

ORIGINAL

IN THE SUPREME COURT OF OHIO

VALENTINE SCHUROWLIEW,)
)
 Relator,)
)
 vs.)
)
 JUDGE LANCE MASON, ET AL.,)
)
 Respondents.)

CASE NO. 2010-0712

Original Action in Prohibition Arising
From Cuyahoga County Common Pleas
Court Case No. 09 CV 684581 and
Cuyahoga County Probate Court Case
No. 2009 ADV 144867

RESPONDENTS' MOTION TO DISMISS

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RECEIVED
MAY 19 2010
CLERK OF COURT
SUPREME COURT OF OHIO

FILED
MAY 19 2010
CLERK OF COURT
SUPREME COURT OF OHIO

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Respondents.)	
)	<u>RESPONDENTS' MOTION TO</u>
)	<u>DISMISS</u>

Pursuant to S.Ct.Prac.R. 10.5, respondents Judge Lance Mason and Judge Laura Gallagher (“respondents”) respectfully move this Court to dismiss the Complaint for an Extraordinary Writ and this cause. The grounds in support of this motion are that the Complaint fails to state claims for relief in prohibition.

A memorandum in support of this motion is attached hereto and incorporated herein.

Respectfully submitted,

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Respondents.)	<u>BRIEF IN SUPPORT OF</u>
)	<u>RESPONDENTS' MOTION TO</u>
)	<u>DISMISS</u>

STATEMENT OF FACTS AND PROCEEDINGS

This is an original action in prohibition. Relator Valentine Schurowliew (“relator”) is a defendant in a civil action that is currently pending in the General Division of the Cuyahoga County Court of Common Pleas, over which respondent Judge Lance Mason is presiding. Relator is additionally a defendant in an action that is currently pending in the Probate Division of the Cuyahoga County Court of Common Pleas, over which respondent Judge Laura Gallagher is presiding. In his Complaint for an Extraordinary Writ (“Complaint”) filed in this Court, it appears relator primarily seeks to prevent Judge Mason from conducting further proceedings in the General Division case. Because relator’s Complaint does not establish that Judge Mason patently and unambiguously lacks jurisdiction to conduct judicial proceedings or the lack of adequate remedies at law, relator’s Complaint does not state a claim for extraordinary relief in prohibition and should accordingly be dismissed pursuant to S.Ct.Prac.R. 10.5.

The following facts are drawn from relator's Complaint.¹

On February 11, 1990, Sofija Schurowliew created an irrevocable grantor trust that named her three (3) children – relator Valentine Schurowliew, Vera Schurowliew, and Alex Schurowliew – as co trustees. See Complaint at p. 4. According to relator, the trust provided that all income earned by trust assets was to be personal income to Sofija Schurowliew that was to pass into an Income Account opened in her name and maintained at Dollar Bank, FSB. Id. At Sofija Schurowliew's death, the trust assets were to be divided into three (3) equal shares. Id.

On March 16, 1990, the trust was funded with two (2) Dollar Bank certificates of deposit totaling \$112,000.00 in the names of the three (3) co-trustees. See Complaint at p. 4.

Relator says he was added as joint owner of the Income Account with rights of survivorship by Sofija Schurowliew on January 25, 1993. See Complaint at p. 4. He avers that the trust assets were never withdrawn during Sofija Schurowliew's lifetime. Id.

According to the Complaint, Sofija Schurowliew added relator over time to her various assets as either a payable-upon-death beneficiary, joint owner with rights of survivorship, or sole owner. See Complaint at p. 4. The assets in question were Sofija Schurowliew's certificates of deposit at Charter One Bank; a Legacy Treasury Direct Account (Treasury Bills); and the personal residence of Sofija Schurowliew at 4323 Leading Avenue, Cleveland, Ohio 44109.² Id.

¹ Relator's Complaint (and nearly-identical supporting affidavit) contains many factual averments but those averments are not set forth in numbered paragraphs. S.Ct.Prac.R. 10.2 provides that the Ohio Rules of Civil Procedure shall supplement the Supreme Court Rules of Practice unless clearly inapplicable. Ohio Civil Rule 10(B) requires pleading averments to "be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances ***." Because relator's filings here do not permit ready citation to particular numbered paragraphs that contain relator's averments, this memorandum will cite to the particular page of the Complaint on which the subject averment appears.

² Relator's Complaint does not specify the nature of the interest he acquired in these assets as a result of Sofija Schurowliew's actions.

In addition, relator was made the payable-upon-death beneficiary of Sofija Schurowliew's Thrift Plan at the Federal Reserve Bank of Cleveland and her Individual Retirement Account at Dollar Bank. Id. He was also joint owner with rights of survivorship of her money market account at Charter One Bank since 1989. Id.

Relator says that the Legacy Treasury Direct assets were never touched; the Leading Avenue residence was never sold or mortgaged; and the Charter One Bank certificates of deposit remained completely intact except that one was used to pay for Sofija Schurowliew's funeral and the other was used to cover Sofija Schurowliew's legal bills in a guardianship court action. See Complaint at p. 4.

In 2005, Sofija Schurowliew executed a power of attorney for health care that named relator as her attorney in fact. See Complaint at p. 5. On May 4, 2007, Sofija Schurowliew executed a financial power of attorney that named relator as her attorney in fact for financial purposes. Id.

On May 30, 2008, Sofija Schurowliew passed away at the age of 88. See Complaint at p. 5.

Shortly before Sofija Schurowliew's death, on May 23, 2008, Vera Schurowliew and Alex Schurowliew filed a complaint for trust accounting and other equitable relief against relator; Charter One Bank, FSB; and Dollar Bank. See Complaint at p. 5. The case was docketed in the Cuyahoga County Probate Court as Case No. 2008 ADV 136931. Id. An August 31, 2008 amended complaint sought a trust accounting and removal of fiduciary and alleged claims for concealment and embezzlement, fraud, conversion, breach of fiduciary duty, negligence, and tortious interference with rights of inheritance. Id.

After the plaintiffs dismissed Charter One Bank and Dollar Bank from the case, the Probate Court on January 26, 2009 dismissed the plaintiffs' claims for negligence, fraud, conversion, and tortious inference with rights of inheritance for lack of subject matter jurisdiction and the claim for concealment and embezzlement of assets for failure to meet the specific statutory requirements of R.C. 2109.50. See Complaint at p. 6. After further pleading, the plaintiffs filed a notice of dismissal of Case No. 2008 ADV 136931 on April 10, 2009. *Id.*

In the meantime, on February 11, 2009, Vera Schurowliew and Alex Schurowliew filed a complaint against relator in the General Division of the Cuyahoga County Court of Common Pleas in the case docketed as Case No. 09 CV 684581. See Complaint at 7. Assigned to respondent Judge Mason, the plaintiffs' complaint asserted claims for negligence, fraud, conversion, tortious inference with expectancy of inheritance, breach of fiduciary duty, and unjust enrichment and sought compensatory and punitive damages and equitable relief. *Id.* On February 24, 2009, relator filed an answer and counterclaim for defamation, malicious prosecution, intentional infliction of emotional distress, and abuse of process. *Id.* Relator voluntarily dismissed his counterclaim for malicious prosecution on April 2, 2009 and the trial court dismissed relator's counterclaims for defamation, intentional infliction of emotional distress, and abuse of process on April 9, 2010. See Complaint at pp. 7-8. The plaintiffs' claims against relator remain pending.

Contemporaneously, on February 26, 2009, Vera Schurowliew and Alex Schurowliew filed a complaint against relator in the Probate Division of the Cuyahoga County Court of Common Pleas in the case docketed as Case No. 2009 ADV 144867. See Complaint at p. 6. Assigned to respondent Judge Gallagher, the plaintiffs' complaint asserted a claim for

concealment and embezzlement of assets pursuant to R.C. 2109.50. Id. Those claims likewise remain pending.

On April 26, 2010, relator commenced the instant original action in prohibition against respondents. For the reasons that follow, relator's Complaint and this cause should be dismissed pursuant to S.Ct.Prac.R. 10.5.

ARGUMENT AND LAW

Relator's Complaint appears to seek primarily a writ of prohibition against respondent Judge Mason as it relates to the proceedings now pending before him in General Division Case No. 09 CV 684581. In particular, relator argues that the claims asserted by Vera and Alex Schurowliew in that case for negligence, fraud, conversion, and breach of fiduciary duty should be dismissed and/or transferred to the Probate Court (presumably to be determined in Probate Court Case No. 2009 ADV 144867, over which respondent Judge Gallagher is presiding) because the plaintiffs lack standing and the Probate Court has exclusive jurisdiction over matters relating to the administration of estates. See Complaint at pp. 1-2. Relator additionally argues that the plaintiffs' claims in General Division Case No. 09 CV 684581 for tortious interference with rights of inheritance and unjust enrichment and their prayer for compensatory and punitive damages should be dismissed for lack of ripeness. See Complaint at p. 2.

Relator's request for a writ of prohibition should be denied because respondent Judge Mason does not patently and unambiguously lack jurisdiction over the claims asserted in General Division Case No. 09 CV 684581 and relator does not lack adequate remedies in the ordinary course of the law. Accordingly, respondents respectfully urge this Court to dismiss relator's Complaint and this cause pursuant to S.Ct.Prac.R. 10.5.

As this is an action in prohibition, relator's Complaint tests only the jurisdiction of the lower court. See *State ex rel. Corn v. Russo*, 90 Ohio St.3d 551, 554, 2001-Ohio-15, 740 N.E.2d 265; *State ex rel. Staton v. Common Pleas Court* (1965), 5 Ohio St.2d 17, 21, 213 N.E.2d 164. "Jurisdiction" means the court's power to adjudicate a case and encompasses jurisdiction over the subject matter, the person, and the particular case. See *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992, at ¶¶ 11-12.

To be entitled to a writ of prohibition, the relator must show that (1) the respondents were exercising or about to exercise judicial or quasi-judicial power; (2) the exercise of that power was unauthorized by law; and (3) denial of the writ would cause injury for which no other adequate remedy exists in the ordinary course of the law. See *State ex rel. Westlake v. Corrigan*, 112 Ohio St.3d 463, 2007-Ohio-375, 860 N.E.2d 1017, at ¶ 12.

"In the absence of a patent and unambiguous lack of jurisdiction, a court having general subject-matter jurisdiction can determine its own jurisdiction, and a party challenging that jurisdiction has an adequate remedy by appeal." *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, at ¶ 12. "Prohibition will not issue as a substitute for appeal to review mere errors in judgment." *State ex rel. Nalls v. Russo*, 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522, at ¶ 28. Thus "[a]ppeal, not prohibition, is the remedy for the correction of errors or irregularities of a court having proper jurisdiction." *Smith v. Warren*, 89 Ohio St.3d 467, 468, 2000-Ohio-223, 732 N.E.2d 992.

When deciding a prohibition case, this Court need not determine the merits of the underlying jurisdictional issue, for its review "is limited to whether jurisdiction is *patently and unambiguously lacking*." *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 431, 2001-Ohio-301, 751 N.E.2d 472 (emphasis in original; internal punctuation omitted). See, also, *State*

ex rel. Mason v. Burnside, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, at ¶ 12 “[O]ur duty in prohibition cases is limited to determining whether jurisdiction is patently and unambiguously lacking.”)

For purposes of this case, there is no dispute that respondents are exercising judicial power in the underlying cases. Beyond that, however, relator cannot establish the grounds necessary for extraordinary relief in prohibition.

To begin, relator’s Complaint does not state any grounds for issuance of a writ of prohibition against Probate Judge Gallagher. There is no suggestion anywhere that she lacks jurisdiction to adjudicate the claims that are pending in Probate Court Case No. 2009 ADV 144867 concerning the estate of Sofija Schurowliew. See R.C. 2101.24; 2109.50. To the extent relator’s Complaint does not provide any reason to doubt Judge Gallagher’s jurisdiction to conduct judicial proceedings in Probate Court Case No. 2009 ADV 144867, relator has not stated any claim for relief in prohibition against Judge Gallagher.

With regard to General Division Judge Mason, relator’s Complaint does not state any legitimate grounds for issuance of a writ of prohibition against him. Relator does not dispute that the Cuyahoga County Court of Common Pleas is a court of general subject matter jurisdiction that, under R.C. 2305.01, has original jurisdiction in all cases in which the sum or matter in dispute exceeds the exclusive jurisdiction of county courts. In *BCL Enterprises, Inc. Ohio Dept. of Liquor Control*, 77 Ohio St.3d 467, 1997-Ohio-254, 675 N.E.2d 1, the Supreme Court of Ohio stated: “It is well settled that ‘[t]he court of common pleas is a court of general jurisdiction. It embraces all matters at law and in equity that are not denied to it.’” *Id.* at 469, 1997-Ohio-254, 675 N.E.2d 1 (quoting *Saxton v. Seiberling* (1891), 48 Ohio St. 554, 558-559, 29 N.E. 179).

As it relates to the instant case, there can be no doubt either that the General Division of the Court of Common Pleas generally has the basic statutory jurisdiction under R.C. 2305.01 to hear claims for negligence, fraud, conversion, breach of fiduciary duty, and unjust enrichment or that the Probate Division of the Court of Common Pleas generally does not have exclusive jurisdiction over such claims under R.C. 2101.24. Indeed, in *Roll v. Edwards*, 156 Ohio App.3d 227, 2004-Ohio-767, 805 N.E.2d 162, the court held that the probate court lacked exclusive or plenary jurisdiction over a claim for intentional interference with an inheritance expectancy.³

Relator asks this Court to dismiss plaintiffs Vera and Alex Schurowliew's claims for negligence, fraud, conversion, and breach of fiduciary duty because they lack standing. See Complaint at p. 1. In *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 1998-Ohio-275, 701 N.E.2d 1002, the Supreme Court of Ohio held that a claimed lack of standing was an issue that should be "properly addressed by the trial court or upon appeal, not by way of a writ of prohibition." *Id.* at 79, 1998-Ohio-275, 701 N.E.2d 1002.

In any case, it cannot be said that General Division Judge Mason *patently* and *unambiguously* lacks jurisdiction to conduct proceedings over the claims asserted in General Division Case No. 09 CV 684581. And to the extent that the tort causes of action asserted in General Division Case No. 09 CV 684581 are different from the estate asset causes of action asserted in Probate Division Case No. 2009 ADV 144867, the jurisdictional priority rule would not forbid these state courts of concurrent jurisdiction from going forward with their respective proceedings. See *State ex rel. Shimko v. McMonagle*, 92 Ohio St.3d 426, 429, 2001-Ohio-301,

³ While the court there ultimately determined that the claim for interfering with an expectancy of inheritance was not yet ripe, the fact that the complaint did not state a ripened claim upon which relief could be granted is analytically different from the question of whether the court has jurisdiction – that is, the power – to hear the case in the first place. But see *Grimes v. Grimes*, 173 Ohio App.3d 537, 2007-Ohio-5653, 879 N.E.2d 247, ¶ 32.

751 N.E.2d 472 (first case does not prevent second case if it does not involve the same cause of action or parties).

Inasmuch as the General Division of the Court of Common Pleas is a court having general subject-matter jurisdiction that does not patently and unambiguously lack jurisdiction over the claims asserted in General Division Case No. 09 CV 684581, Judge Mason can determine his own jurisdiction to proceed and appeal is an adequate remedy to address relator's challenge to that jurisdiction. See *Dzina v. Celebrezze*, supra.

Appeal is not inadequate just because it would have to await final judgment. See *State ex rel. Willacy v. Smith*, 78 Ohio St.3d 47, 50, 1997-Ohio-244, 676 N.E.2d 109 (rejecting contentions that appeal from subsequent adverse final judgment would be inadequate due to time and expense); *Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, 76 Ohio St.3d 374, 379, 1996-Ohio-384, 667 N.E.2d 1189 (fact that postjudgment appeal contesting jurisdiction may be may be time-consuming and expensive does not render appeal inadequate so as to justify extraordinary writ of prohibition).

It should be recalled that prohibition "is an extraordinary remedy which is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies." *State ex rel. Henry v. Britt* (1981), 67 Ohio St.2d 71, 73, 424 N.E.2d 297. In *State ex rel. Ellis v. McCabe* (1941), 138 Ohio St. 417, 35 N.E.2d 571, the court said:

A writ of prohibition will not be issued unless it clearly appears that the court or tribunal 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.

Id., syllabus at paragraph three. Thus "[b]ecause of its nature, the writ of prohibition is to be used with care and caution. The right thereto must be clear, and in a doubtful or borderline case

its issuance should be refused.” *State ex rel. Merion v. Court of Common Pleas of Tuscarawas Cty.* (1940), 137 Ohio St. 273, 277, 28 N.E.2d 641.

In this case, relator’s Complaint does not clearly establish that respondent Judge Mason patently and unambiguously lacks jurisdiction to conduct judicial proceedings in General Division Case No. 09 CV 684581. Judge Mason can determine in the first place whether or not he has jurisdiction over the particular claims presented. Relator’s Complaint does not contend let alone establish that he lacks adequate remedies in the ordinary course of the law. Consequently, relator’s Complaint does not establish the grounds necessary for the extraordinary writ of prohibition.

Respondents accordingly request that this Court dismiss relator’s Complain and this cause pursuant to S.Ct.Prac.R. 10.5.

CONCLUSION

Respondents Judge Lance Mason and Judge Laura Gallagher respectfully request that this Court dismiss the Complaint and this cause pursuant to S.Ct.Prac.R. 10.5.

Respectfully submitted,

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of Cuyahoga County, Ohio

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PROOF OF SERVICE

A true copy of the foregoing Respondents' Motion to Dismiss was served this 18TH day of May 2010 by regular U.S. Mail, postage prepaid, upon:

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