ORIGINAL

IN THE SUPREME COURT OF OHIO

State Ex Rel. Kevin O'Brien & Assoc. Co. L.P.A., et al.	:	
Relators,	:	Case No. 2013-0156
v.	:	Original Action in Mandamus
Hon. Judge David B. Tyack	:	
Respondents.	:	

RELATORS' MEMORANDUM CONTRA RESPONDENTS LORI M. TYACK'S AND HON. JUDGE DAVID B. TYACK'S MOTION TO DISMISS

A. Legal Standard.

A motion to dismiss for failure to state a claim on which relief can be granted tests the sufficiency of the complaint, Volbers-Karich v. Middletown Mgt., Inc., 125 Ohio St.3d 494. In order for a court to dismiss a complaint for failure to state a claim on which relief can be granted, it must appear beyond a reasonable doubt that from the complain that the plaintiff can prove no set of facts entitling him to relief. O'Brien v. University Tenants Union, Inc. (1975(, 42 Ohio St.2d 242. For purposes of the motion, a court must presume that all factual allegations of the complain are true and make all reasonable inferences in favor of the non-moving party, Mitchell v. Lawson Milk Co. (1988), 40 Ohio St. 3d 190.

B. Relators' Complaint has Been Amended and is not Facially Defective.

Respondents allege that Relators' Complaint must be dismissed because it was not brought in the name of the state on the relation of the person applying. Relators have

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amended their complaint to properly bring their action in the name of the state. Therefore, there are no grounds to dismiss Relators' Complaint on this basis.

C. Relators have Satisfied the Requisites for Mandamus.

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 duty to perform the requested relief, and (3) there must be adequate remedy at law, State ex rel Ney v. Niehaus (1987), 33 Ohio St. 118.

Here, when presuming the factual allegations of the complaint to be true and making all reasonable inferences in favor of the non-moving party, Relators have clearly satisfied these three elements.

As to Clerk Tyack, the first two elements should be so obviously satisfied as to require no explanation. It is Clerk Tyack's job and duty as the elected Clerk of the Franklin County Municipal Court to properly receive, account for and disburse funds for the Court. When Clerk Tyack was elected she certainly swore an oath to perform these duties for the public to the best of her ability. Clerk Tyack does not appear to disagree that she failed to properly account for the funds and mistakenly disbursed funds on the wrong case and to the wrong attorney. Rather, her argument appears to be that she cannot be compelled to fix the problem. This completely misses the point and is incomprehensibly irresponsible coming from an elected official. **Clerk Tyack should not have to be compelled by the Supreme Court to do her job and fulfill her duty to the public.** R.C. 1901.31(F) spells out the duties of the clerk of a municipal court and states:

> The clerk of a municipal court ***shall*** receive, collect, and issue receipts for all costs, fees, fines, bail, and other moneys payable to the

> office or to any officer of the court. The clerk ***shall*** on or before the twentieth day of the month following the month in which they are collected disburse to the proper persons or officers, and take receipts for, all costs, fees , fines, bail, and other moneys that the clerk collects.

Clerk Tyack has a mandatory statutory duty to property collect, account for and disburse funds paid to the Clerk. As an elected official she should take it upon herself to use her best efforts to fulfill her duties with being ordered to do it. Relators obviously have a right to have their funds properly account for and disbursed by the Clerk. Therefore, the first two elements set forth above are satisfied as to Clerk Tyack.

Relators have also satisfied the first two elements as to Judge Tyack. As detailed in Relators' Complaint, this matter came before Judge Peoples for a full hearing, which included testimony from a representative of Clerk Tyack's Office. Judge Peoples then issued her Decision and Entry which ordered the parties wrongfully in possession of the mistakenly disbursed funds to return those funds to the Clerk's office. Judge Tyack then chose, without any explanation, to inject himself into the matter and vacate Judge Peoples' Order without any type of notice to Relators or any type of hearing. This constituted a massive violation of Relators' due process rights. Relators clearly have the right not to have their substantive and procedural rights violated by an elected judge, who had absolutely no prior contact with the matter, without any type of due process whatsoever. Relators have satisfied the first two elements set forth above as to Judge Tyack.

Relators do not have an adequate remedy at law. First, Relators do not have standing to sue the parties who are now in possession of the funds. The funds in question are not due directly to Relators. Rather, the funds are due to the Clerk who, as discussed

above, must then properly account for the funds and disburse the funds to Relators. Only the Clerk has standing to recover the funds.

Second, Relators cannot file an appeal because Judge Tyack and or Clerk Tyack have, wrongfully and in violation of R.C. 1901.31(E), failed to property docket the hearing and entries in these cases, altered the court docket and destroyed the Entries from which Relators might have appealed. R.C. 1901.31(E) states:

> The clerk shall prepare and maintain a general index, a docket, and other records that the court, by rule, requires, all of which shall be the public records of the court. In the docket, the clerk shall enter, at the time of the commencement of an action, the names of the parties in full, the names of the counsel, and the nature of the proceedings. Under proper dates, the clerk shall note the filing of the complaint, issuing of summons or other process, returns, and any subsequent pleadings. The clerk also shall enter all reports, verdicts, orders, judgments, and proceedings of the court, clearly specifying the relief granted or orders made in each action.

Clerk Tyack has completely failed to fulfill her duties under R.C. 1901.31(E). Relators' due process rights have been denied and the court record has been altered. Entries which were previously on the Court docket have vanished without explanation. Relators cannot appeal an entry that has simply been removed from the record as though it never existed. It is astounding that Clerk Tyack and Judge Tyack assert that Relators should simply file an appeal when they are fully aware that no such appeal is possible due to the alterations to the court docket. Relators have no adequate remedy at law and therefore fulfill the third element set forth above.

D. CONCLUSION

Relators have clearly satisfied all three elements necessary to maintain this action. The fact is, Relators have been trying unsuccessfully for years to resolve this issue without the need for litigation. Unfortunately, all attempts to resolve this issue have met

with frustration. Relators are unable to understand why Clerk Tyack and Judge Tyack are not willing to simply fulfill their duty to the public and fix what everyone involved agrees began with an administrative mistake.

WHEREFORE, Relators respectfully ask that Respondents' Motion be DENIED and that Judgment be entered in favor of Relators.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Memorandum Contra was served on the parties set forth below by ordinary U.S. Mail, today , June 18, 2013, by ordinary first class U.S. Mail, postage prepaid.

Kevin O'Brien