

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex rel. :
ASSOCIATED BUILDERS & :
CONTRACTORS OF CENTRAL OHIO, :
ET AL., :

Relators,

vs.

NANCY H. ROGERS, OHIO :
ATTORNEY GENERAL, ET AL., :

Respondents. :

Case No. 2008-1923

Original Action Seeking
Writs of Prohibition; Alternative Writs
Of Mandamus; Alternative "Other Writs"

MOTION TO DISMISS OF RESPONDENT
NANCY H. ROGERS, OHIO ATTORNEY GENERAL

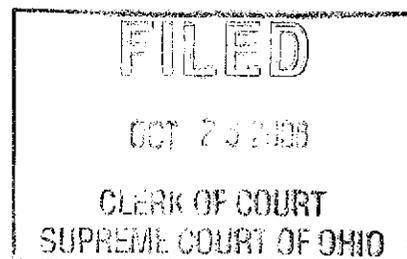
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IN THE SUPREME COURT OF OHIO

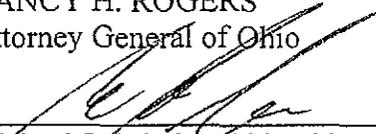
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MOTION TO DISMISS OF RESPONDENT
NANCY H. ROGERS, OHIO ATTORNEY GENERAL

Pursuant to Ohio S. Ct. Prac. Rule X(5) and Rules 12(B)(1) and 12(B)(6) of the Ohio Rules of Civil Procedure, Respondent, Ohio Attorney General Nancy H. Rogers, respectfully moves this Honorable Court for an order dismissing Relators' Complaint for a writ of prohibition, writ of mandamus or other alternative writs. A memorandum in support of this motion is attached.

Respectfully Submitted,

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STATUTES

R.C. 109.029

R.C. 4115.012

RULES

Civil Rule 12(B)(6)3

OTHER AUTHORITIES

Ohio Const. art. IV, § 26

INTRODUCTION

This case involves a last ditch effort by the Relators, Associated Builders and Contractors of Central Ohio and The Painting Company to reverse the Franklin County Board of Commissioners' decision not to grant The Painting Company ("TPC") a contract to paint Huntington Park. In doing so, however, Relators misstate the duties of the Attorney General and misrepresent her role as counsel for the Department of Commerce.

Relators have named the Attorney General as a Respondent under the improper representation that the Attorney General serves in a quasi-judicial capacity. Relators have also attempted to attribute duties to the Attorney General beyond those conferred by the Ohio Constitution or the Ohio Revised Code. In doing so, Relators have alleged that the Attorney General has a duty to assure that her clients abide by settlement agreements, and to counsel her clients in a specific manner. Relators have improperly attempted to accomplish their goal by asking for a writ of prohibition, a writ of mandamus, or any other extraordinary writ.

Relators' request must be denied for multiple reasons. First, because they cannot establish that the Attorney General is acting in a judicial or quasi-judicial manner as required to issue a writ of prohibition, Relators fail to state a claim upon which that relief can be granted. Second, this court lacks jurisdiction to issue a writ of mandamus because, although their claims are couched as a request for a writ of mandamus, Relators truly seek injunctive relief. Finally, in the event this Court determines that it has jurisdiction to issue a writ of mandamus, Relators' claims must fail on the merits because they fail to establish that the Attorney General has a clear legal duty that this Court should compel, nor that they have a clear legal right to the relief requested.

STATEMENT OF THE CASE AND FACTS

The dispute at issue here started with a lawsuit filed by the Department of Commerce brought against The Painting Company to recover restitution for fifteen (15) allegations that TPC violated Ohio's prevailing wage laws, codified under R.C. 4115.01 *et seq.* During the course of this prior litigation, the Attorney General merely served as the attorney on behalf of the Department of Commerce. Complaint, ¶ 25. Before a hearing was ever held, however, the lawsuit was settled and the case was dismissed with prejudice. *Id.* at ¶ 26; see also, Complaint, Exhibit 5 of Exhibit B. The settlement agreement contained a standard non-admission of guilt clause. Complaint, Exhibit B. Even a cursory examination of the four corners of the document shows that the Attorney General was not a party to the settlement, nor did she or any of her duly authorized agents sign the settlement agreement. *Id.* Misapprehending the Attorney General's role in the litigation, Relators confusingly state that the Attorney General settled the lawsuit, yet in other instances recognize that the Attorney General was merely litigating on behalf of her client, the Department of Commerce. Complaint, ¶¶ 25-32.

After the underlying suit was settled, in 2007, the Franklin County Board of Elections ("Board") opened bids to paint Huntington Park in the Arena District. Complaint, ¶ 42. A quality contracting standard in the Board's request for proposals barred any company from acquiring a public contract if it were found to have violated the prevailing wage laws more than three times in the previous two-year period. Complaint, ¶ 39; see also Complaint, Exhibit B, ¶ 8. Based on requested information from the Department of Commerce, the Board of rejected TPC's bid, even though it was the lowest. Complaint, ¶¶ 43, 48-53. TPC filed an objection to the Board's rejection, but the rejection was affirmed at the Board's general session on March 4, 2008. Complaint, ¶¶ 55-57.

On March 5, 2008, Relators filed suit against the Board in the Franklin County Court of Common Pleas, requesting declaratory judgment, injunctive relief, and a petition for a writ of mandamus. Complaint, ¶¶ 58-61. Relators lost at the trial court and court of appeals, and appealed to this Court on July 28, 2008. Case No. 2008-1478. That case is still pending a jurisdictional decision by the Court. Complaint, ¶ 62. Recognizing that that case will most likely be unsuccessful, Relators filed this original action in the Supreme Court naming the Attorney General and the Department of Commerce.

STANDARD OF REVIEW

A motion to dismiss under Civil Rule 12(B)(6) must be granted when it appears that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief. *Vail v. Plain Dealer Publishing Co.* (1995), 72 Ohio St. 3d 279, 280 (citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, syllabus). However, “unsupported conclusions of a complaint are not considered admitted and are not sufficient to withstand a motion to dismiss.” *State ex rel. Seikbert v. Wilkinson* (1994), 69 Ohio St.3d 489, 490. In the context of a motion to dismiss, while a trial court must accept factual allegations as true, it is not required to accept legal conclusions as true. See *Community Housing Network, Inc. v. Stoyer*, 10th Dist. App. No. 06AP-73, 2006-Ohio-5094, ¶ 6; *Sweet v. City of N. Ridgeville*, 9th Dist. App. No. 04CA008542, 2005-Ohio-871, ¶ 11.

As explained in more detail below, Relators can prove no set of facts that would entitle them to relief against the Attorney General.

ARGUMENT

This Court should dismiss Relators' Complaint against the Attorney General because it fails to state a claim upon which relief can be granted and fails to invoke the jurisdiction of this Court. Relators first request relief in the form of a writ of prohibition, yet base their claim on the faulty – and legally unsupported – premise that the Attorney General serves in a judicial or quasi-judicial capacity when representing a client. Relators are equally wrong in their alternative request relief by couching their action in the form of a writ of mandamus, because courts lack jurisdiction in mandamus where a declaratory judgment and injunction will afford relief. Nevertheless, even if the Court retains jurisdiction here, the action must be dismissed because the Attorney General has no clear legal duty to enforce settlement agreements or to police counties or localities, nor do Relators have a clear legal right to have the Attorney General do so.

I. Relators' Request for a Writ of Prohibition Must Fail Because the Attorney General Did Not Act in a Judicial or Quasi-Judicial Manner.

The standard for a writ of prohibition is well-established. This Court has stated on numerous occasions that a writ of prohibition is an extraordinary remedy that allows a superior court to prevent an inferior tribunal from exercising extra-legal power:

In order to obtain a writ of prohibition, [relator] must establish that (1) the [respondent] is about to exercise judicial or quasi-judicial power, (2) the exercise of that power is unauthorized by law, and (3) denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of the law.

State ex rel. Polo v. Cuyahoga County Bd. of Elections (1995), 74 Ohio St. 3d 143, 144-145 (citing *Goldstein v. Christiansen* (1994), 70 Ohio St. 3d 232, 234-235); See also *Rosen v. Celebrezze*, 117 Ohio St. 3d 241, 2008-Ohio-853. In other words, a writ of prohibition is appropriate only when a superior court must stop an inferior court or some quasi-judicial authority from an exercise of judicial power it lacks, and then only if the relator can show that he will suffer injury for which no other adequate remedy exists.

“Quasi-judicial authority is defined as ‘the power to hear and to determine controversies between the public and individuals which require a hearing resembling a judicial trial . . .’” *State ex rel. Youngstown v. Mahoning County Bd. of Elections* (1995), 72 Ohio St. 3d 69, 71 (quoting *State ex rel. Hensley v. Nowak* (1990), 52 Ohio St.3d 98, 99 (internal citations omitted)). The Attorney General does not generally hear and determine controversies in hearings, and certainly does not do so when acting in her capacity as counsel to a client. Indeed, the Tenth District Court of Appeals has held that “the attorney general . . . is not a judicial officer and does not have judicial or quasi-judicial authority.” *State ex rel. Wilson v. Ohio*, 2002-Ohio-7448, ¶ 18. In that case the Crime Victims Reparations Fund, through the legal representation of the Attorney General, brought suit seeking reimbursement from the relator. *Id.* at ¶ 3. After losing on the merits, the relator then filed for a writ of prohibition to prevent the Attorney General from taking the money out of his account. *Id.* at ¶ 13. In holding that a writ of prohibition could not issue against the Attorney General, the court reasoned that “the complaint indicates that the attorney general served as the **representative of the Fund** when the Fund filed a civil action against relator.” *Id.* at ¶ 18 (emphasis added). In light of this fact, and that “the allegations do not indicate that the attorney general is about to exercise judicial or quasi-judicial authority,” *Id.*, the court dismissed the action because the relator could not prove the three requisite elements as a matter of law.

The same is true here. First, the Attorney General is not a court, nor does she have judicial or quasi-judicial authority. As found in the *Wilson* case, the very nature of the Attorney General’s role as counsel establishes that she was not acting in a quasi-judicial capacity determining controversies between the public and individuals. Rather, the Attorney General was acting in her capacity as an attorney for her client, an administrative agency. Common sense

dictates that an attorney counseling and/or litigating on behalf of a client cannot – by the very nature of that role – be acting in a quasi-judicial capacity, much less as a court about to exercise judicial power.

Second, Relators' claim that the Attorney General is "exercising quasi-judicial power" is a legal conclusion, and need not be accepted as true. Nevertheless, Relators claim that the Attorney General is exercising "quasi-judicial" power by not enforcing the settlement agreement, interpreting settlement agreements to be violations of the prevailing wage laws, and allowing the Director of Commerce to report unadjudicated prevailing wage determinations as adjudicated. None of these acts, however, are "quasi-judicial" in nature because they do not decide disputes between parties. Relators have not stated a claim against the Attorney General for relief in prohibition and the claim must be dismissed.

II. This Court Should Dismiss Relators' Request for a Writ of Mandamus

A. Relators' request for a Writ of Mandamus must fail because this Court lacks subject matter jurisdiction to hear such a claim

This Court does not have jurisdiction over Relators' claim because it is, in reality, a claim for declaratory and injunctive relief, not for relief in mandamus. The Ohio Constitution confers original jurisdiction on the Supreme Court over mandamus proceedings but not over original actions seeking injunctive relief. *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41, 44; Ohio Const. art. IV, § 2. The difference between the two remedies is simply stated: a writ of mandamus compels the performance of a preexisting legal duty, whereas an injunction restrains action. *State ex rel. Smith v. Industrial Comm'n.* (1942), 139 Ohio St. 303, 306. This Court has consistently held "if the allegations of a complaint for a writ of mandamus indicate that the real objects sought are a declaratory judgment and a prohibitory injunction, the complaint does not state a cause of action in mandamus and must be dismissed for want of jurisdiction." *State ex*

rel. Evans v. Blackwell, 111 Ohio St. 3d 1, 2006-Ohio-4334, ¶ 19; *State ex rel. Grendell v. Davidson* (1999), 86 Ohio St. 3d 629, 634.

This Court has, on more than one occasion, looked past the form of a purported mandamus petition to the substance of the case, and dismissed a miscaptioned “mandamus” petition. For example, in *State ex rel. Smith v. Industrial Comm’n.* (1942), 139 Ohio St. 303, the petitioner sought a writ of mandamus to bar the Ohio Industrial Commission from disbursing funds. The Court denied the writ because an order compelling one to desist from some action is an injunction, which is beyond the original jurisdiction of the Ohio Supreme Court. As the Court observed, “[t]he nature of the writ sought is not to be determined by the label attached thereto by the relator.” *Id.* at 308. Likewise, the fact that the petitioner in *State ex rel. Stine v. McCaw* (1939), 136 Ohio St. 41, sought a writ of mandamus did not alter the essential nature of the requested relief, which was an injunction to prevent payment of salary to the woman hired to replace the petitioner. *See also State ex rel. Grendell v. Davidson* (1999), 86 Ohio St. 3d 629, 634 (Supreme Court dismissed a petition seeking to declare statutes unconstitutional for lack of original jurisdiction, notwithstanding that the request was joined as part of a plea for a mandamus writ).

In this case, Relators have improperly disguised a prayer for injunctive relief as a petition for a writ of mandamus. Aside from the Attorney General having no involvement, simply stated, Relators seek an order to stop the Department of Commerce from maintaining a list of companies that have settled allegations of violating the Ohio’s prevailing wage laws. Complaint, Prayer for Relief. To the extent that this claim alleges anything at all against the Attorney General, the injunctive nature of the relief sought in this case is evident. Even on the face of the Complaint itself, the Relators request that the Attorney General “**cease and desist** from reporting

unadjudicated determinations of prevailing wage violations as actual adjudicated findings of violations of the law where no hearing has been held and/or the determinations were settled with a non-admission clause in the settlement agreement.” (Complaint, Prayer for Relief; *See also* Complaint, ¶ 98) (emphasis added). Relators also request that the Attorney General “**cease** maintaining and disseminating a list(s) of unadjudicated determinations of prevailing wage violations for contractors.” (Complaint, ¶ 100; Prayer for Relief) (emphasis added). From this language, it is apparent that Relators do not seek relief appropriate for a writ of mandamus; rather, they seek to restrain the Attorney General and the Director of Commerce.

In short, Relators may couch their requested relief as mandamus, but the nature of the relief requested is injunctive in nature and the Court lacks original jurisdiction to hear cases requesting injunctive relief. Consequently, Relators’ request for a writ of mandamus should be dismissed for lack of subject matter jurisdiction.

B. Even if the Court has jurisdiction Relators’ request for a Writ of Mandamus must be denied because it does not satisfy the elements of mandamus.

1. Respondent Attorney General Has No Clear Legal Duty to Perform the Requested Acts.

Even assuming, *arguendo*, that Relators’ complaint satisfies the Court’s jurisdictional requirements (and it does not), Relators cannot satisfy the requirements for relief in mandamus. “Mandamus is a writ issued, in the name of the state, to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” *State ex rel. Smith v. Indus. Comm’n* (1942), 139 Ohio St. 303, 306. To obtain a writ of mandamus in this case, Relators must show that (1) they have a clear legal right to the requested relief from the Attorney General, (2) the Attorney General is under a clear legal duty to perform the requested act, and (3) Relators do not have an adequate

remedy at law. *State ex rel. Nat'l City Bank v. Bd. of Ed.* (1977), 52 Ohio St. 2d. 81, 83. If Relators fail to establish just one of these three requirements, a writ of mandamus will not lie.

In this case, Relators have claimed that the Attorney General has a clear legal duty to enforce a settlement agreement, to assure that hearings are conducted, or generally stand as a governmental entity to protect the constitutional guarantees of the Fourteenth Amendment. Complaint, ¶¶ 91-93. However, neither the Ohio Constitution nor the Ohio Revised Code confer such duties upon the Attorney General. In fact, the Revised Code defines the duties of the Attorney General as the state's chief law officer, who represents the state in court:

The attorney general shall appear for the state in the trial and argument of all civil and criminal causes in the supreme court in which the state is directly or indirectly interested. When required by the governor or the general assembly, the attorney general shall appear for the state in any court or tribunal in a cause in which the state is a party, or in which the state is directly interested. Upon the written request of the governor, the attorney general shall prosecute any person indicted for a crime.

R.C. 109.02. In other words, the Attorney General's role is as an attorney representing her state-agency client(s), such as the Director of Commerce. No court has ever held that an attorney has a duty to enforce settlements upon her client or to force the client to comply with a settlement or court order. Nor has a court ever held that the Attorney General has a duty to force a state-agency client to perform or not to perform an act, or to not allow a state-agency client to perform an administrative function, as the Relators have alleged in this case. Relators fail to state a claim in mandamus because the Attorney General has no clear legal duty to do that which Relators ask.

2. Relators Have No Clear Legal Right to Their Requested Relief.

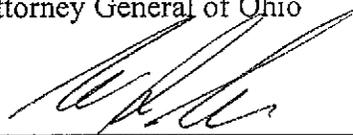
As a direct corollary, because the Attorney General has no clear legal duty, the Realtors have no clear legal right to have the Attorney General act in such a fashion. Because Relators cannot satisfy the requirements of mandamus, this case should be dismissed.

CONCLUSION

For the reasons explained above, the Attorney General respectfully requests that all claims against the Attorney General be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Motion to Dismiss of Respondent Nancy H. Rogers, Ohio Attorney General** was served on this 23rd day of October, 2008, by *electronic mail, facsimile transmission* and ordinary, postage prepaid U.S. mail to:

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