

OP:

ORIGINAL

10-0248

THE SUPREME COURT OF OHIO

MICHAEL MANUEL
Petitioner,

CASE NO-09CA-23583

vs.

DAVID STENSON
Respondent

**MEMORANDUM IN SUPPORT OF JURISDICTION
OF PETITIONER MICHAEL MANUEL WITH ATTACHMENT
OF MAGISTRATES DECISION AND ENTRY FILED DECEMBER 26
2008**

Now come Petitioner and respectfully gives notice of jurisdiction concerning denial of his petition in Mandamus denied by the Second District Court of Appeals from Montgomery County, Ohio decided December 23, 2009.

Respectfully submitted


MICHAEL MANUEL PRO-SE
1180 INFIRMARY RD DAYTON OHIO
45417

DAVID STENSON RESPONDENT
PRO-SE 120 WEST SECOND ST.
SUITE1210 DAYTON 45402

CERTIFICATE OF SERVICE

The undersigned hereby certify that a copy of the forgoing will be served to the Office Attorney David Stenson at 120 West Second Street Suit 1210 Dayton Ohio 45402 the memorandum will be sent by ordinary US. Mail within 3 days of this filing on this day of February _____ 2010.

FILED
FEB 08 2010
CLERK OF COURT
SUPREME COURT OF OHIO


MICHAEL MANUEL

EXPLANATION OF WHY THIS CASE IS A CASE OF GREAT IMPORTANCE AND PUBLIC INTEREST

This case raises a substantial constitutional question and is one of great importance whereas the Second District Court of Appeals dismissed a Writ of Mandamus in CA-23583 concerning Court case N0. 05-cv 5695 where attorney David Stenson who represented the Petitioner refuses to turn over the Petitioners file for briefing in CA-23250 originating in 05-cv 5695.

As stated in CA-23583 the Court of Appeals denied the Petition in Mandamus to compel the respondent to turn over his file. The respondent represented the Petitioner in 05cv5695 to recover damages against Wright Dunbar Technology Academy, Lucas County Educational Service Center and Tom Baker who was the Superintendent.

ATTACHMENT (1) MAGISTRATES DECISION AND ENTRY FILED DECEMBER 26 2008

It was discovered in 05cv5695 on page 3 lines 18-20 and page -4 lines 1-13 that respondent David Stenson intentionally failed to file a post trial brief as ordered by the court on September 30, 2008. Later entry on the record indicates that David Stenson was granted an extension to file post trial briefs by October 3, 2008. The court found that David Stenson violated the order by filing on October 6, 2008 and offered no explanation for the tardiness. Then David Stenson offered an untimely motion for summary Judgment as opposed to the requested and stipulated post trial brief.

David Stenson was also offered notice of pending dismissal. Wright Dunbar provided a certificate of service with the motion requesting an entry and order for dismissal and certified that a copy of the motion was sent to the Plaintiffs attorney David Stenson and the document was sent to the address that Attorney David Stenson has on file with the Court in this matter. David Stenson was properly served with notice and it was presumed perfected. David Stenson never filed an objection to the motion, which was filed on October 17, 2008.

As a direct and proximate cause the Magistrate found that the Defendants motion was well taken and dismissed the complaint in Toto for failure to prosecute the complaint against Wright Dunbar in October of 2008 causing the trial Judge to dismiss said cause of action were the respondent committed acts of malpractice and gross negligence showing ineffectiveness of counsel in which he knew of said mandatory dismissal of all claims.

The respondent misrepresented the Petitioner throughout 05cv5695 by never informing him of what the Court ordered concerning the post trial brief having been due causing the break down that lead to this appeal for his records and files. The Court of Appeals insisted that App.9-E for correction of the record was the remedy that is not true the Petitioner only demands the return of his entire record and file not any correct at this time.

The Court of Appeals also stated that David Stenson represented the Petitioner in a private capacity and a Mandamus could not have been executed as an Officer of the Court and under the cannon of professional responsibility attorneys have a clear duty to the Court that is outside a private capacity.

WHEREFORE: The Petitioner request that the Ohio Supreme Court reverse the ruling of the Second District Court of appeals and direct them to direct Attorney David Stenson to turn over complete file of the Petitioner so that he can prepare his merit brief CA-23250.



MICHAEL MANUEL

FILED
COURT OF APPEALS
2009 DEC 23 PM 2:25

REBECCA A. BRUSH
CLERK OF COURTS
MONTGOMERY CO. OHIO

38
IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE, ex rel., MICHAEL MANUEL

Appellate Case No. 23583

Petitioner

v.

ATTORNEY DAVID E. STENSON

Respondent

DECISION AND ENTRY

December 23, 2009

PER CURIAM:

This matter is before the court on Michael Manuel's "Amended Motion for Rehearing to the Decision and Entry of the Appellate Courts [sic] Judgment Entry," filed November 24, 2009.¹

The record shows that Manuel filed with this Court a complaint for a writ of mandamus on August 12, 2009, seeking an order that compelled Respondent, Attorney David E. Stenson, to provide Manuel with the file in Montgomery County Court of Common Pleas Case No. 05-CV-5695. According to Manuel, the file is necessary in order to move forward with his appeal in Montgomery App. No. 23250. This Court denied Manuel's complaint on November 10, 2009. Thereafter, Manuel filed the present motion(s).

¹ Manuel filed a "Motion for Rehearing to the Decision and Entry of the Appellate Courts [sic] Judgment Entry" on November 20, 2009. The amended version corrected several clerical errors.

Upon consideration of the foregoing, Manuel's "Amended Motion for Rehearing to the Decision and Entry of the Appellate Courts [sic] Judgment Entry" is OVERRULED, whether construed as an App.R. 26(A) application for reconsideration of this Court's November 10, 2009 Decision and Final Judgment Entry or Civ.R. 60(B)(5) motion for relief from judgment from the same entry. See *State ex rel. Burnes v. Athens Cty. Clerk of Courts* (1998), 83 Ohio St.3d 523, 524 (finding that reconsideration under App.R. 26(A) is inapplicable to ruling on mandamus complaint filed as original action in the court of appeals). See, also, *State ex rel. Howard v. Doneghy*, 102 Ohio St.3d 355, 2004-Ohio-3207, at ¶8 (finding that a Civ.R. 60(B) motion for relief from judgment cannot be used as a substitute for a timely appeal from order dismissing an original action in mandamus).

SO ORDERED.



JAMES A. BROGAN, Judge



JEFFREY E. FROELICH, Judge

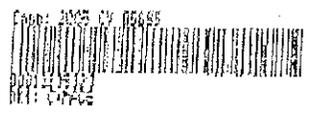
Copies to:

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Attorney David E. Stenson
Respondent, *Pro Se*
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CA3/JM

Att. (4)



B-FILED
COURT OF COMMON PLEAS

2009 DEC 26 P 3:38

GREGORY A. BRUSH
CLERK OF COURTS
IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO

D.O.J.T., LLC,	:	CASE NO. 2005 CV 5695
and	:	
MICHAEL MANUEL,	:	
Plaintiffs,	:	
v.	:	
BOARD OF WRIGHT DUNBAR, TECHNOLOGY ACADEMY	:	JUDGE A. J. WAGNER (Magistrate Kristi A. Wuebben)
and	:	
GOVERNING BOARD LUCAS COUNTY EDUCATIONAL SERVICE CENTER	:	
and	:	
THOMAS A. BAKER	:	<u>MAGISTRATE'S DECISION</u>
Defendants.	:	

To: Honorable A. J. Wagner

From: Magistrate Kristi A. Wuebben

By an Order of the Court dated April 20, 2007, this case was referred to the Magistrate pursuant to Civil Rule 53 for trial and magistrate's decision include findings of fact and conclusions of law on all issues of law and fact as prescribed by Ohio Civil Procedure Rule 53.

The matter before the Court is Defendant's, Board of Wright Dunbar Technology Academy, motion to strike the Plaintiffs', D.O.J.T., LCC and Michael Manuel ("Plaintiffs), Motion for Summary Judgment. In addition, Defendant Board of Wright Dunbar Technology Academy ("Defendant") has filed a motion for an entry and order to dismiss based upon Plaintiffs failure to prosecute. Plaintiffs are represented by Attorney David E. Stenson and Defendant is represented by Attorney Gregory M. Gantt.

FINDINGS OF FACT

A bench trial was conducted on August 20, 2008. Both parties were present and represented by counsel. After testimony was taken for both parties, the parties agreed to submit documents in support of the testimony given and stipulated to the submission of the documents. The undersigned set a post-trial brief deadline for these documents for both parties. The Plaintiffs were to submit by September 30, 2008, and the Defendants were to submit by October 31, 2008.

The undersigned sustained a motion made by the Plaintiffs following the trial to extend the time to file the brief. The new deadline was set at October 3, 2008. The Defendants' deadline was accordingly extended to November 7, 2008. On October 6, 2008, the Plaintiffs filed a motion for summary judgment. Defendant filed its Motion to Strike Summary Judgment and Motion to Dismiss on October 17, 2008, and its post trial brief on October 28, 2008.

LAW AND ANALYSIS

A. Motion to Strike

If an action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court. Ohio R. Civ. Pro. 56 (A). Where a motion for summary

judgment is filed following this time frame without permission of the court, the motion is not properly before the court for decision and the Court cannot rule upon it. *Reizenwald v. Mills* (1983) Ohio App. LEXIS 12023, *11.

Plaintiffs' Motion for Summary Judgment was filed after both pretrial and trial were set, and following the bench trial, without the Court's permission. The docket reflects that Plaintiffs did not file a request, and the Plaintiffs' filing occurred after the deadline to file its post trial brief in spite of being granted an extension to file. Further, Plaintiffs have not filed a response opposing the motion, to date. Thus, the Defendant's Motion to Strike the Plaintiffs' Motion for Summary Judgment is granted; Plaintiffs' Motion for Summary Judgment is stricken.

B. Motion for Entry and Order to Dismiss

The court may upon the motion of a defendant or on its own motion dismiss an action or claim if the plaintiff fails to prosecute or comply with the Civil Rules or any court order. Ohio R. Civ. Pro 41(B)(1). Prior notice to plaintiff's counsel must be given before the involuntary dismissal is ordered. *Id.* Notice is not required when the dismissal is based upon a motion by a defendant. *Genesis Outdoor Adver., Inc. v. Troy Twp. Bd. of Zoning Appeals* (2003) Ohio App. LEXIS 3330, *20; *Svoboda v. Brutswick* (1983) 6 Ohio St. 3d 348, 350. The motion itself serves as notice of the pending possibility of a dismissal. *Genesis Outdoor Adver., Inc.*, Ohio App. LEXIS 3330, *20.

Plaintiffs in this matter have failed to comply with the Court's orders and have received notice that dismissal is pending. An order was given orally to both parties at the conclusion of testimony that the post trial briefs were to be filed; the Plaintiffs were to file by September 30,

2008, and the Defendant by October 31, 2008. A later entry on the record indicates that the Plaintiffs were granted an extension to file post trial briefs by October 3, 2008. Plaintiffs violated the order by filing on October 6, 2008, and offered no explanation for the tardiness. Further, the Plaintiffs submitted an untimely Motion for Summary Judgment as opposed to the requested and stipulated post trial brief.

Plaintiffs were also afforded notice of the pending dismissal. Defendant provided a certificate of service with the Motion Requesting an Entry and Order for Dismissal and certified that a copy of the motion was sent to Plaintiffs' attorney, David E. Stenson. The document was sent to the address that Attorney Stenson has on file with the Court in this matter. There is no indication that the service was incomplete and is presumed perfected. To date, Plaintiffs have not filed an objection to the motion, which was filed on October 17, 2008. As a result, the Magistrate finds the defendant's motion well-taken and dismisses the complaint for failure to prosecute pursuant to Civil Rule 41(B)(1).

Accordingly, the Magistrate decides as follows:

- 1) Plaintiffs, D.O.I.T., LLC and Michael Manuel, Motion for Summary Judgment is STRICKEN.
- 2) Defendant's, Board of Wright Dunbar Technology Academy, Motion Requesting an Entry and Order to Dismiss is GRANTED.
- 3) Costs to the Plaintiffs, D.O.I.T., LLC and Michael Manuel.

ATT.

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The parties are referred to Civil Rule 53 and Rule 2.31 of the Rules of the Montgomery County Common Pleas Court regarding the filing of objections to the Magistrate's Decision. Pursuant to Civil Rule 53, either party may file objections to this Magistrate's Decision within fourteen (14) days of the time stamped date of this entry.

Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusions, whether or not specifically designated as a finding of fact or conclusion of law under Civil Rule 53 (D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civil Rule 53 (D)(3)(b).


MAGISTRATE KRISTI A. WIERBEN

Copies of this Decision, Order and Entry were forwarded to all parties listed below:

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ATTORNEY FOR DEFENDANT, BOARD OF WRIGHT DUNDAR TECHNOLOGY ACADEMY