

**IN THE  
SUPREME COURT OF OHIO**

**STATE OF OHIO EX REL.  
ZILBERBRAND, ET AL.**

**: Case No. 13-0051**

**Relators**

**:  
: ORIGINAL ACTION  
: IN PROHIBITION**

**vs.**

**HON. NORBERT A. NADEL, JUDGE,  
HAMILTON COUNTY COURT OF  
COMMON PLEAS**

**:  
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:  
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:**

**Respondent**

**MEMORANDUM IN OPPOSITION TO  
MOTION FOR LEAVE TO AMEND COMPLAINT BY  
HONORABLE NORBERT A. NADEL, JUDGE, COURT OF COMMON PLEAS,  
HAMILTON COUNTY AND COURT OF COMMON PLEAS, HAMILTON COUNTY**

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<b>STATE OF OHIO EX REL. ZILBERBRAND, ET AL.</b>	:	<b>Case No. 13-0051</b>
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<b>Relators</b>	:	<b><u>ORIGINAL ACTION</u></b>
	:	<b><u>IN PROHIBITION</u></b>
<b>vs.</b>	:	
	:	<b><u>MEMORANDUM IN</u></b>
<b>HON. NORBERT A. NADEL, JUDGE, HAMILTON COUNTY COURT OF COMMON PLEAS</b>	:	<b><u>OPPOSITION TO MOTION FOR</u></b>
	:	<b><u>LEAVE TO AMEND</u></b>
	:	<b><u>COMPLAINT</u></b>
<b>Respondent</b>	:	

**MEMORANDUM**

The Relators have moved the Court for leave to amend their Complaint. The Hamilton County Court of Common Pleas and Judge Norbert Nadel (“Respondents”) oppose the motion for leave because the amendment would be futile in this instance.

**A. Procedural Background in the Court of Common Pleas**

As set out in the Motion to Dismiss filed by Respondents, there appears to be a factual dispute that is not yet resolved. Relator moved to dismiss the case in the Court of Common Pleas because no service upon the Defendants occurred. The Plaintiff responded with a memorandum and an email attached, purportedly from Plaintiff/Relator’s attorney, agreeing to waive service. There has yet to be an evidentiary hearing in the Court of Common Pleas on the Motion to Dismiss to determine whether the Zilberbrand attorneys sent the email waiving service and if so, the significance of the email, if any. Until the facts are found, there is no clear right to dismissal of the Complaint in the Court of Common Pleas.

In the proposed Amended Complaint before this Court, the Relator wants to change the argument from improper service to a violation of the requirement of Ohio Civ. R. 3(A) because service of summons did not occur within a year. It would seem that to prevail, the attorneys for Relator must acknowledge that they sent the email agreeing to waive service and argue that the email and their purported agreement to waive service was simply permissible gamesmanship.

**B. Argument**

In *Studier v. Taliak* (8<sup>th</sup> Dist. 1991) 74 Ohio App.3d 512 the court upheld the denial of a Motion to Amend a Complaint if the proposed amendment is futile. The Federal Courts follow the same line of reasoning. *Carson v. U.S. Office of Special Counsel*, 633 F.3d 487, 495 (6th Cir. 2011). A court may deny a motion for leave to amend for futility if the amendment could not withstand a motion to dismiss. *Riverview Health Inst. LLC v. Med. Mut. of Ohio*, 601 F.3d 505, 512 (6th Cir. 2010).

In this instance the proposed amendment to the complaint still deals with the significance of the email and purported waiver of service. The facts concerning it have not been determined. This Court has held that, “[i]f contested allegations of defective service of process are not premised upon a complete failure to comply with the minimum-contacts requirement of constitutional due process, prohibition does not lie.” *State ex rel. Suburban Construction Co. v. Skok* (1999), 85 Ohio St.3d 645, 646, 710 N.E.2d 710. No such minimum-contacts claims are made by Relators and the Complaint should be dismissed.

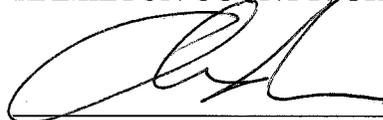
With or without the proposed amendment the question still concerns contested allegations of defective service. The proposed amendment to the Complaint is futile and the matter should be dismissed.

**CONCLUSION**

The Motion to file an Amended Complaint should be denied.

Respectfully,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served upon each party of record in this case by ordinary U.S. mail on the 13th day of February, 2013 addressed to:

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