

IN THE SUPREME COURT OF OHIO

ORIGINAL

Kevin O'Brien & Associates Co., L.P.A.
and Columbus Checkcashers, Inc.
and Checks 2 Cash, Inc.

Case No. 2013-0156

Relators,

v.

Original Action in Mandamus

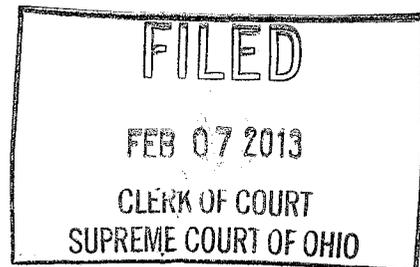
Hon. Judge David B. Tyack
and Lori M. Tyack

Respondents.

**RESPONDENT LORI M. TYACK'S MOTION TO DISMISS
RELATORS' COMPLAINT FOR WRIT OF MANDAMUS**

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Pursuant to S.Ct.Prac.R. 10.5(A) and Civ.R. 12(B)(6), Respondent Lori M. Tyack, Clerk of the Franklin County Municipal Court, moves this Court to dismiss Relators' complaint for a writ of mandamus because it fails to state a claim upon which relief can be granted. Additionally, the action was not brought in the name of the state on the relation of the people applying. A Memorandum in Support is attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Respondent Clerk Lori Tyack is the duly elected Clerk of the Franklin County Municipal Court (“the Clerk’s Office”). Relators Kevin O’Brien & Associates Co., L.P.A., (hereinafter “O’Brien”), Columbus Checkcashers Inc. (hereinafter (“CCC”), and Checks 2 Cash Inc. (hereinafter “C2C”), filed this action in mandamus seeking orders regarding two separate issues pertaining to the Clerk’s Office’s disbursement of funds. For “Count One” of their complaint, Relators describe an incident where the Clerk’s Office mistakenly disbursed \$81.55 of garnished funds to Attorney William Yost rather than O’Brien and CCC. [Complaint at ¶ 12]. According to Relators, Yost has never returned the funds to the Clerk’s Office. *Id.* at ¶ 23. According to Relators, Franklin County Municipal Judge David Tyack then “improperly ordered Clerk Tyack to pay O’Brien the wrongly disbursed funds, apparently out of taxpayer money. By law, this can only be accomplished by the passage of a city ordinance.” *Id.* at ¶ 30. According to Relators, “Clerk Tyack did not pay the funds and does not have the funds as they have never been recovered from Attorney Yost.” *Id.* at 32. According to Relators, “To date, the matter has not been rectified and Attorney Yost has not returned CCC’s money to the Clerk.” *Id.* at 33.

For “Count Two” of their complaint, Relators allege that the Clerk’s Office mistakenly disbursed garnished funds to Attorney Jonathan Holfinger rather than O’Brien and C2C. According to Relators, Judge Peeples of the Franklin County Municipal Court “issued an Entry which ordered Holfinger to return the funds to O’Brien.” *Id.* at ¶ 47. According to Relators, “Judge Tyack, on his own authority and without notice to O’Brien

or C2C or any hearing, improperly set aside Judge Peeples' order of February 3, 2010 and had Clerk Tyack strike Judge People's February 3, 2010 Entry from the court docket, which she did." *Id.* at ¶ 50. According to Relators, "Over the past three years, O'Brien has regularly spoken to Judge Tyack and his bailiff and has been repeatedly assured that the matter of the wrongly disbursed funds would be resolved," but "To date, the matter has not been rectified and Attorney Holfinger has not returned CCC's money to the Clerk." *Id.* at ¶¶ 54-55.

Relators have asked this Court to order the Clerk's Office "to promptly process those funds, correct the court records and remit payment to Relators," and "to develop procedures and methods to avoid distributing garnishment monies to the incorrect parties and to recover said monies in the event of an error." Although it is the Clerk's Office's position that the facts as alleged by Relators in their complaint are incomplete, they will be taken as true for purposes of this motion to dismiss.

II. LAW AND ARGUMENT

A. Legal Standard

A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint. *Volbers-Karich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. In order for a court to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). For purposes of the motion, a court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the

non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St. 3d 190, 192, 532 N.E. 2d 753 (1988).

B. Relators' Complaint is Facially Defective

This action in mandamus was not instituted in conformity with the provision of Section 2731.04 of the Revised Code requiring that an application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying. The court has dismissed petitions for writs of mandamus when, *inter alia*, the action was not brought in the name of the state on the relation of the person requesting the writ. *Blankenship v. Blackwell* (2004), 103 Ohio St. 3d 567, 574 (2004).

C. The Requisites for Mandamus

Even if Relators' petition was not procedurally deficient, it would still lack merit. The requisites for mandamus are well established: (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) there must be no adequate remedy at law. *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118, 118-119, 515 N.E.2d 914 (1987). Mandamus is an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases. *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977). It is clear from the face of Relators' complaint that they are unable to establish those requisites.

Relators have asked this Court to order the Clerk's Office "to promptly process those funds, correct the court records and remit payment to Relators." This order must be denied because Relators' right to the relief sought is not clear and there are other adequate and specific means of relief for Relators. Clearly the Clerk's Office cannot simply pay

O'Brien the wrongly disbursed funds out of taxpayer money. According to Relators, "By law, this can only be accomplished by the passage of a city ordinance." [Complaint at ¶ 30]. Relators are able to file motions with the trial court to compel Yost and Holfinger to repay the allegedly mistakenly disbursed funds so they can be paid to Relators. It is ultimately up to the trial court to decide whether or not those motions have merit. Mandamus cannot control judicial discretion. R.C. 2731.03. The remedy has never been extended so far as, or ever used, to control the discretion and judgment of such tribunal acting within the scope of its judicial power. *State ex rel. De Ville Photography, Inc. v. McCarroll*, 167 Ohio St. 210, 211 (1958). Further, if Relators disagree with any decisions or orders of the trial court, they can appeal. Mandamus is not a substitute for appeal. *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 631 N.E.2d 119 (1994); and *State ex rel. Pressley v. Indus. Comm. of Ohio*, 11 Ohio St.2d 141, 228 N.E.2d 631 (1967), paragraph three of the syllabus. Mandamus does not lie to correct errors and procedural irregularities in the course of a case, because appeal provides an adequate remedy. *Kennedy v. Chalfin* (1974), 38 Ohio St. 2d 85, 310 N.E.2d 233.

Relators do not allege that the Clerk's Office abused its discretion in any way, yet Relators have asked this Court to order the Clerk's Office "to develop procedures and methods to avoid distributing garnishment monies to the incorrect parties and to recover said monies in the event of an error." This request also must be denied. "The extraordinary writ of mandamus cannot be used to control the exercise of administrative or legislative discretion." *State ex rel. Dublin v. Delaware Cty. Bd. of Comm'rs.*, 62 Ohio St. 3d 55, 60, 577 N.E.2d 1088 (1991). "Absent an abuse of discretion, mandamus cannot compel a public body or official to act in a certain way on a discretionary matter." *State*

ex rel. Veterans Serv. Office v. Pickaway Cty. Bd. of Cty. Comm'rs. (1991), 61 Ohio St. 3d 461, 463, 575 N.E.2d 206 (1991). Mandamus is designed to redress past grievances not control future conduct to prevent future injury. *Curran v. Board of Park Comm'rs*, 22 Ohio Misc. 197, 200 (Ohio C.P. 1970) "Mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives." *State ex rel. Mecartney v. Hummel*, 150 Ohio St. 18, 20-21 (1948).

III. CONCLUSION

Based on the foregoing, Respondent Clerk Lori Tyack respectfully requests that this Court issue an Order dismissing Relators' Complaint with prejudice, assessing costs to Relator, and ordering any other relief deemed necessary and just.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Respondent's Motion to Dismiss was sent by First Class U.S. Mail, postage prepaid, to the following this 7th day of February 2013.

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