

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, ex rel. TIMOTHY)
A. SWANSON,)
)
Relator,)
)
vs.)
)
GEORGE T. MAIER,)
)
Respondent.)

CASE NO. 2013-0274

ORIGINAL ACTION IN
QUO WARRANTO

RELATOR'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS

Gregory A. Beck (0018260)
(Counsel of Record)
James F. Mathews (0040206)
BAKER, DUBLIKAR, BECK
WILEY & MATHEWS
400 South Main Street
North Canton, Ohio 44720
Phone: (330) 499-6000
Fax: (330) 499-6423
E-mail: beck@bakerfirm.com
mathews@bakerfirm.com
Counsel for Relator

Thomas L. Rosenberg (0024898)
Michael R. Traven (0081158)
ROETZEL & ANDRESS, LPA
PNC Plaza, Twelfth Floor
155 East Broad Street
Columbus, Ohio 43215
Phone: (614) 463-9770
Fax: (614) 463-9792
E-mail: trosenberg@ralaw.com
mtraven@ralaw.com
Counsel for Respondent

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**RELATOR'S MEMORANDUM IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**

I. INTRODUCTION.

The Relator, Timothy A. Swanson ("Swanson"), filed his complaint seeking a writ of quo warranto in this case on February 12, 2013. Relator alleges that the Respondent, George T. Maier ("Maier"), has unlawfully assumed the Office of Sheriff in Stark County, Ohio. This allegation, and thus this case, turns on whether or not the Respondent possessed the necessary credentials to qualify for the Office of Sheriff, under the strict qualifications set forth in R.C. 311.01(B). Relator alleges that the Respondent did not possess the necessary credentials to qualify under R.C. 311.01(B)(8) or R.C. 311.01(B)(9) and, consequently, Maier never lawfully assumed the office.

In turn, the Relator Swanson further alleges that he is lawfully entitled to the Office of Sheriff, pursuant to the appointment to that position made by the Stark County Commissioners on January 4, 2013. In his motion to dismiss filed February 14, 2013, the Respondent challenges the Relator's "standing" to bring this action. What the Respondent fails to acknowledge in his motion is that the only reason the Relator is not serving as Stark County Sheriff at this moment, and exercising the authority of that office, is the unlawful assumption of the office by the Respondent based upon his later appointment by the Stark County Democratic Central Committee (an appointment challenged as being invalid in this case). In other words, but for the Respondent's unlawful appointment, the Relator Swanson has every legitimate right to be serving as Stark County Sheriff. The complaint sets forth clearly and succinctly the factual predicate for the claim that Maier's appointment was never legitimate and, therefore, never valid. The Relator has standing to pursue the ouster of Maier in this action and, accordingly, the motion to dismiss should be overruled.

II. RESPONDENT ACKNOWLEDGES THAT THE ALLEGATIONS OF THE COMPLAINT ARE TAKEN AS TRUE FOR PURPOSES OF THE MOTION TO DISMISS.

The Respondent's motion is filed under Ohio R. Civ. P. 12(B)(6). The parties recognize that, pursuant to S.Ct. Prac. R. 10.2, in an original action, the "Ohio Rules of Civil Procedure shall supplement these rules [the Rules of Practice of the Supreme Court of Ohio] unless clearly inapplicable." Respondent further recognizes in his motion that all factual allegations in the complaint "must be construed in favor of the non-moving party." Mitchell v. Lawson Milk Co. (1988), 40 Ohio St. 3d 190, 192. (Respondent's Brief, p. 5). The more-accurate statement of the rule is that the "factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom." Volbers-Klarich v. Middletown Mgmt., Inc., 125 Ohio St. 3d 494, 2010-Ohio-2057, ¶12 (Citations omitted). *See also*, City of Cincinnati v. Beretta USA, 95 Ohio St. 3d 416, 2002-Ohio-2480, ¶5. "[A]s long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." Id. For a motion to dismiss, under Civ. R. 12(B)(6), to be granted it "must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief." Id.

In light of this standard, the analysis of Relator's standing must begin with acceptance of the following facts as true:

- Relator Swanson possesses the experience and background to legally qualify for the Office of Sheriff, pursuant to R.C. 311.01(B). Swanson served as Stark County Sheriff from 1999 through January 6, 2013, by appointment and multiple elections. (Complaint, ¶2).
- Relator was appointed by the Stark County Commissioners to serve as acting Sheriff on January 4, 2013. Swanson then took the oath of

office, and his bonds were obtained and approved as required by law. (Complaint, ¶¶5, 6).

- The Relator's appointment remains effective until a legally-qualified person is appointed as Stark County Sheriff, under R.C. 305.02. (Complaint, ¶¶5, 51; Ct. Exhibit "B").
- Respondent Maier did *not* possess the credentials in order to qualify for the Office of Sheriff by the qualification date of February 6, 2013. (Complaint, ¶¶17, 20, 33, 45, 47-49).
- Despite his lack of legal qualifications, the Stark County Democratic Central Committee purported to appoint Respondent to the Office of Sheriff by vote taken on February 5, 2013. At the time of the vote, the Central Committee made no effort to determine Maier's qualifications for office, despite the fact that such qualifications had been contested. (Complaint, ¶¶9, 10, 15).
- Based only upon the putative appointment by the Stark County Democratic Central Committee, the Respondent has assumed the Office of Stark County Sheriff. In other words, the Respondent does not claim the office by any other action in any form. (Complaint, ¶¶16, 50).

Perhaps the most significant factual allegation that must be accepted as true at this point in these proceedings is the essential allegation that the Respondent Maier does not legally qualify to hold the Office of Stark County Sheriff. Assuming such facts, as alleged in the complaint, as true, the purported appointment by the Stark County Democratic Central Committee was a nullity and never effective. R.C. 311.01 is clear on this issue. "[N]o person is eligible to be a candidate for sheriff, and **no person shall be elected or appointed to the office of sheriff, unless that person meets all of the following requirements**" R.C. 311.01(B). (Emphasis added).

III. SWANSON HAS STANDING UNDER THE FACTS ALLEGED IN THE COMPLAINT, INASMUCH AS THE MERE ACT OF APPOINTMENT UNDER R.C. 305.02 DOES NOT CURE AN APPOINTEE'S LACK OF LEGAL QUALIFICATIONS FOR THE OFFICE.

Standing, generally, is satisfied when one has a “stake in the outcome” of litigation. E.g., State ex rel. E. Cleveland Fire Fighters v. Jenkins, 96 Ohio St. 3d 68, 70, 2002-Ohio-3527; Cleveland v. Shaker Heights (1987), 30 Ohio St. 3d 49, 51. Because the appointment of Respondent was never valid, for reasons alleged in the complaint, the Respondent’s appointment never supplanted the Relator’s lawful appointment to the office by the County Commissioners. Relator’s stake in the outcome of this quo warranto action is manifestly clear.

Otherwise, in a quo warranto action the relator “need not establish his right to title to the public office beyond all doubt, but rather need only establish his claim ‘in good faith and upon reasonable grounds.’” State ex rel. Powers v. Curtis, 2003-Ohio-6104, ¶10; State ex rel. Delph v. Barr (1989), 44 Ohio St. 3d 77, 80 (Citations omitted). *Accord*, State ex rel. Hanley v. Roberts (1985), 17 Ohio St. 3d 1, 6. In the complaint, the Relator has set forth a series of facts which fully support his claim to the Office of Stark County Sheriff “in good faith and upon reasonable grounds.” Those facts need not be rehashed yet again.

The Respondent appears to suggest that the action of the Stark County Democratic Central Committee in “appointing” him to serve as Sheriff operates in some fashion to effectively cure any lack of qualifications for the office, simply because the Committee acted within the time frame set forth in R.C. 305.02(C). Maier argues that the “DCC’s authority to appoint a person to fill the vacancy only extends to forty-five (45) days after the vacancy occurs.” (Respondent’s Brief, p. 8). It is correct that, under R.C. 305.02(C), the Central Committee was to meet within 45 days after the vacancy occurred to address the matter of appointment. There is absolutely no authority within R.C. 305.02, however, authorizing the Central Committee to appoint a person to the Office of Sheriff who does not qualify for that office under the strict provisions of R.C. 311.01. It simply does not matter

that Maier's purported appointment was within the time parameters of R.C. 305.02(C). The DCC had no authority to appoint an unqualified person to the Office of County Sheriff.

The Respondent, in his motion, takes further liberty with R.C. 305.02. Respondent's argument that Swanson does not have standing relies upon the false assumption that "once the DCC appointed Sheriff Maier and he actually took office, title to the office of Sheriff vested in Maier." (Respondent's Brief, p. 7). In other words, the Respondent again suggests that the DCC could somehow cure Respondent's lack of qualifications for the Office of Sheriff, by the simple act of voting to appoint. As a matter of law, the DCC possessed no authority to somehow waive the legal requirements for the Office of Sheriff set forth in R.C. 311.01(B). In the absence of the necessary qualifications for office, as alleged in the complaint, title to the Office of Stark County Sheriff *never* "vested" with Respondent Maier as he claims. Respondent should not have assumed the office and began exercising any authority of that office. Ouster, in quo warranto, is the remedy available in this case. R.C. 2733.14.

Logic dictates that the resolution of the Stark County Commissioners appointing Relator as acting Sheriff remains valid, precisely because the Respondent was never qualified to assume the functions of that office. Consequently, upon the ouster of Respondent, the Relator Swanson will remain entitled to serve as Sheriff, until a duly-qualified successor is lawfully appointed. R.C. 2733.17.

Relator has alleged a legitimate factual basis for his claim for entitlement to the Office of Sheriff. Regardless, even if the Relator should fail to establish his entitlement to the office, that would not justify dismissal of the complaint as the Respondent suggests. This Court has recognized on numerous occasions that "[i]f a relator in a quo warranto proceeding fails to establish entitlement

to the office, judgment may still be rendered on the issue of whether respondent lawfully holds the disputed office.” State ex rel. Deiter v. McQuire, 119 Ohio St. 3d 384, 2008-Ohio-4536, ¶22; State ex rel. Newell v. Jackson, 118 Ohio St. 3d 138, 2008-Ohio-1965, ¶8; State ex rel. Myers v. Brown, 87 Ohio St. 3d 545, 547, 2000-Ohio-478; State ex rel. Varnau v. Wenninger, 131 Ohio St. 3d 169, 2012-Ohio-224, ¶12. *Accord*, State ex rel. Powers v. Curtis, supra at ¶11. Thus, regardless of Respondent’s contention that the Relator is not entitled to the Office of Sheriff, dismissal is not warranted. “If [Swanson] established that [Maier] is unlawfully holding the office of [sheriff], [h]e would be entitled to the writ to oust him.” State ex rel. Newell v. Jackson, supra, at ¶8.

This rule is premised upon R.C. 2733.08. R.C. 2733.08 states:

When an action in quo warranto is brought against a person for usurping an office, the petition shall set forth the name of the person claiming to be entitled to the office, with an averment of his right thereto. Judgment may be rendered upon the right of the defendant, and also on the right of the person averred to be so entitled, or only upon the right of the defendant, as justice requires.

All persons who claim to be entitled to the same office or franchise may be made defendants in one action, to try their respective rights to such office or franchise.

Relator’s complaint contains the necessary factual allegations called for under the statute. The Court in State ex rel. Deiter v. McQuire, supra, observed:

[I]t is apparent that Section 2733.08 recognizes that a relator’s proof may fail in regard to one element and yet succeed with respect to the other, and provides that in such instance the court, as representative of the state, shall step in and render whatever decision is required by justice.

Id., 2008-Ohio-4536, ¶22. Therefore, Respondent’s motion to dismiss is wholly without merit.

Finally, the Respondent contends that proceeding to the merits of this case could result in a “violation of R.C. 305.02.” (Respondent’s Brief, p. 8). Not proceeding with the merits of this case will result in a violation of R.C. 311.01(B). R.C. 311.01(B) has an “unequivocal and definite

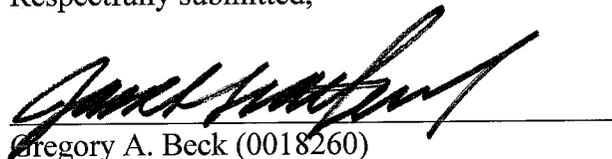
meaning,” and the requirements for election or appointment as a County Sheriff are just that, requirements. *See, Wellington v. Mahoning County Bd. of Elections*, 117 Ohio St. 3d 143, 2008-Ohio-554, ¶48. Regardless, any predicament that the Stark County Democratic Central Committee has placed itself in by the appointment of a person to hold the Office of Sheriff who does not possess the necessary legal qualifications is a predicament of its own creation. The DCC will have to deal with any consequences produced by the outcome of this case.

IV. CONCLUSION.

Assuming the facts set forth in the complaint as true at this stage, Relator’s appointment as acting Stark County Sheriff by the Stark County Commissioners has not “expired” by its own terms, because no legally-qualified successor has been appointed. Upon ouster of Respondent, the Office of Sheriff necessarily defaults to Swanson’s prior appointment. The Relator has alleged facts sufficient to assert standing in this case under R.C. 2733.06 – he claims entitlement to the office based upon his lawful appointment which predated Maier’s tainted appointment.

WHEREFORE, Relator, Timothy A. Swanson, respectfully requests that the Respondent’s motion to dismiss be overruled. Further, Relator respectfully requests that a schedule be fixed for the prompt completion of discovery, presentation of evidence and submission of briefs.

Respectfully submitted,



Gregory A. Beck (0018260)

(Counsel of Record)

James F. Mathews (0040206)

BAKER, DUBLIKAR, BECK

WILEY & MATHEWS

400 South Main Street

North Canton, Ohio 44720

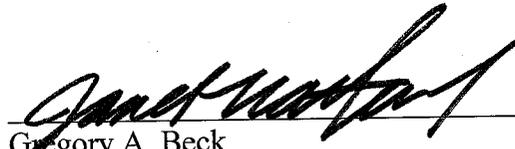
Phone: (330) 499-6000
Fax: (330) 499-6423
E-mail: beck@bakerfirm.com
mathews@bakerfirm.com

Counsel for Relator

PROOF OF SERVICE

A copy of the foregoing memorandum was served by regular U.S. mail this 21st day of February, 2013, to:

Thomas L. Rosenberg, Esq.
Michael R. Traven, Esq.
Roetzel & Andress, LPA
PNC Plaza, Twelfth Floor
155 East Broad Street
Columbus, Ohio 43215
Counsel for Respondent



Gregory A. Beck
(Counsel of Record)

James F. Mathews
BAKER, DUBLIKAR, BECK
WILEY & MATHEWS