

ORIGINAL

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO ex. rel. AMERICAN))	Case No. 2010-0582
GREETINGS CORP., et al.)	
)	
Relators)	
)	Original Action in Mandamus and
vs.)	Prohibition
)	
JUDGE NANCY A. FUERST, et al.,)	
)	
Respondents.)	
)	

PARTY OF INTEREST, ELECTRICAL WORKERS PENSION FUND
LOCAL 103 I.B.E.W.'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS
RELATORS' COMPLAINT FOR WRITS OF PROHIBITION AND MANDAMUS

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APR 28 2010
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SUPREME COURT OF OHIO

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FILED
APR 28 2010
CLERK OF COURT
SUPREME COURT OF OHIO

I. INTRODUCTION¹

Relators' Complaint for Writs of Prohibition and Mandamus ("Relators' Complaint") should be rejected on both significant procedural and substantive grounds. This Court has already held that mandamus and prohibition will not be used to second-guess selection of cases for the commercial docket. Relators' grievance that the wrong judicial officer was "improperly assigned" has "an adequate remedy by way of appeal." *State ex rel. Carr v. McDonnell*, (2009), 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E.2d 1004, ¶2. Although Relators attempt to frame the matter in jurisdictional terms, there is no dispute that the Cuyahoga Court of Common Pleas has the power to hear this case. As *Carr* reaffirmed, appellate courts do not intervene in what is actually at issue here – docket management at the trial level. Relators flatly disregard this Court's recent guidance, which disposes of their Complaint on procedural grounds alone.

Even if their substantive contentions were considered, Relators fail to demonstrate error by either Judge Corrigan or Administrative Judge Fuerst, who reviewed and upheld the case assignment. Relators' position flouts the plain language of the Temporary Rules. "Cases in which a labor organization is a party" do not go to the commercial docket. Temp.Sup.R. 1.03(B)(7). Plaintiff Electrical Workers Pension Fund, Local 103, I.B.E.W

¹ As the party in interest in this extraordinary proceeding, plaintiff Electrical Workers Pension Fund, Local 103, I.B.E.W. has filed, concurrently with this memorandum, a motion to intervene.

("Plaintiff") is a "labor organization" within the meaning of this exception. Relators identify no reason this Court should overturn this fact-specific ruling by the Respondent Judges who are close to the litigation. In the end, Relators' strained interpretations and policy-based arguments cannot displace the unambiguous text. For these and other reasons discussed below, Relators' Complaint lacks merit and should be dismissed.

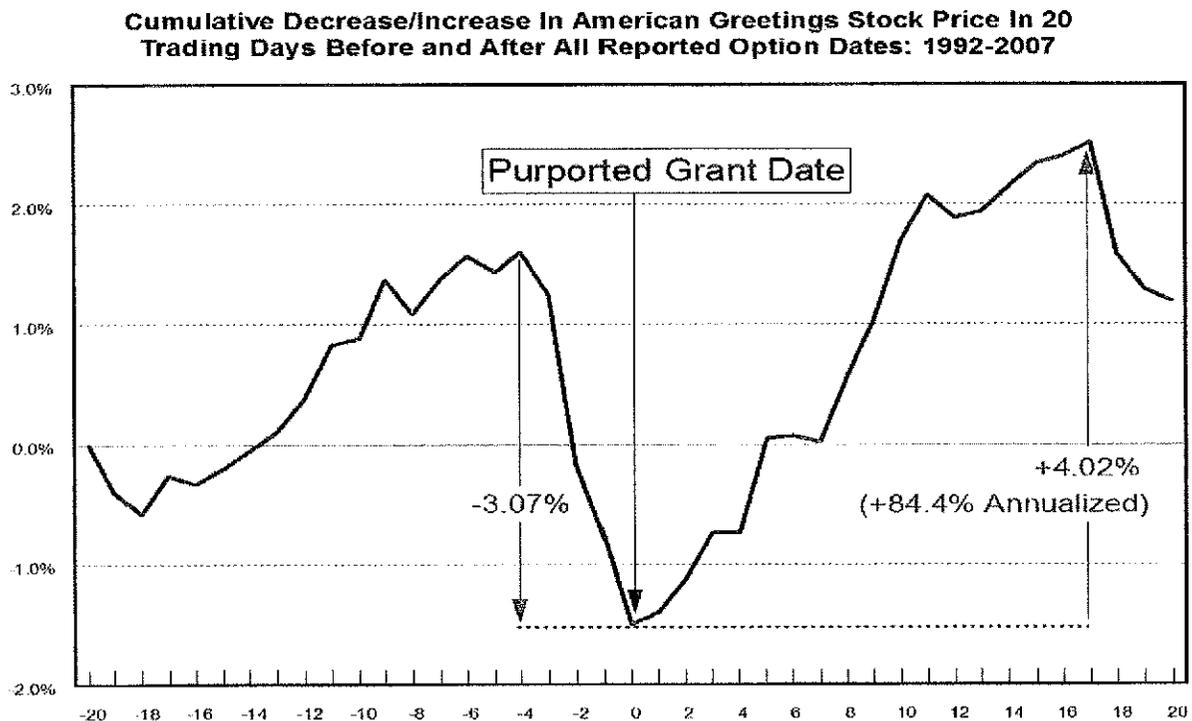
II. FACTUAL BACKGROUND

This case arises out of corporate stock-option backdating and is not unlike those cases that have received national attention. Plaintiff is a shareholder of American Greetings Corporation (the "Company"). Relators' Complaint, Ex. 1 (*see* Ex. F therein, Plaintiff's Verified Shareholder Derivative Complaint ("Derivative Complaint"), ¶¶15-16). Relators are the directors and top executives who controlled the Company and engaged in the challenged conduct. Derivative Complaint, ¶¶1-2, 17-46.

Suing derivatively on the Company's behalf, Plaintiff seeks to hold Relators accountable for damaging the Company through unlawful stock-option backdating. Derivative Complaint, ¶¶1-2, 5. "Stock option backdating" refers to the practice of using hindsight to date a stock option prior to when the option award was actually authorized, to price the option more favorably for the recipient. Derivative Complaint, ¶¶2-4, 10, 65. This is done to secretly increase the option's value.

A historical pattern emerged at American Greetings suggesting deliberate manipulation by the corporate insiders who controlled the grant of options at the

Company. Relators had an uncanny ability, too consistent for good luck or guesswork, to price options at low points in the trading price. Derivative Complaint, ¶¶66-67. The chart below so illustrates:



Plaintiff further alleges that Relators’ backdating concealed executive compensation and falsified the Company’s financial statements. Derivative Complaint, ¶¶92, 138-140, 147-154. Relators concealed the backdating by false statements in proxies concerning compensation and stock option granting practices and policies, option grant dates, and recommendations of the Audit Committee. Derivative Complaint, ¶¶94, 99-136. Likewise, the backdating was concealed by false statements in reports on Forms 10-K and 10-Q concerning the exercise price of options, and the Company’s compensation expense, net income and shareholders’ equity. Derivative Complaint, ¶¶154-192, 195-197. Based on

these and other facts alleged, Plaintiff avers causes of action for breach of fiduciary duty and related claims, all under state law. Derivative Complaint, ¶¶216-53.

III. PROCEDURAL HISTORY

Since the outset of this litigation, Relators have engaged in thinly veiled forum shopping to avoid the adjudication of Plaintiff's serious allegations. The irony here is that although the commercial docket was established to speed resolution of business disputes, Relators have delayed at every turn consideration of the merits.

In March 2009, Plaintiff filed this derivative suit in the Cuyahoga Court of Common Pleas. Relators' Complaint, Ex. 1 (*see* Ex. F therein); Ex. 5 at 5. Relators did not answer. Rather, although Plaintiff asserted no federal causes of action, Relators attempted to remove to the United States District Court for the Northern District of Ohio. *Id.*, Ex. 5 at 3. In March 2010, rejecting Relators' stance that a federal question was somehow presented, the federal court granted Plaintiff's motion to remand the action to the Cuyahoga Court of Common Pleas. *Id.*

Relators' groundless removal thus delayed prosecution of the case by nearly a year. They were not done, however, in their effort to shift the forum. One day after the parties were sent back to state court, Relators filed their motion to transfer to the commercial docket. Judge Corrigan received full briefing. *Id.*, Ex. 1 (*see* Exs. C-E therein). He summarily denied Relators' motion. *Id.*, Ex. 3.

Relators then appealed to Administrative Judge Fuerst. This led to another, even more extensive, round of briefing on the same arguments. *Id.*, Exs. 1-2, 4, 6. The documentation reviewed by Administrative Judge Fuerst included Relators' initial submissions to Judge Corrigan. *Id.*, Ex. 1 (*see* Exs. C-E therein). In all, Relators filed four briefs urging transfer to the commercial docket. *Id.*, Ex. 1, Exs. C and E therein; Ex. 6. Administrative Judge Fuerst denied Relators' appeal. Her affirmance explained: "Upon Review by Administrative Judge of [Defendants'] Appeal of Judge Corrigan's [March 5, 2010] Order Denying [Defendants'] Motion to Transfer to Commercial docket, the Court finds [Defendants'] appeal is without merit and Judge Corrigan's Order is sustained." *Id.*, Ex. 5 at 1.

IV. ARGUMENT

A. Relators Do Not Satisfy the Rigorous Standards for a Writ of Mandamus or Prohibition

The reported decisions applying the Temporary Rules dispose of Relators' Complaint on procedural grounds alone. As stated at the outset, *Carr* disposes of Relators' attempt to second-guess the judicial assignment in this case, and clearly does so against the Relators.

Relators reference the *Carr* precedent, but they wholly evade its holding on the unavailability of writ review. Like the present case, *Carr* originated in the Cuyahoga Court of Common Pleas. The matter was assigned to the commercial docket. The plaintiff sought to challenge this ruling by complaint for writs of prohibition and mandamus in the Eighth

District Court of Appeals. *State ex rel. Carr v. McDonnell*, (2009), 184 Ohio App.3d 373, 2009-Ohio-2488, 921 N.E.2d 251, ¶¶1, 5-7, *aff'd*. (2009), 124 Ohio St.3d 62, 2009-Ohio-6165, 918 N.E. 2d 1004. The Eighth District reiterated the familiar standards. For a writ of prohibition, “[t]he relator must demonstrate that: (1) the respondent is about to exercise judicial or quasi-judicial authority; (2) the exercise of the judicial or quasi-judicial authority is not authorized by law; and (3) the denial of the writ will cause injury to the relator for which no other adequate remedy exists in the ordinary course of the law.” *Id.*, ¶8. “Furthermore, a writ of prohibition shall be used with great caution and shall not issue in doubtful cases.” *Id.*

The Eighth District then stated that the Cuyahoga Court of Common Pleas is a court of general jurisdiction. As such, judges of that court have the power, at a minimum, to determine their own jurisdiction. *Id.*, ¶¶9, 13. Disagreement with that ruling is pursued by appeal. This Court has long deemed an appeal an “adequate remedy at law” unless “the lower court’s lack of jurisdiction is patent and unambiguous,” which is not implicated when the issue is simply assignment to a particular judge. *Id.*, ¶¶9-10. Dismissing the complaint in *Carr*, the Eighth District distilled this Court’s precedent: “In fact, the Supreme Court of Ohio has held that a claim of improper assignment of a judge must be raised through a direct appeal and not through prohibition or mandamus.” *Id.*, ¶20 (collecting cases).

But the plaintiff in *Carr* took his appeal further and this Court affirmed in a short opinion. This Court agreed that the dissatisfied party in this situation “has an adequate remedy by way of appeal” to make the argument that the trial judge “was improperly assigned.” *Carr*, 2009-Ohio-6165, ¶2. The unanimous decision added the stern command, echoing the Eighth District in *Carr*, that “mandamus and prohibition are not substitutes for appeal to contest alleged improper assignment of [a] judge.” *Id.*

Fully consistent with *Carr*, the Franklin Court of Common Pleas published an opinion rejecting Relators’ suggestion that assignment to the commercial docket is jurisdictional. “The temporary rules of superintendence do not demand that commercial cases only be decided by a commercial judge, failing which they are void or voidable. Instead, those rules are concerned with case-assignment and case-management procedures. They do not – indeed could not – alter the jurisdiction of the court.” *GLIC Real Estate Holding, L.L.C. v. 2014 Baltimore-Reynoldsburg Road, L.L.C.* (Franklin C.P. 2009), 151 Ohio Misc.2d 33, 2009-Ohio-2129, 906 N.E. 2d 517, ¶6. Rules of court “relative to case assignments between judges are not jurisdictional,” but rather create “housekeeping rules which are of concern to the judges of the several courts but create no rights in litigants.” *Id.*, ¶7 (citations and internal quotation marks omitted).

This case law under the Temporary Rules more than justifies summary dismissal of Relators’ Complaint. Furthermore, Relators have already availed themselves of some form of review. The Temporary Rules provide for an appeal within the Court of Common Pleas.

Assignment decisions are thereby examined for correctness. As they had the right to do, Relators appealed Judge Corrigan's initial ruling on the assignment to Administrative Judge Fuerst. *Carr* illustrates that this review is not a rubber stamp. There, the administrative judge reversed the initial decision to deny transfer, of two actions, to the commercial docket. *Carr*, 2009-Ohio-2488, ¶¶5-6 (noting that administrative judge "granted the appeal").

The Temporary Rules are clear, however, that immediate review of the case assignment ends there. "The decision of the administrative judge as to the transfer of a case" to the commercial docket "is final and not appealable." Temp.Sup.R. 104(D)(2). Relators contend that this express prohibition allows recourse to an extraordinary proceeding. To the contrary, the strong "final and not appealable" language should cut, if anything, against writ review. Taken together, the Temporary Rules and *Carr* establish that the administrative appeal is all the process the unsatisfied party is due before final judgment.

Indeed, Relators' zeal for immediate review loses sight of what is at issue. The Temporary Rules are only "procedural and not substantive in nature." *Carr*, 2009-Ohio-2488, ¶18 n.1. Whether on the commercial docket or not, this case belongs and is properly heard in the Court of Common Pleas. Relators do not identify any injury resulting from failure to assign this case, under a set of procedural rules, to their preferred judicial officer within that court.

Even though Relators do not acknowledge the holding of this Court, *Carr* rejects their approach and should result in summary rejection of their Complaint. Aside from *stare decisis*, Relators' proposal to add yet another layer of immediate review would only further delay cases at the trial level while rarely altering the assignment decision. It would needlessly expend appellate judicial resources on what amounts to the micromanagement of trial court dockets. Additional admonitions from this Court are pertinent. Although "neither prohibition nor mandamus may be employed as a substitute for an appeal from interlocutory orders," this is what Relators actually seek – yet another appeal beyond the administrative one they already had. *State ex rel. Sliwinski v. Unruh*, (2008), 118 Ohio St.3d 76, 2008-Ohio-1734, 886 N.E.2d 201, ¶122. Finally, the required urgency does not exist merely because Relators, like any litigant dissatisfied with an interlocutory ruling, would prefer not to wait. "The fact that postjudgment appeal may be time-consuming and expensive to pursue does not render appeal inadequate so as to justify extraordinary relief." *Fraiberg v. Cuyahoga County Court of Common Pleas, Domestic Rels. Div.* (1996), 76 Ohio St.3d 374, 379, 1996-Ohio-384, 667 N.E.2d 1189, 1194.

B. Relators Fail to Show that Judge Corrigan Patently and Unambiguously Lacks Jurisdiction to Hear this Case

Even assuming Relators' substantive contentions are considered on the merits, their quest to force this case onto the commercial docket was properly denied. The Temporary Rules distinguish between cases that are "accepted into the commercial docket" and those "not accepted." Temp.Sup.R. 1.03(A), (B). In the latter category, the text relevant to this

case is the following: “A commercial docket judge shall not accept a civil case into the commercial docket . . . if the gravamen of the case relates to . . . [c]ases in which a labor organization is a party.” Temp.Sup.R. 1.03(B)(7).

Focusing on the word “gravamen,” Relators appear to contend that all shareholder derivative actions necessarily qualify for the commercial docket. They observe that *Carr* involved a derivative suit assigned to the commercial docket. *Carr* did not involve, however, a labor organization as a party. The fatal flaw in Relators’ interpretation is their suggestion, with the end result, to read “[c]ases in which a labor organization is a party” out of Rule 1.03 (B)(7). Written instruments are not construed in this fashion. All words must be given effect. Relators’ position rests unabashedly on policy considerations, not genuine room for debate on what Rule 1.03 plainly provides. There should be no leeway for loose construction. The Temporary Rules, in fact, forbid it: “The factors set forth in Temporary Rule 1.03 . . . shall be dispositive in determining whether a case shall be transferred to . . . the commercial docket” Temp.Sup.R. 1.04(D)(1).

Taking a slightly different tack, Relators assert that Plaintiff’s identity may be disregarded entirely because, again, this is a shareholder derivative action. While Relators are correct that the Company is the intended beneficiary of this action, this does not render Plaintiff irrelevant. As Relators acknowledge, by definition, a derivative case must be brought by the stockholder (because the corporate fiduciaries, as here, are too conflicted to initiate a legal action). To be precise, the party who initiated this suit is not the Company,

but Plaintiff “Derivatively on Behalf of AMERICAN GREETINGS CORPORATION.” Relators’ Complaint, Ex. 1 (see Ex. F, Derivative Complaint). If the Temporary Rules intended to qualify the “labor organization” exception in a derivative case – essentially creating an exception within this exception – they would have said so expressly. Relators’ novel interpretation has no textual support in the Temporary Rules.

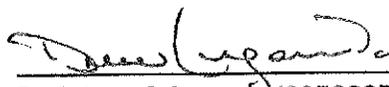
As their fallback argument, Relators contend that the two Respondent Judges got the facts wrong in concluding that Plaintiff, a Taft-Hartley Fund, is a “labor organization.” Plaintiff refuted this far-fetched objection (and Relators’ fundamental misreading of Rule 1.03) in its opposition brief before Administrative Judge Fuerst. The Court is respectfully referred to that memorandum for additional discussion, to the extent Relators’ substantive points merit further examination. See Relators’ Complaint, Ex. 4.

V. CONCLUSION

For the reasons given, Relators’ Complaint should be dismissed.

Dated: April 27, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above *Party of Interest, Electrical Workers Pension Fund Local 103 I.B.E.W.'S Memorandum in Support of Motion to Dismiss Relators' Complaint for Writs of Prohibition and Mandamus* was served on April 27, 2010, via electronic mail, upon the following counsel:

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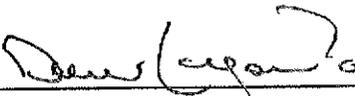
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