

MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

I. INTRODUCTION

Relator Melvin Marinkovic (aka Mel Marin), a vexatious litigator under R.C. 2323.52, appears to request that this Court compel the Mahoning County Court of Appeals to vacate its decision not to grant Relator leave to proceed pursuant to R.C. 2323.52. Relator's Exhibits C and J, Vexatious Litigator Orders (noting that Marinkovic identifies himself as "Mel Marin, aka Mel Marinkovic aka Melvin Marinkovic").¹ As argued below, Relator's complaint fails because his request for leave to proceed failed the requirements for leave to appeal pursuant to R.C. 2323.52. Accordingly, Respondent Court of Appeals respectfully asks this Court to dismiss Relator's action in mandamus.

II. STATEMENT OF FACTS

On December 1, 2011, Relator wrote a civil complaint that he later filed in the Mahoning County Court of Common Pleas against several defendants alleging fraud, conspiracy to commit fraud, and "foreclose lien." Relator's Ex. A, *Marinkovic v. Liller* complaint without date-stamp. In response, the defendants filed a motion for summary judgment. Relator's Ex. E, *Marinkovic v. Liller*, Mahoning C.P., Case No. 12 CV 256.

On July 4, 2012, Relator wrote an opposition to summary judgment for that case. Relator's Ex. F. Relator's complaint in the present matter claims that he responded to the defendant's opposition, but he has provided no indication that he timely or properly filed this

¹ Civil Rule 12(B)(6) requires that, where a motion to dismiss presents matters outside of the complaint, the court treat the motion as one for summary judgment under Civil Rule 56. However, the court may consider documents attached to or incorporated into the complaint in a motion to dismiss. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 49 (1997). Here, Relator's complaint cites repeatedly to the Trumbull County Court of Common Pleas' vexatious litigator order (attached to his complaint as Exhibit C) and to the Mahoning County Court of Common Pleas' vexatious litigator order (attached as Exhibit J). Additionally, Relator's complaint cites to and relies heavily upon his attached exhibits lettered A-L.

opposition with the court of common pleas. Complaint, pp. 7-8. Defendants filed a motion for default judgment with the court of common pleas. Relator's Ex. G.

On August 14, 2012, the common pleas court dismissed Relator's complaint for failure to move or plead. Relator's Ex. J. In that same order, the Mahoning County Court of Common Pleas also declared Relator a vexatious litigator pursuant to R.C. 2323.52(D)(1). *Id.* Pursuant to the vexatious litigator order, Relator is prohibited from instituting litigation or continuing legal proceedings in the Ohio Court of Claims or municipal or county courts in Mahoning County. *Id.*

On September 13, 2012, Relator filed with Respondent Mahoning County Court of Appeals a motion for leave to appeal the common pleas court's judgment entry. Relator's Ex. L. On November 14, 2012, Respondent Court of Appeals denied Relator's request. Relator's Ex. L, *Marinkovic v. Liller*, 7th Dist. No. 12 MA 166 (Nov. 14, 2012).

On December 21, 2012, Relator filed this complaint seeking a writ of mandamus against Respondent Mahoning County Court of Appeals.

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which a court can grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt, Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering the factual allegations of the complaint, a court must accept incorporated items as true and "the plaintiff must be afforded all reasonable inferences possibly derived therefrom." *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). However, the Court need not accept unsupported legal conclusions. *York v. Ohio State*

Highway Patrol, 60 Ohio St.3d 143, 147, 573 N.E.2d 1063 (1991) (citing *Mitchell*, 40 Ohio St. at 756). Finally, a court must find that the plaintiff's complaint does not provide relief on any possible theory. Civ. R. 12(B)(6); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1199, ¶ 8.

B. Relator is not entitled to relief in mandamus.

A writ of mandamus will issue only where three requirements are met: (1) the relator must have a clear legal right to the requested relief; (2) the respondent must have a clear legal duty to perform the requested relief; and (3) the relator must have no adequate remedy at law. *State ex rel. Van Gundy v. Indus. Comm'n*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13, citing *State ex rel. Luna v. Huffman*, 74 Ohio St.3d 486, 487, 659 N.E.2d 1279 (1996). Because Relator fails to meet these requirements, his mandamus action must fail.

Relator has no legal right to the relief he requests because he has not sued a proper party in this mandamus action. A court is not in itself sui juris and, absent express statutory authority, cannot sue or be sued in its own right. *Malone v. Court of Common Pleas of Cuyahoga Cty.*, 45 Ohio St.2d 245, 248, 344 N.E.2d 126 (1976); *State ex rel. Cleveland Municipal Court v. Cleveland City Council*, 34 Ohio St.2d 120, 121, 296 N.E.2d 544 (1973). Here, Relator has sued only the "Mahoning County Court of Appeals." Complaint, cover page. Because the only respondent named in this action is not an entity that Relator can sue, this Court should dismiss his complaint.

Even if Relator had sued a proper party, he has no legal right to have the Court of Appeals grant him leave to proceed pursuant to R.C. 2323.52, nor does the Court of Appeals have a legal duty to do so. Where a vexatious litigator pursuant to R.C. 2323.52 files a motion for leave to proceed with a court of appeals, that court "shall" dismiss a motion for leave to

proceed where the court is not satisfied that “the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application.” R.C. 2323.52(F)(2).

On November 14, 2012, the Court of Appeals determined that Relator had not demonstrated any reasonable ground for proceeding or that the application was not an abuse of process, pursuant to R.C. 2323.52. Complaint, Ex. J. In reaching this decision, the Court of Appeals noted that it had searched the Ohio Supreme Court’s website and found that Relator had a vexatious litigator order from Trumbull County, dated February 21, 2012, issued against him. Complaint, Ex. J. Revised Code 2323.52(D)(1)(a) allows a common pleas court to enter a vexatious litigator order that prohibits the litigator from proceeding in “the court of claims or in a court of common pleas, municipal court, or county court” without first seeking leave of the issuing court. The Trumbull County vexatious litigator order prohibits Relator from filing “in a court of common pleas” without first seeking leave of the Trumbull County Court of Common Pleas. Complaint, Ex.C. Respondent Mahoning County Court of Appeals determined that the docket lacked any indication that Relator had first sought leave to file in the Mahoning County Court of Common Pleas pursuant to the Trumbull County order and as required by R.C. 2323.52. Complaint, Ex. J. The Respondent Court of Appeals noted that, despite failing to file for leave, Relator continued to file pleadings in the Mahoning County Court of Common Pleas. *Id.* Given his multiple filings in the Mahoning County Court of Common Pleas without first seeking leave, Respondent Court of Appeals appropriately determined that he had not demonstrated any reasonable ground for proceeding or that the application was not an abuse of process. Accordingly, the Court of Appeals properly denied Relator’s motion to leave.

Finally, Relator has an adequate remedy at law by way of appeal to this Court. An extraordinary writ will not issue where a relator does not avail himself of a remedy by way of appeal. *State ex rel. Corrigan v. Griffin*, 14 Ohio St.3d 26, 27, 470 N.E.2d 894 (1984). Here, Relator has not indicated, nor does the record support, that he has attempted to appeal to this Court.

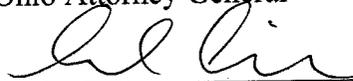
In sum, Relator has not demonstrated that he has met any of the requirements necessary for an extraordinary writ to issue.

IV. CONCLUSION

For the foregoing reasons, Respondent Mahoning County Court of Appeals respectfully asks this Court to dismiss Relator's Complaint.

Respectfully submitted,

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Counsel for Respondent

Mahoning County Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion to Dismiss of Respondent Mahoning County Court of Appeals* was served by regular U.S. mail, postage prepaid, on January 16, 2013 upon the following:

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