

No. 2013-0274

Original Action for Writ of Quo Warranto

In the Supreme Court of Ohio

STATE OF OHIO ex rel. TIMOTHY A. SWANSON

Relator,

v.

GEORGE T. MAIER

Respondent.

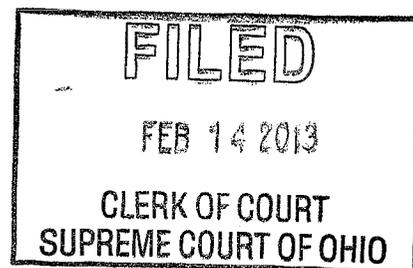
**MOTION OF RESPONDENT GEORGE T. MAIER TO DISMISS COMPLAINT FOR
WRIT OF QUO WARRANTO**

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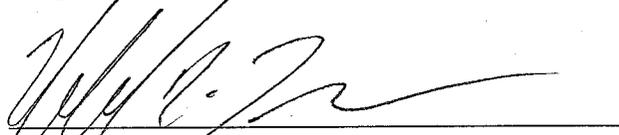
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Pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure, as made applicable herein by Rule 10.2 of the Supreme Court Rules of Practice, Respondent George T. Maier respectfully moves this Court to dismiss the Complaint for a Writ of Quo Warranto filed by Relator Timothy A. Swanson. Even when viewing the allegations in the Complaint in a light most favorably to Relator, this Court can only conclude that Relator has failed to state a claim for which relief may be granted because Relator lacks standing to pursue the relief requested. Specifically, Relator has failed to sufficiently demonstrate an entitlement to the office for which he seeks to oust Respondent, namely, the Sheriff of Stark County, Ohio. The reasons in support of this Motion are set forth in detail in the attached Memorandum in Support.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

Relator Timothy A. Swanson (“Swanson”) filed his Complaint for a Writ of Quo Warranto (“Complaint”), seeking (1) the ouster of Respondent, George T. Maier (“Maier” or “Sheriff Maier”), the currently and rightful Sheriff of Stark County, Ohio, and (2) an Order placing Swanson in possession of the office of Sheriff. See generally Compl. The Complaint should be dismissed because Swanson lacks standing to bring this action. An action for quo warranto may be filed by a private citizen (as opposed to the attorney general or appropriate prosecutor) only when the person can demonstrate that he is entitled to the public office at issue. See, e.g., State ex rel. Newell v. Jackson, 118 Ohio St.3d 138, 140, 886 N.E.2d 846, 848 (2008). Here, the allegations of the Complaint fail to sufficiently demonstrate that Swanson is entitled to the office of Sheriff of Stark County, Ohio. Accordingly, the Complaint should be dismissed.

II. STATEMENT OF RELEVANT ALLEGATIONS

Swanson served as Stark County Sheriff from 1999-2000, after being appointed to the position, and also between 2000 and 2012, based on his being elected in the 2000, 2004, and 2008 General Elections. Compl. ¶ 2. Swanson did not, however, run for re-election in 2012.

Michael A. McDonald (“McDonald”) was elected Sheriff as a result of the 2012 General Election, which term began on January 7, 2013. Id. ¶ 3. Before assuming the role, however, on January 3, 2013, McDonald reported to the Stark County Commissioners that health reasons prevented him from performing the duties of Sheriff. Id. ¶ 4. The next day, and pursuant to a resolution, the Stark County Commissioners appointed Swanson to serve as interim sheriff until the appropriate central committee could appoint a replacement sheriff to fill the vacancy left by McDonald, as permitted by R.C. 305.02(F). See id. ¶ 5. Specifically, the Stark County Resolution stated that Swanson was to serve as acting sheriff “between the occurrence of the

vacancy caused by the officer-elect's inability to assume the office, and the time when an officer is appointed by the appropriate central committee, qualifies, and takes office." Ex. B to Compl. Consequently, when the appropriate central committee appointed its officer, and the appointed officer took office, Swanson's authority to act as Sheriff immediately ceased.

The Stark County Democratic Central Committee ("DCC") was the appropriate central committee to fill the vacancy, because McDonald was a Democratic candidate. See R.C. 305.02(B); Compl. ¶ 7. On February 5, 2013, the DCC held a public meeting, during which Maier was selected by majority vote of the members, thereby becoming the DCC's appointment to fill the vacancy for Sheriff left by McDonald. See id. ¶ 9. On February 8, 2013, Maier was sworn in as the Sheriff, and, on February 11, 2013, Maier posted the necessary bond. See Swanson Aff. ¶ 10. Thus, the Complaint acknowledges that Maier has actually taken the office of Stark County Sheriff. Compl. ¶ 16.

The Complaint alleges that Maier is not qualified to be Sheriff under R.C. 311.01(B)(8) and (B)(9). See id. ¶¶ 18-45. As a result, the Complaint seeks a writ of quo warranto to oust Maier as Sheriff and to place Swanson in possession of the office of Sheriff. See id. ¶¶ 1, 50-52. The Complaint fails to provide sufficient evidence, however, to demonstrate that Swanson is entitled to possession of the office of Sheriff of Stark County, Ohio.

Indeed, Swanson is not entitled to possession of the office of Sheriff for three reasons. First, the express terms under which he was appointed pursuant to the Stark County Commissioner's Resolution have expired. The resolution appointing Swanson interim sheriff included an express end-date to his appointment: "when an officer is appointed by the appropriate central committee, qualifies, and takes office." Ex. B to Compl. Sheriff Maier was elected by the DCC, qualifies, and has taken office. Second, placing Swanson in the office of

Sheriff would be a violation of Ohio's elections laws. R.C. 305.02(B) expressly permits the DCC, as the appropriate central committee, to fill the vacancy of Sheriff. Swanson was not one of the available candidates who could have been appointed by majority vote. See Compl. ¶ 9. Therefore, this Court's appointing Swanson as the Sheriff pursuant to this action for quo warranto would improperly usurp the statutory authority granted to the DCC. Third, even if Maier was removed by this Court as being unqualified pursuant to R.C. 311.01(B)—which should not occur—such an outcome would simply create another vacancy, which would need to be filled. Swanson has failed to aver or otherwise demonstrate that he would be the individual appointed by the appropriate government authority to fill the void created by Sheriff Maier's vacancy.

Accordingly, and as explained in more detail below, Swanson lacks the standing to maintain this action, and the Complaint should be dismissed.¹

III. LAW AND ARGUMENT

A) Standard of Review

A respondent in a quo warranto action is entitled to file a motion to dismiss for failure to state a claim under Rule 12(B)(6) of the Ohio Rules of Civil Procedure. See State ex rel. Yeagley v. Harden, 68 Ohio St.3d 136, 624 N.E.2d 702 (1993); State ex rel. Hawthorn v. Russell, 107 Ohio St.3d 269, 838 N.E.2d 666, 2005-Ohio-6431. Moreover, a Rule 12(B)(6) motion is the appropriate procedural mechanism to dismiss an action for lack of standing. See, e.g., Hawthorn, 107 Ohio St.3d ¶¶ 3, 6.

¹ Sheriff Maier notes for the Court that he vigorously disputes the allegations in the Complaint that he is not qualified to be appointed Sheriff pursuant to R.C. 311.01(B)(8) and (B)(9). That issue will become ripe, however, only if the Court denies this Motion to Dismiss, and the case proceeds forward.

A motion to dismiss for failure to state a claim pursuant to Rule 12(B)(6) “is procedural and tests the sufficiency of the complaint.” State ex rel. Hanson v. Guernsey Cty. Bd. of Comm’rs, 65 Ohio St.3d 545, 548, 605 N.E.2d 378 (1992). Dismissal is proper under Ohio Civil Rule 12(B)(6) when it is clear “beyond doubt that the [non-moving party] can prove no set of facts in support of his claim which would entitle him to relief.” O’Brien v. Univ. Cmty. Tenants Union, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). All facts alleged in the complaint must be construed in favor of the non-moving party. See Mitchell v. Lawson Milk Co., 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Although a court is restricted to reviewing the four-corners of the Complaint when presented with a motion to dismiss under Rule 12(B)(6), the court may validly examine documents attached as exhibits to the complaint. See State ex rel. Crabtree v. Franklin Cty. Bd. of Health, 77 Ohio St.3d 247, 249, n.1, 673 N.E.2d 1281 (1997).

Here, even accepting all averments in the Complaint as true, this Court should dismiss the Complaint because Swanson cannot demonstrate that he is entitled to the office of Sheriff of Stark County, Ohio.

B) Swanson Lacks Standing to Maintain his Quo Warranto Action.

“Quo warranto is the exclusive remedy by which one’s right to hold a public office may be litigated.” State ex rel. Johnson v. Richardson, 131 Ohio St.3d 120, 961 N.E.2d 187, 2012-Ohio-0057, ¶ 15 (quoting State ex rel. Battin v. Bush, 40 Ohio St.3d 236, 238-39, 533 N.E.2d 301 (1988)). R.C. 2733.06 permits the filing of an action for quo warranto by a private citizen “claiming to be entitled to a public office unlawfully held and exercised by another.” Id. This Court has consistently held that such an action may be maintained by meeting two elements: (1) the office at issue is being unlawfully held and exercised by respondent; and (2) relator is entitled to the office. See, e.g., Newell, 118 Ohio St.3d ¶ 6 (citing State ex rel. Paluf v. Feneli, 69 Ohio St.3d 138, 141, 630 N.E.2d 708 (1994)). Thus, a private citizen (as opposed to the attorney

general or prosecuting attorney) may only bring a quo warranto action when he is personally claiming title to the office at issue. Id.

A complaint for quo warranto need not demonstrate, beyond all doubt, that relator is entitled to the office, but, rather, must be based upon good faith and reasonable grounds. State ex rel. Hanley v. Roberts, 17 Ohio St.3d 1, 6, 476 N.E.2d 1019 (1985). Nevertheless, a complaint for quo warranto may not merely allege that the relator is entitled to the office, but must aver facts to demonstrate such an entitlement. See State ex rel. Davis v. Plapp, 58 Ohio App. 321, 16 N.E.2d 586 (1st Dist. 1937) (holding that the relator failed to allege a cause of action for quo warranto because his complaint failed to contain “any allegations showing the conditions under which he was appointed and the right of the court to appoint him” if the respondent was removed from office). Indeed, a simple allegation that the relator is entitled to the position is a mere legal conclusion and is insufficient to properly maintain an action for quo warranto. Id.

Here, the Complaint alleges that Swanson should be placed into the office of Sheriff if the Court removes Maier, but fails to aver any facts to demonstrate that the Court would have authority to do so. Thus, the Complaint is legally insufficient, fails to demonstrate that Swanson has standing to pursue the action, and it should be dismissed.

1) The Resolution Under Which Swanson Was Appointed Has Expired.

The Stark County Commissioners’ Resolution appointing Swanson indicates that the County Commissioners were acting in accordance with R.C. 305.02(F), which statute states:

The board of county commissioners may appoint a person to hold any of the offices named in division (A) of this section as an acting officer and to perform the duties thereof between the occurrence of the vacancy and the time when the officer appointed by the central committee qualifies and takes the office.

Id. The Resolution expressly provides that Swanson is only authorized to act as interim sheriff “between the occurrence of a vacancy caused by the officer-elect’s inability to assume the office,

and the time when an office is appointed by the appropriate central committee, qualifies, and takes office.” Ex. B to Compl. By its own terms, therefore, Swanson was the interim sheriff only until the central committee appointed a replacement Sheriff, and said Sheriff took office. See id.

Here, the allegations of the Complaint demonstrate that Sheriff Maier was duly appointed by the DCC on February 5, 2013, pursuant to an appropriate meeting. See Compl. ¶ 9. The Complaint further avers that Sheriff Maier has actually assumed and taken office. See id. ¶ 16. Swanson admits in his Affidavit that Maier was sworn-in on February 8, 2013, and obtained a bond as required under law to fulfill his appointment. See Swanson Aff. ¶ 10. Exhibit D to the Complaint is a Journal Entry from the Stark County Court of Common Pleas Administrative Judge verifying, pursuant to R.C. 311.01(F)(1), that Maier swore, under oath, as to the truth of his qualifications for the Office of Sheriff of Stark County.²

Accordingly, because Sheriff Maier was appointed as Sheriff by the DCC, obtained the necessary bond, was properly sworn-in, and has actually taken the office of Sheriff of Stark County, Ohio, Swanson’s right to act as interim sheriff has expired pursuant to the express terms of the Resolution and pursuant to R.C. 305.02(F). Stated differently, once the DCC appointed Sheriff Maier and he actually took office, title to the office of Sheriff vested in Maier. See State ex rel. Norman v. Viebranz, 19 Ohio St.3d 146, 147, 483 N.E.2d 1176 (1985) (“By the act of appointment, title is vested.”). Swanson no longer has any authority to act as Sheriff of Stark County, as the Resolution appointing him is no longer valid. Therefore, he cannot demonstrate that he has title to the office of Sheriff, even if Maier is removed as requested. Swanson’s Complaint for a writ of quo warranto should be dismissed.

² Exhibit D actually cites R.C. 311.02(F)(1), but this is clearly a clerical error, as there is no R.C. 311.02(F)(1).

2) **A Violation of R.C. 305.02 Would Result if Swanson Was Entitled to the Office of Sheriff.**

Perhaps even more problematic for Swanson is that placing him in the office of Sheriff, even for a short time following the requested removal of Maier, would result in a violation of prevailing Ohio election laws. R.C. 305.02(B) grants exclusive authority to the “county central committee of the political party with which the last occupant of the office was affiliated” to appoint a person to fill an existing vacancy under the facts and circumstances of this case. It is undisputed that the DCC was the appropriate body to act to fill the vacancy in this case. See Compl. ¶ 7. Three individuals submitted their names for consideration of the appointment: Lou Darrow, Maier, and Lawrence Dordea. Id. In other words, Swanson’s name was not among those which the DCC could have appointed. Swanson admits as much in his Affidavit, stating that the only qualified candidates for the office were those available to the DCC during the February 5, 2013 meeting. See Swanson Aff. ¶ 9.

This Court’s placing Swanson in the office of Sheriff would, therefore, usurp the exclusive authority of the DCC to appoint a person to fill the then-existing vacancy. Moreover, the DCC’s authority to appoint a person to fill the vacancy only extends to forty-five (45) days after the vacancy occurs. R.C. 305.02(C). If Maier is removed as requested, and Swanson is placed in office by this Court, it would effectively foreclose the DCC’s ability to select a candidate to fill the vacancy as permitted by Ohio law.

Swanson has no right, under the Resolution or R.C. 305.02, to the title of the office of Sheriff of Stark County. Therefore, his Complaint should be dismissed.

3) **Even if Maier Is Removed, Swanson Cannot Demonstrate that He Would be Legally Entitled to Fill the Vacancy.**

The final basis for why Swanson has no right to the office of Sheriff, which is related to the second reason above, is that the removal of Sheriff Maier as requested by the Complaint

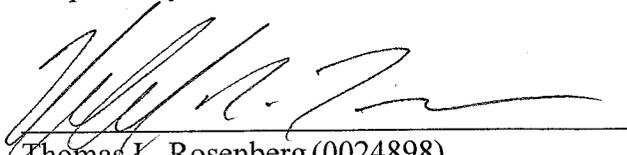
would simply create another vacancy in the office. See State ex rel. Hanley v. Roberts, 17 Ohio St.3d 1, 7, 476 N.E.2d 1019 (1985) (noting that the decision to grant relator's quo warranto meant that "the office of chief of police is vacant"). As explained above, once an appointment has been made by an appropriate government body as permitted under law, title in that office vests. Norman, 19 Ohio St.3d at 147. This Court has also held that "[t]he power of appointment, once exercised, is exhausted until a new vacancy occurs. Where power has been given to appoint to an office and the same has been exercised, any subsequent appointment to the same office will be void unless the prior incumbent has been removed or the office has otherwise become vacant." State ex rel. Gahl v. Lutz, 132 Ohio St. 466, 471, 9 N.E.2d 288 (1937).

The Complaint contains no allegations that, if such a new vacancy is created, Swanson would be the individual appointed to fill the vacancy. Indeed, any such allegation would amount to pure conjecture.

IV. CONCLUSION

For all of the foregoing reasons, this Court should dismiss Relator's Complaint for a Writ of Quo Warranto. The Complaint fails in the basic requirement to aver adequately that Swanson has the right to title of the office of the Sheriff of Stark County, Ohio. By failing to meet this requirement, Swanson lacks standing to maintain this case as a private citizen. Swanson is simply not an appropriate party to maintain this action under Ohio statute or the case law interpreting those statutes.

Respectfully submitted,



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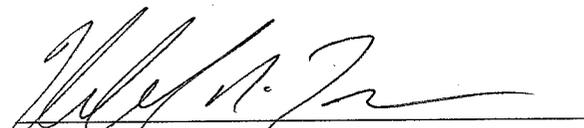
PROOF OF SERVICE

A copy of the foregoing was served on February 14, 2013 pursuant to Civ. R. 5(B)(2)(c),

Civ. R. 5(B)(2)(f), and S. Ct. R. 14.2 by e-mail and mailing it by United States mail to:

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