UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 18-3113, *Nexus Gas Transmission, LLC v. City of Green, Ohio, et al*
Originating Case No. : 5:17-cv-02062

Dear Counsel,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Antoinette S. Macon
Case Manager
Direct Dial No. 513-564-7015

cc: Ms. Sandy Opacich

Enclosure

No. 18-3113

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NEXUS GAS TRANSMISSION, LLC, Plaintiff-Appellee, v. CITY OF GREEN, OHIO, et al., Defendants, JUDY JANE HAMRICK; JOHN SELZER; ELAINE SELZER, Defendants-Appellants.	)	O R D E R

Before: SILER, COOK, and WHITE, Circuit Judges.

John and Elaine Selzer and Judy Hamrick, defendants in this condemnation action, appeal the December 28, 2017 order granting partial summary judgment and a limited preliminary injunction to Nexus Gas Transmission, LLC ("Nexus") and the January 8, 2018 order denying their motion to dismiss and dismissing their counterclaims. Nexus moves to dismiss the appeal from the preliminary injunction as moot and to dismiss the remaining portions of the appeal for lack of jurisdiction. The appellants oppose the motion to dismiss, and Nexus replies in support. Nexus also moves for an expedited ruling on its motion to dismiss.

The Federal Energy Regulatory Commission issued certificates of public convenience and necessity to Nexus, permitting construction and operation of an interstate pipeline running through Ohio and Michigan. A holder of an interstate pipeline certificate is authorized by the Natural Gas Act to exercise the right of eminent domain to acquire the necessary rights of way if

it is unable to do so by agreement. 15 U.S.C. § 717f(h). On December 28, the district court found that Nexus had a statutory right of condemnation and granted a preliminary injunction authorizing its access to certain property to conduct various surveys. The appellants did not seek a stay pending appeal, and Nexus has now completed all of the surveys authorized by the preliminary injunction.

Orders granting injunctive relief are immediately appealable pursuant to 28 U.S.C. § 1292(a)(1). But "[t]he mootness inquiry must be made at every stage of the litigation." *Lawrence v. Blackwell*, 430 F.3d 368, 370–71 (6th Cir. 2005). "Mootness results when events occur during the pendency of a litigation which render the court unable to grant the requested relief." *Carras v. Williams*, 807 F.2d 1286, 1289 (6th Cir. 1986). The court can no longer prevent Nexus from conducting the authorized surveys because they have been completed. The appeal from the preliminary injunction is moot. *See Serv. Emps. Int'l Union Local 1 v. Husted*, 531 F. App'x 755, 755 (6th Cir. 2013).

The appellants argue that dismissal of the appeal as moot is not warranted because the controversy is capable of repetition but evading review. *See Kerr for Kerr v. Comm'r of Soc. Sec.*, 874 F.3d 926, 932 (6th Cir. 2017). They have the burden of demonstrating that this exception to mootness applies and must satisfy both prongs of the exception. *Lawrence*, 430 F.3d at 371. They have not demonstrated that the controversy evades review because they did not seek a stay of the preliminary injunction pending appeal. *United States v. Taylor*, 8 F.3d 1074, 1076-77 (6th Cir. 1993) (finding that an appeal from an order granting limited access to property did not evade review where the defendant could have moved the court for a stay or refused to comply and risk contempt to preserve a right to appeal); *see also Armstrong v. FAA*, 515 F.3d 1294, 1297 (D.C. Cir. 2008) ("We join every other circuit to have considered the matter

and conclude that a litigant who could have but did not file for a stay to prevent a counter-party from taking any action that would moot his case may not, barring exceptional circumstances, later claim his case evaded review." (citing *Taylor*, 8 F.3d at 1077)); *United States v. Cleveland Elec. Illuminating Co.*, 689 F.2d 66, 68 (6th Cir. 1982).

We have jurisdiction over appeals from final judgments under 28 U.S.C. § 1291. The December 28 partial summary judgment in favor of Nexus is not a final, appealable order. A summary judgment ruling as to liability that does not resolve damages is not immediately appealable. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 744 (1976); *see Kovacic v. Cuyahoga Cty. Dep't. of Children and Family Servs.*, 724 F.3d 687, 693 (6th Cir. 2013). In a condemnation action, "appellate review may be had only upon an order or judgment disposing of the whole case, and adjudicating all rights, including ownership and just compensation, as well as the right to take the property." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Likewise, the January 8 order denying a motion to dismiss and dismissing the appellants' counterclaims is not a final, appealable order. *Id.* (stating that a final judgment "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment").

The December 28 order states that "the Court certifies pursuant to Fed.R. Civ.P. 54(b) that there is no just reason for delay. It is the Court's hope that this certification will allow all of the issues raised surrounding this pipeline to be decided together by the Sixth Circuit." The appellants argue that this Rule 54(b) certification permits an appeal of both the December 28 and the January 8 orders. They are incorrect.

The granting of partial summary judgment to Nexus does not resolve any single claim in this action, and thus is not properly certified under Rule 54(b). Rule 54(b) cannot be used to certify for an immediate appeal the ruling on liability of a single claim where the assessment of

damages or awards of other relief have not been resolved. *Wetzel*, 424 U.S. at 743–44. In addition, the mere recitation that there is "no just reason for delay" without any analysis or application to the facts of the case generally is not considered a proper Rule 54(b) certification. "Certainly a proper exercise of discretion under Rule 54(b) requires the district court to do more than just recite the 54(b) formula of 'no just reason for delay.'" *Solomon v. Aetna Life Ins. Co.*, 782 F.2d 58, 61 (6th Cir. 1986); *see also EJS Props., LLC v. City of Toledo*, 689 F.3d 535, 537–38 (6th Cir. 2012). Where a ruling is not properly certified under Rule 54(b), the court lacks jurisdiction.

Accordingly, the motion to dismiss is **GRANTED**; the motion to expedite is **DENIED** as moot.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk