to rest future decisions"). It is "not of the same precedential value as would be an opinion of th[e Supreme] Court treating the question on the merits" especially where the affirmed decision—like that in *Balthazar*—did not "contain any substantive discussion" of the legal issue at question. *See Edelman v. Jordan*, 415 U.S. 651, 671 (1974). Indeed, a summary affirmance must be read narrowly and limited to its facts. *Anderson v. Celebrezze*, 460 U.S. 780, 785, n.5 (1983) ("A summary disposition affirms only the judgment of the court below, and no more may be read . . . than was essential to sustain that judgment."); *Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (A summary affirmance only "prevent[s] lower courts from coming to opposite conclusions on the precise issues presented and

[2] As Plaintiffs explained in their memorandum on the law, the Supreme Court in *Nelson* did not hold that laws confiscating excess tax proceeds are constitutional; only that they pass muster if they allow reimbursement, 352 U.S. at 110, a condition that does not apply to Michigan's Act. *See* Plaintiffs' Memorandum of Law in Support of Rule 60(b) Motion to Reopen Case at 13-14. *Nelson* expressly reserved the question at issue in this case. *Nelson*, 352 U.S. 103, 110 ("But we do not have here a statute which absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale.").

necessarily decided by those actions," and "should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.").

Thus the Supreme Court's summary affirmance in *Balthazar* must be interpreted narrowly and limited to its facts. Indeed, a closer look at *Balthazar* demonstrates it involved different legal questions—like whether a private *buyer* of tax foreclosed property could be forced to pay just compensation, rather than a government-seller. The Court may have recognized that the property owner failed to sue the appropriate party for just compensation. *See Coleman*, 70 F. Supp. 3d at 79 ("The plaintiffs in Balthazar did not sue a defendant that could have paid just compensation . . . ."); *Balthazar*, 301 F. Supp. at 104 (the plaintiffs sued the buyer—not the governmental entity that sold plaintiffs' property rights). Or the Supreme Court's affirmance may have been a rejection of an attempt to get an injunction to stop the taking of his property, where just compensation would have been the appropriate remedy. *See Coleman*, 70 F. Supp. 3d at 79 (explaining *Balthazar* background); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 315 (1987) (Just Compensation Clause "is designed not to limit the governmental interference with property rights per se, but rather to secure compensation"). Moreover, the property in *Balthazar* was sold only for taxes owed—there were no surplus proceeds from that sale. Because *Balthazar* involved different facts and legal issues, it is not controlling or helpful in divining the Supreme Court's rationale for approving the district court's decision.

CONCLUSION

The County converted the Plaintiffs' equity into public property. By taking more than it was owed in taxes, penalties, and fees, the County violated unalienable rights protected by the Takings Clause. Plaintiffs respectfully request that this Court reopen their case and vindicate their constitutional rights.

DATED: April 20, 2018.

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