

IN THE SUPREME COURT OF OHIO

ORIGINAL

State ex rel.
MICHAEL ROBERTS

CASE NO. 2012-1136

Relator,

Original Procedendo Action

-vs-

KIMBERLY COCROFT, Judge

Respondent,

RELATOR'S REPLY TO RESPONDENT'S MOTION TO DISMISS
Pursuant to Rule 12(A)(2), of the Ohio Rules of Civil Procedure

Comes now Relator, Mr. Roberts acting in a Pro se capacity, who humbly moves this Honorable Court to Overrule Respondent's Motion to Dismiss of the Honorable Kimberly Cocroft for the following substantive particularized reasons, and as a strict matter of fundamental fairness grounded in justice. The attached memorandum fully supports the granting of this equitable request.



Respectfully submitted,

Michael Roberts

Michael Roberts #609-069
CCI PO Box #5500
Chillicothe, OH 45601

CERTIFICATE OF SERVICE

I do hereby certify that I did forward a true copy of this motion upon Respondent's Counsel of record, Asst. Prosecuting Attny., Jeremy D. Smith, located at 373 S. High St. 13th Fl., Columbus, OH 43215, via regular US Mail on this 1 day of August, 2012.

Michael Roberts

MLR/Sc
CC:FILED

MEMORANDUM IN SUPPORT

At first blush, Respondent's attempt at issues of "redherring," wants to string this court along lines of misrepresentation of substantive law and facts. Instead of answering the Relator's pleading, the respondent chose to circumvent the real issue with a summary dismissal pursuant to Civ R. 12(B)(6).

Standard of Review:

When deciding a Motion to Dismiss presented pursuant to Civ. R. 12(B)(6), which harmonious with Fed R. Civ. P. 12(b)(6), the Court must accept all the well pleaded allegations of the complaint as true and must construe them in the light most favorable to the Plaintiff; Erickson v. Pardus, 551 U.S. 89, 127 S.Ct. 2187, 167 L.Ed.2d 1081 (2007). Courts should look to the specific allegations of the complaint to determine whether they plausibly support a legal claim for relief. Alvarado V. KOB-TV, LLC, 493 F.ed 1210, 1215 (10th Cir. 2007). That is, a complaint must include "enough facts to state a claim to relief that is plausible on its face." TON Services, Inc. v. Owest Corp., 493 F.3d 1225, 1235 (10th Cir. (2007).

Finally, because Relator here is proceeding *Pro se*, the Court is to construe his pleadings with liberality. See Ledbetter v. City of Topeka, Kan., 318 F.3d 1183, 1187 (10th Cir. 2003).

Law and Argument:

In this case subjudice, Respondent at first argues the procedural requirements set forth in R.C. 2569.25(C)(1). As such, reasonable minds would conclude that the Relator being in the custody of the ODRC is at the mercy of the Institution, and forced to abide by its policy and procedures. It is clear that the ODRC is a division of the State, and that any deficiencies committed by its officers are imputed to the division thereof.

Relator, is required to prepare his filings, and present it with prepaid stamped envelope to the Institution's cashier dept., who then handles the preparation of the Certified Account Statement. Relators is prohibited from obtaining such Acct. statement for his personal inspection before it is mailed to the perspective clerk of court. Respondent concedes that Relator has indeed filed an affidavit of indigency, but for reasons beyond his control that affidavit is lacking in some way. This argument is presented in bad faith, and should be held as lacking in substantive merit.

Moreover, Respondent then argues that Relator fails to state that he has a right to the requested relief, citing *State ex rel Weiss v. Hoover (1999)*, *84 Ohio St.3d 530, 532-32, 705 N.E.2d 122&*, and *Ex rel. Richard v. Callabrese(1993),66 Ohio St.3d 193, 610 N.E.2d 1002*.

LAW AND ARGUMENT CONTINUED

In order to be entitled to a writ of procedendo, **Roberts** must establish a clear legal right to require respondents to proceed, a clear legal duty on the part of respondents to proceed, and the lack of an adequate remedy in the ordinary course of law. *State ex rel. Sherrills v. Cuyahoga Cty. Court of Common Pleas* (1995), 72 Ohio St. 3d 461, 462, 650 N.E.2d 899, 900. A writ of procedendo is appropriate when a court has either refused to render a judgment or has unnecessarily delayed proceeding to judgment. *State ex rel. Miley v. Parrott* (1996), 77 Ohio St. 3d 64, 65, 671 N.E.2d 24, 26. For example, a writ of procedendo will issue requiring a judge to proceed to final judgment if the judge erroneously stayed the proceeding based on a pending case that has no effect on the court's jurisdiction to proceed. *State ex rel. Crandall, Pheils & Wisniewski v. DeCessna* (1995), 73 Ohio St. 3d 180, 184, 652 N.E.2d 742, 745.

The Respondent argues that Mr. Roberts feels he is entitled to the requested *procedendo* because Rule 40 of the Rules of SuperIntendence, and that Rule 40 does not create rights in litigants. However, Respondent fails to mention what the "*inter alia*," are. SuperIntendence Rule 40 was promulgated by this very court to instruct, and insure that the "Fundamental Fairness" of "Due Process" is accorded all litigants. The onus is on the Trial Courts/Respondents "Duty" to make a timely ruling on Relator's Motion as stated above.

It is presumed that Rule 40 is setting a standard of guidelines for the expeditious adjudication of the court to ensure the Constitutional Mandates of Due Process. So as such, please forgive Relator's oversight in failing to mention what he might have thought as a given.

Mr. Roberts, has acted with all due diligence in presenting his (2) Motions in the proper vehicle for the courts timely ruling, and waited patiently before filing a motion to proceed to judgment which was denied. The demands of justice would inquire as the the trial court's reasons for not ruling either way on Relators Motion to Withdraw His Plea, and Judicial Notice, but can find the time and effort to deny his subsequent request for proceeding to judgment.

WHEREFORE: In the interest of justice, Relator asked that this court issue the writ of procedendo, so that he can try to effectuate the some modicum of relief in justice.