

ORIGINAL

IN THE SUPREME COURT OF OHIO

INTERNATIONAL ASSOCIATION OF HEAT
AND FROST INSULATORS AND
ASBESTOS WORKERS, LOCAL
UNION NO. 45

Relator

v.

LUCAS COUNTY COURT OF APPEALS

Respondent

Case No. 2009-2031

[ORIGINAL ACTION IN PROHIBITION
MANDAMUS]

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RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS

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I. STATEMENT OF THE CASE

On November 6, 2009, Relator International Association of Heat and Frost Insulators and Asbestos Workers, Local 45 filed a Verified Complaint for Writs of Prohibition and Mandamus. The Complaint named as Respondent the Lucas County Court of Appeals, Sixth Appellate District.

The Complaint seeks a writ of prohibition based of the Respondent's denial of Relator's motion to dismiss an appeal filed in the underlying case. *Complaint*, ¶¶ 7, 8, 10-12, Exhibit 3. The Complaint also seeks a writ of mandamus ordering the Respondent to cease acting on the appeal in the underlying case. *Id.*, ¶¶ 12-15. The Relator filed its Answer on December 3, 2009.

The Respondent now also files this motion for judgment on the pleadings. This motion will establish that the Relator can prove no set of facts that would entitle it to relief and the Respondent Court of Appeals is entitled to judgment as a matter of law. Specifically, the motion will establish that the Relator failed to correctly caption the complaint, the *Civ.R.* 54(B) determination does not apply to an order that proceedings be stayed issued pursuant to *R.C.* 2711.02, and the appeal in the underlying case was timely filed, since the plaintiff in the underlying case was not served with notice of the judgment that is the subject of the underlying appeal.

Thus, the Relator's Complaint fails to state a cause of action for a writ of prohibition and writ of mandamus. Thus, the Relator's complaint must be dismissed.

II. STATEMENT OF THE FACTS

On July 18, 2008, Quality Insulation Co., Inc. filed a complaint in the Lucas County Common Pleas Court against Relator seeking a declaratory judgment or, alternatively, an order vacating an arbitration award. *Complaint*, ¶ 1; Exhibit 2. On April 29, 2009, the Relator filed a motion to stay proceedings pending arbitration. *Id.*, ¶ 2; Exhibit 2.

On June 8, 2009, the trial court granted Relator's motion to stay. *Id.*, ¶ 3; Exhibit 1. The Order did not dispose of all claims by all parties nor did it contain a determination pursuant to *Civ. R. 54(B)* that there was no just reason to delay appeal. *Id.*

The Order was journalized on June 10, 2009. *Id.*, ¶ 5; Exhibit 2. Notice of the Order was not served on the plaintiff as required by *Civ.R. 58(B)*. *Id.*, Exhibit 2. On July 17, 2009, Quality Insulation filed a notice of appeal from the trial court's June 8, 2009 Order. *Id.*, ¶ 6. This was 37 days after the June 8th Order was journalized. *Id.*

Relator filed a motion to dismiss the appeal. *Id.*, ¶ 7.

This motion was based on the following alternate grounds: (1) the appeal was not timely filed; and (2) the Order lacked a Civ.R. 54(B) determination that there was no just reason to delay the appeal. *Id.*, ¶ 7. The Relator argued that either one of these grounds deprived the Respondent Court of jurisdiction to hear the appeal of the trial court's June 8th Order. *Id.*

On September 22, 2009, the Respondent Court entered its Decision and Judgment Entry denying Relator's motion to dismiss the appeal. *Id.*, ¶ 8; Exhibit 3. The Respondent continues to exercise jurisdiction over the appeal. *Id.*; Exhibit 4.

On November 6, 2009, Relator filed a Verified Complaint for Writs of Prohibition and Mandamus. The Complaint named as Respondent the Lucas County Court of Appeals, Sixth Appellate District.

The Complaint seeks a writ of prohibition based on the Respondent's denial of Relator's motion to dismiss an appeal filed in the underlying case. *Complaint*, ¶¶ 7, 8, 10-12, Exhibit 3. The Relator also seeks a writ of mandamus ordering the Respondent to cease acting on the appeal in the underlying case. *Id.*, ¶¶ 12-15. The Relator filed its Answer on December 3, 2009.

The Respondent now also files this motion for judgment on the pleadings. This motion will establish that the Relator can prove no set of facts that would entitle it to relief and the

Respondent Court of Appeals is entitled to judgment as a matter of law. Specifically, the motion will establish that the Relator failed to correctly caption the complaint, the Civ.R. 54(B) determination does not apply to an order staying proceedings issued pursuant to R.C. 2711.02, and the appeal in the underlying case was timely filed, since the plaintiff in the underlying case was not served with notice of the judgment that is the subject of the underlying appeal.

Thus, the Relator's Complaint fails to state a cause of action for a writ of prohibition and writ of mandamus. Therefore, the Relator's complaint must be dismissed.

III. LAW AND ARGUMENT

A. Introduction

1. Standard for Granting a Motion for Judgment on the Pleadings

The Respondent requests that the Court dismiss all claims asserted in the complaint, pursuant to Rule 12(C) of the Ohio Rules of Civil Procedure and *S.Ct.Prac.R.* X(5), since the Relator has failed to state a claim upon which relief can be granted. A motion to dismiss filed after the pleadings have closed and based on grounds found in Rule 12(B) is considered a motion for judgment on the pleadings pursuant to Rule 12(C) of the Ohio

Rules of Civil Procedure. *Lin et al. v. Gatehouse Construction Company, et al.* (1992), 84 Ohio App.3d 96, 616 N.E.2d 519; *Lawreszuk v. Nationwide Insurance Co.*(1977), 59 Ohio App.2d 111, 392 N.E.2d 1094.

A Rule 12(C) motion presents only questions of law. *Peterson v. Teodosio* (1976), 34 Ohio St.2d 161, 297 N.E.2d 113. Therefore, the Court may only consider the statements contained in the pleadings and may not consider any evidentiary materials. *Burnside v. Leimbach* (1991), 71 Ohio App.3d 399, 594 N.E.2d 60. A motion for judgment on the pleadings is to be granted when, after viewing the allegations of the complaint and reasonable inferences therefrom in the light most favorable to the relator, the relator can prove no set of facts that would entitle it to relief and the respondent is entitled to judgment as a matter of law. *Bruce v. Riddle*(C.A. 4, 1980), 631 F.2d 272; *Ashland Oil, Inc. v. Arnett*(N.D.Ind. 1987), 656 F. Supp. 950; *Peterson, supra*; *Brown et al. v. Wood County Board of Education*(1992), 79 Ohio App.2d 474, 607 N.E.2d 848.

2. Standard for Granting a Writ of Prohibition

A writ of prohibition is the most difficult of any of the extraordinary remedies to obtain. *State ex rel. Utility Workers Union of America v. MacElwane, Judge*(1961), 116 Ohio App. 183, 191, 187 N.E.2d 901, 906. A writ of prohibition is issued only in

cases of extreme necessity. *Id.* The writ should be used with great caution and should not issue in doubtful or borderline cases. *ANS Connect v. Hon. William J. Coyne, et al.*, Cuyahoga App. No. 88602, 2006 Ohio 6599, at ¶ 6; *State ex rel. Utility Workers Union of America*, *supra*. The question presented in every instance where the issuance of a writ of prohibition is requested is whether it clearly appears that the court whose action is sought to be prohibited has no jurisdiction of the cause which it is attempting to adjudicate, or is about to exceed its jurisdiction. *State ex rel. The Ohio Company, et al. v. Maschari*, *Judge*(1990), 51 Ohio St.3d 18, 20-1; 553 N.E.2d 1356, 1359.

The principles governing prohibition are well established. *ANS Connect*, *supra*. In order to be entitled to the requested writ of prohibition, relator must establish that (1) respondent was about to exercise judicial power, (2) the exercise of that power was not authorized by law, and (3) denial of the writ would have caused injury for which no other adequate remedy in the ordinary course of law existed. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, 2005 Ohio 3804, 831 N.E.2d 1003, at ¶14.

Where a court has general *subject-matter jurisdiction* over a cause of action, a writ of prohibition will not be awarded to prevent an anticipated erroneous judgment, since an adequate remedy is available through an appeal. *State ex rel. Carody, et*

al. v. Justice, Judge (1926), 114 Ohio St. 94, 150 N.E. 430.

In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction, such as a common pleas court, can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal. *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002 Ohio 4907, 775 N.E.2d 522, at ¶ 18; *State ex rel. United States Steel Corp. v. Zaleski*, 98 Ohio St.3d 395, 2003 Ohio 1630, 786 N.E.2d 39, at ¶ 8.

Therefore, if the lack of jurisdiction is not patent and unambiguous, there is generally no entitlement to a writ of prohibition to prevent a trial court's exercise of jurisdiction. *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005 Ohio 4105, 832 N.E.2d 1202, at ¶¶ 9-10.

3. Standard for Granting a Writ of Mandamus

The basic purpose of a writ of mandamus is to compel public officers to perform the duties imposed on them by law. *State ex rel Scott v. Materson*(1962), 173 Ohio St. 402, 404, 183 N.E.2d 376, 379; *State ex rel Sneary, et al. v. Miller et al.*, 86 Ohio App.3d 684, 687, 621 N.E.2d 785, *motion to certify overruled* (1993), 66 Ohio St.3d 1473, 611 N.E.2d 835. Thus, in order to grant a writ of mandamus, a court must find that the Relator has a clear legal right to the relief requested and that the

Respondent was under a clear legal duty to perform the acts prayed for in the Petition. *State ex rel. Westchester Estates, Inc. v. Bacon*(1980), 61 Ohio St.2d, 399 N.E.2d 81; *State ex rel. Harris v. Rhodes*(1978), 54 Ohio St.2d 41, 374 N.E.2d 641; *State ex rel. Van Curen v. Ohio Adult Parole Authority*(1976), 45 Ohio St.2d 298, 345 N.E.2d 75; *State ex rel. Pressley v. Industrial Commission of Ohio*(1967), 11 Ohio St.2d 141, 228 N.E.2d 631; *Gregory T. Howard v. Judge, Ruth Ann Franks*(Aug. 21, 2000), Lucas App. No. L-00-1163, unreported, 2000 Ohio App. LEXIS 3828; R.C. 2731.01.

Lastly, a writ of mandamus cannot be used to supplant or supersede any other form of remedy and therefore, the law is well-settled in Ohio that mandamus will not lie where there is an adequate legal or equitable remedy. *State ex rel. Woodbury et al. v. Spitler*(1973), 34 Ohio St.2d 134, 296 N.E.2d 526; R.C. 2731.05.

B. The Complaint Must be Dismissed since it is Captioned Incorrectly

R.C. 2731.04 expressly provides that a petition for a writ of mandamus must be brought in the name of the state on the relation of the person applying and this requirement is mandatory. *Rust v. Lucas County Board of Elections*, 108 Ohio St.3d 139, 2005 Ohio 5795, 841 N.E.2d 766, at ¶ 16. The failure

to properly caption a complaint requires that it be dismissed. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004 Ohio 5596, 817 N.E.2d 382, at ¶ 36; *Litigaide, Inc. v. Lakewood Police Department Custodian of Records*, 75 Ohio St.3d 508, 1996 Ohio 205, 664 N.E.2d 521; *Maloney v. Court of Common Pleas of Allen County*(1962), 173 Ohio St. 226, 27; 181 N.E.2d 270.

The same caption requirements apply to a complaint for a writ of prohibition. *Maloney*, supra.; *Kathy W. Coleman v. Ohio Supreme Court Chief Justice, et al.*, Cuyahoga App. No. 91829, 2008 Ohio 5878, at ¶ 4. The failure to properly caption a complaint for a writ of prohibition also requires that it be dismissed. *Id.*

The Complaint herein is captioned *International Association of Heat and Frost Insulators and Asbestos Workers, Local Union No. 45 v. Lucas County Court of Appeals*. This caption does not comply with the mandatory caption requirements for a complaint seeking a writ of mandamus and a writ of prohibition. *State of Ohio ex rel. Lewis Johnson v. State of Ohio*(July 17, 2001), Cuyahoga App. 79415, unreported, 2001 Ohio App. LEXIS 3223 *2. Thus, this Court must dismiss the Complaint.

Therefore, after viewing the allegations of the complaint and reasonable inferences therefrom in the light most favorable to the Relator, the Relator can prove no set of facts that would

entitle it to relief and the Respondent is entitled to judgment as a matter of law.

C. Relator is not Entitled to a Writ of Prohibition since the Exercise of Judicial Power by Respondent Lucas County Court of Appeal was Authorized by Law

1. A Civil Rule 54(B) Determination is not Required to Appeal an Order to Stay Issued pursuant to R.C. 2711.02

The Relator's Complaint asserts that the June 8, 2009 Order staying the proceedings pursuant to R.C. 2711.02 was not immediately appealable, since it lacked a Civ.R. 54(B) determination that there was no just reason for delay. *Complaint*, ¶ 7. The Relator is incorrect.

This Court has determined that R.C. 2711.02 permits a party to appeal a trial court order that grants or denies a stay of trial pending arbitration, even when the order makes no determination pursuant to Civ.R. 54(B). *Mynes, et al. v. Brooks, et al.*, _____ Ohio St.3d _____, 2009 Ohio 5946, ¶ 13.

Thus, the June 8th Order was appealable, since a Rule 54(B) determination was not required. Therefore, after viewing the allegations of the complaint and reasonable inferences therefrom in the light most favorable to the Relator, the Relator can prove no set of facts that would entitle it to a writ of prohibition and the Respondent is entitled to judgment as a matter of law and the Complaint must be dismissed.

2. The Appeal was Timely filed since Plaintiff was not Served with the June 8, 2009 Order

The Relator's Complaint alleges that the notice of appeal of the June 8th Order was not timely filed, since it was not filed with 30 days of the Order being journalized. *Complaint*, ¶ 7.

If a right of appeal from a trial court's judgment is to have meaning, the parties to the judgment or their attorneys of record must be given notice of the judgment before the time for appeal begins to run. *Swander Ditch Landowners' Association v. Joint Board of Huron & Seneca County Commissioners*(1990), 51 Ohio St.3d 131, 133, 554 N.E.2d 1325. Thus, due process requires that litigants be given reasonable notice of a trial court's appealable orders. *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 85, 523 N.E.2d 851. In addition, failure to give reasonable notice of appealable orders is a denial of the right to redress of injuries created by Section 16, Article 1 of the Ohio Constitution. *State ex rel Sautter, et al. v. Grey, Judge, et al.*, 117 Ohio St.3d 465, 2008 Ohio 1444, 884 N.E.2d 1062, at ¶ 9; *Atkinson, supra.* at 81; *Moldovan v. Cuyahoga County Welfare Department*(1986), 25 Ohio st.3d 293, 296, 496 N.E.2d 466.

The June 8, 2009 Order was journalized on June 10, 2009. *Complaint*, ¶ 5; Exhibit 2. Quality Insulation filed a notice of appeal from the trial court's June 8, 2009 Order. *Id.*, ¶ 6. This

was 37 days after the June 8th Order was journalized. *Id.*

However, Civ.R. 58(B) required the Clerk to serve the plaintiff with a copy of the Order and to note the service on the appearance docket. The appearance docket in the underlying case contains no such notification. *Id.*, Exhibit 2.

Thus, there is no indication that the plaintiff was given notice of the June 8th Order or, if given notice, when such notice was served. Therefore, due process and Section 16, Article 1 of the Ohio Constitution prohibit the dismissal of the underlying appeal on the basis that it was not timely filed.

Thus Respondent's exercise of judicial power in the underlying case is authorized by law and the Complaint for a Writ of Prohibition must be denied. Therefore, after viewing the allegations of the complaint and reasonable inferences therefrom in the light most favorable to the Relator, the Relator can prove no set of facts that would entitle it to a writ of prohibition and the Respondent is entitled to judgment as a matter of law.

D. Relator is not Entitled to a Writ of Mandamus since the Complaint Fails to Assert Facts Sufficient to Establish that Relator has a Clear Right to the Relief Requested

The Complaint seeks a writ of mandamus ordering the Respondent Court to dismiss the appeal and remand the underlying case to the trial court. *Complaint*, ¶¶ 13-15. As established above, in order to grant a writ of mandamus, the Relator must

have a clear legal right to the relief requested and that the Respondent under a clear legal duty to perform the acts prayed for in the Petition.

The claim for a writ of mandamus is based solely on the assertion that the Respondent lacks jurisdiction over the appeal in the underlying case. Based on the allegations in the complaint and the attached exhibits, the Respondent has established that it has jurisdiction over the underlying appeal.

Therefore, after viewing the allegations of the complaint and reasonable inferences therefrom in the light most favorable to the Relator, the Relator can prove no set of facts that would entitle it to a writ of mandamus and the Respondent is entitled to judgment as a matter of law.

IV. CONCLUSION

Based on the pleadings filed herein, it is clear that the Relator can prove no set of facts that would entitle it to a writ of mandamus or prohibition and that the Respondent is entitled to judgment as a matter of law.

Respectfully submitted,

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BY: John A. Borell
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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Motion for Judgment on the Pleadings was sent by ordinary U.S. mail on the 2d day of December 2009 to:

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