UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

ANITA YU, JOHN BOYER, and
MARY RAAB,

Plaintiffs,

vs.

CITY OF ANN ARBOR

Defendants.

Case No.: 2:14-cv-11129-AC-MKM
Hon. Avern Cohn
Magistrate Judge Mona K. Majzoub

REPLY MEMORANDUM OF LAW IN SUPPORT OF THE PLAINTIFFS' MOTION TO REMAND

DATED: April 24, 2014
Ann Arbor, Michigan

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CONCISE STATEMENT OF THE ISSUES PRESENTED

1. Did Plaintiffs' Complaint include a well-pleaded separate federal cause of action for "personal injury" suffered under a City requirement to provide uncompensated operation and maintenance services for equipment, when the equipment itself is part of a physical occupation of real estate and that is the subject of Plaintiffs' ripe inverse condemnation claims and its non-ripe takings claims under 42 USC §1983?

Plaintiffs Answer: No

This Court Should Answer: No

2. Did Plaintiffs' complaint include a well-pleaded cause of action for "personal injury," attributable to mandatory operation and maintenance of FDDs, that was created by federal law or with respect to which the Plaintiffs' right to relief necessarily depends on resolution of a substantial question of federal law?

Plaintiffs Answer: No.

This Court Should Answer: No

3. Are Plaintiffs' allegations concerning the City's operation and maintenance requirements for FDD equipment ancillary to the Plaintiffs' inverse condemnation claims in State Circuit Court?

Plaintiffs Answer: Yes

This Court Should Answer: Yes

4. Should all of Plaintiffs' claims (including their ripe inverse condemnation claims and non-ripe federal takings claims) be remanded to State Circuit Court, rather than dismissed in federal court in whole or in part?

Plaintiff's Answer: Yes.

This Court Should Answer: Yes

CONTROLLING OR MOST APPROPRIATE AUTHORITIES

Cases

Statutes

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TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In response to the Plaintiffs' simple and direct motion to remand, the Defendant, City of Arbor ("the City") fails to address in any meaningful way the Plaintiffs' main argument that, because this inverse condemnation case is not ripe for federal review, it should be remanded to Michigan State Court. The City fails to distinguish the governing authority, *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) and, in fact, completely sidesteps this case and its progeny by mischaracterizing the Plaintiffs' causes of action or, worse, importing into the Complaint causes of action the Plaintiffs have not asserted. Moreover, even though the merits of the Plaintiffs' claims are not to be adjudicated in the context of a motion to remand, the City's opposing papers dwell on its substantive defenses. Finally, the City has ignored the clear mandate of 28 U.S.C. § 1447(c) which requires that, under the circumstances present here, remand, rather than dismissal, is the appropriate result.

The City removed this case from the only court that has subject matter jurisdiction at this time. Arguing as if the case had been commenced by the *Plaintiffs* in federal court, the City goes on to ignore precedent from the United Stated Supreme Court, the Sixth Circuit Court of Appeals and the Eastern District of Michigan, all holding that there is no subject matter jurisdiction in takings cases under 42 USC 1983 where, as in this case, the federal claim does not meet the "State finality" requirement under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 1055.ct.3108, 87 L. Ed. 2d 126 (1985). The City asks this court to assert subject matter jurisdiction only long enough to dismiss the Plaintiffs'

case on the merits, rather than remand it to the court in which it was commenced, where the issues raised in this case are ripe for review.[1]

ARGUMENT

THE CITY HAS FAILED TO DISTINGUISH *WILLIAMSON* AND ITS PROGENY

In opposing the Plaintiffs' motion to remand, the City faces an insurmountable hurtle. It cannot overcome the logic of the syllogism this case presents:

> *Proposition:* Inverse condemnation cases are not ripe for federal court review so long as the state court provides an adequate procedure for seeking just compensation for a taking.
>
> *Proposition:* In this case, there is an adequate procedure in State Circuit Court for seeking just compensation for the taking alleged by the Plaintiffs.
>
> *Conclusion:* This case is not ripe for federal court review.

The City wisely does not challenge the authority of *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985) but, rather, attempts to distinguish it from the case at bar. The City makes such an attempt even though the gravamen of the Plaintiffs' complaint is that they have been deprived of just compensation to which they are entitled as a result of inverse condemnations by the City through its physical occupation of their property by permanent physical installations.[2] Indeed, the City concedes that the doctrine of ripeness as raised by the Plaintiffs in their motion to remand applies to "actual federal takings claims and to any federal claims that are intertwined with those takings

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[1] In particular, the City repeatedly relies on a three-year statute of limitations to argue for dismissal in federal court of Plaintiffs' inverse condemnation claims and their non-ripe federal takings claims. The City completely ignores the line of Michigan cases, starting with *Hart v Detroit*, 418 Mich. 438 (1982) (which the City cites), and including *Difronzo v Village of Sanilac*, 166 Mich.App. 148, 419 N.W.2d 756 (1988), holding that inverse condemnations **by physical occupation** are akin to adverse possession, by reason of which the 15-year limitation period for adverse possession applies under MCL 600.5801(4). See *Difronzo*, supra, at 759.

[2] Paragraph 48 of the Plaintiffs' complaint reads as follows: "[d]ue to the City's enactment, implementation and enforcement of the Ordinance, the Plaintiffs' properties have been unreasonably burdened, economically impaired, physically occupied and/or invaded or otherwise damaged, resulting in the *de facto* or **inverse condemnation** of the Plaintiffs' properties. (See Exhibit "1" attached to the Declaration of M. Michael Koroi submitted in support of the Plaintiffs' Motion to Remand) (Emphasis supplied).

claims such as a claim for due process pursuant to 28 U.S.C. §1447(c), *citing MacNamara v. City of Rittman*, 473 F. 3d 633, 639 (6th Cir. 2007) *See*, Defendant City of Ann Arbor's opposition to Plaintiffs' motion to remand (hereinafter "City's Opposition") at p.6.

Confronted by this controlling law and confined to the causes of action asserted by the Plaintiffs in their Complaint, the City argues that there is an additional federal claim buried in the Plaintiffs' complaint—a claim that the City argues would be ripe for federal question purposes and, as a result, one that can serve as an independent predicate for federal question jurisdiction. According to the City, the Plaintiffs' fourth cause of action, for a violation of 42 U.S.C. §1983, asserts a separate cause of action for "personal injury" because the Plaintiffs allege that the enactment and implementation of the FDDP ordinance included the imposition of a requirement for "mandatory work and physical labor." (City's Opposition at p. 5.) The City's argument in this regard lacks merit.

First, in *Majeske v. Bay City Bd. of Educ*., 177 F.Supp.2d 666 at 670 (E.D. Mich., 2001) the court recognized that "[a] claim falls within this Court's original jurisdiction under 28 U.S.C. § 1331 'only [in] those cases in which a well-pleaded Complaint establishes **either that federal law creates the cause of action or that the plaintiffs right to relief necessarily depends on resolution of a substantial question of federal law,**' citing *Thornton v. Southwest Detroit Hosp.*, 895 F.2d 1131, 1133 (6th Cir.1990) and noting *Thornton's* reliance on *Franchise Tax Bd. v. Constr. Laborers Vacation Trust*, 463 U.S. 1 at 27-28, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)). [Emphasis added.] *Majeske* also recognized that even where a claim "is stated based on alternate state-and federal-law theories, either of which would be sufficient to resolve the claim, there is no substantial federal question and no 'arising under' jurisdiction." 177 F.Supp.2d at 671.

The City in fact concedes that "Plaintiffs do not identify the federal statute(s) or the provision(s) of the U.S. Constitution they claim have been violated" in the allegations the City

cites (City Opposition at 5) and, therefore, that it has not met the first alternative test for a "well-pleaded complaint" under *Thornton* and *Majeske*, supra. The City's own notice of removal, in fact, made no mention of a separate claim (actually framed as a federal claim) in the Complaint for damages arising out of allegations of non-volunteer work under the FDDP. [Docket No. 1, p.1-4].

Defendant City's argument also fails to fulfill the second alternative test under *Thornton*, cited in *Majeske*, supra: whether the "right to relief necessarily depends on resolution of a substantial question of federal law." In fact, if Plaintiffs sought to advance a claim of "involuntary servitude" in this case, the claim could be framed under Article I, Section 9 of the Michigan State Constitution without invoking federal court jurisdiction at all.

Any fair reading of the Plaintiffs' complaint, however, leads to the different conclusion that the allegations regarding non-volunteer work and uncompensated expenses describe an ongoing burden on the Plaintiffs' property rights that is associated with the physical takings these Plaintiffs have alleged they have suffered under the FDD Ordinance. For example, paragraph 44 of the Plaintiffs' Complaint reads as follows:

> Moreover, the ongoing and perpetual responsibilities for the operation and maintenance of the sump pumps and related equipment **represent an unreasonable financial and personal burden upon the Plaintiffs' use and enjoyment of their property** and represent an inappropriate delegation by the City to citizens of its governmental obligations.

[Docket No. 1, Exhibit "A"].[3] [Emphasis added.] This is the actual context, within the complaint as pleaded, for Plaintiff's allegations regarding the ongoing maintenance and repair requirement of the FDD Ordinance: as a burden "upon the Plaintiffs' use and enjoyment of their property"

[3] With respect to Plaintiff, Anita Yu, the Complaint makes clear that she does not has been unable since before the FDD completed in her home to perform the operation and maintenance mandated by the FDDP and the FDD ordinance herself but, rather, because of her disabilities and, is required to hire a contractor to perform this work at her own cost ¶33 [Docket No. 1, Exhibit "A"]. This is clearly not plead in the Complaint in the nature of "involuntary servitude," but, rather, is simply another example of the costly burdens imposed by the ordinance FDD Ordinance.

after a physical occupation of their real estate mandated and authorized by a City ordinance. The allegations in the Plaintiffs' Complaint in this regard are clearly intended to set forth the nature and scope of the "cognizable burden" imposed upon the Plaintiffs **as property owners** by the City's actions. See *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419, 441 n. 19 (1982) [even though New York City ordinance provided remedy for physical damage to property resulting from installation of cable television bracket, "the inconvenience to the landlord of initiating the repairs remains a cognizable burden"]. As such, these allegations are inextricably intertwined with the Plaintiffs' takings claims and do not, as the City maintains, supply an independent basis for federal court jurisdiction.

In addition, the Plaintiffs' allegations regarding the ongoing operation and maintenance requirements of the FDD Ordinance (which have applied to them only since completion of the FDDs in their homes in 2002 and 2003) are clearly ancillary to their inverse condemnation claims, rather than separate, distinct and well-pleaded federal causes of action. "A federal court lacks jurisdiction over related constitutional claims when those claims are ancillary to the unripe takings claims." *A.M Rodriguez Assoc., Inc. v. City Council of the Village of Douglas*, 2009 U.S. Dist. LEXIS 110998 at *10 (W.D. Mich., November 30, 2009). The courts in the Sixth Circuit have rejected attempts by parties to circumvent the *Williamson* ripeness requirement by joining assorted federal constitutional and statutory claims to unripe takings claims. *See e.g., Braun v. Ann Arbor Charter Twp*., 519 F. 3d 564, 571-76 (6th Cir. 2008) [procedural due process, substantive due process, equal protection and §1983 claims deemed "ancillary" to takings claim]; *Bigelow v. Michigan Dept. of Natural Resources*, 970 F. 2d 154, 157-160 (6th Cir. 1992) [Plaintiff's equal protection and procedural due process claims ancillary to takings claim]; *Jarvis-Orr v. Twp. of Hartford*, 2012 U.S. Dist. LEXIS 183058 at **24-35 (W.D. Mich., November 30, 2012) [Fifth Amendment, Fourteenth Amendment (due process), Fourteenth Amendment (equal protection) claims ancillary to unripe inverse condemnation claim].

These cases make clear that a *plaintiff* cannot evade the ripeness requirement and leapfrog the state courts through artful pleading. In this case, the Plaintiffs complaint includes no "involuntary servitude" claim under the United States Constitution, as the City apparently would have the court believe. The City is, in effect, attempting to amend the Plaintiff's complaint and then attack its own amendment. "A court cannot rewrite plaintiff's pleading to create claims which were never presented." *Jarvis-Orr v. Twp. of Hartford, supra, citing Rogers v. Detroit Police Dept.*, 595 F. Supp. 2d 757, 766 (E.D. Mich. 2009). If the court cannot rewrite the Plaintiffs' complaint to assist the *Plaintiffs* in preserving federal court jurisdiction, then it cannot rewrite the Complaint to assist the *Defendant* either.

Finally, remand of the Plaintiffs non-ripe federal takings claims, rather than dismissal, is the appropriate remedy where the federal court lacks subject matter jurisdiction. According to 28 U.S.C. §1447(c), "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case **shall be remanded.**" (Emphasis added). Where a federal court lacks subject matter jurisdiction over a claim that has been removed from state court, remand, rather than dismissal, is warranted. See, e.g. *Armstrong v. Armstrong*, 508 F. 2d 348, 350 (1st Cir. 1974) ["[w]hile we agree with the district court's conclusion that the action may not be entertained in a federal forum, this should have dictated a remand to the state court rather than a dismissal"]. *Balzer v. Bay Winds Fed. Credit Union*, 622 F. Supp. 2d 628 (W.D. Mich. 2009) [where a district court lacked subject matter jurisdiction over removed action, the case was remanded to the Circuit Court for the State of Michigan, rather than dismissed].

CONCLUSION

For the reasons set forth above, the Plaintiffs respectfully request that an order of remand to the Circuit Court for Washtenaw County be granted, together with the costs and attorneys' fees associated with the City's improper removal.

DATED: April 24, 2014
Ann Arbor, Michigan

Respectfully submitted,

/s Irvin A. Mermelstein_____
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CERTIFICATE OF SERVICE

Case No.: 2:14-cv-11129-AC-MKM
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I, Irvin A. Mermelstein, hereby certify that I have on this 24th day of April, 2014, electronically filed Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Remand Pursuant to 28 U.S.C. §1447(c) and the instant Certificate of Service by utilizing the CM/ECF system established by the court, which sent notification of the filing to:

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