

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE EX REL. CLAUGUS FAMILY :
 FARM, L.P., :
 :
 Relator, : Case No. 2014-0423
 :
 v. : Original Action in Mandamus and Prohibition
 :
 SEVENTH DISTRICT COURT OF :
 APPEALS, *et al.*, :
 :
 Respondents. :

MOTION TO DISMISS OF RESPONDENTS
 THE SEVENTH DISTRICT COURT OF APPEALS, JUDGE GENE DONOFRIO,
 JUDGE JOSEPH J. VUKOVICH, AND JUDGE MARY DEGENARO

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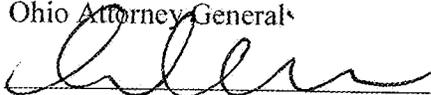
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**MOTION TO DISMISS OF RESPONDENTS
THE SEVENTH DISTRICT COURT OF APPEALS, JUDGE GENE DONOFRIO,
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Pursuant to S.Ct. R. Pract. 12.04(A)(2), Respondents the Seventh District Court of Appeals, Judge Gene Donofrio, Judge Joseph J. Vukovich, and Judge Mary DeGenaro respectfully ask this Court to dismiss Relator's complaint. A memorandum in support is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. INTRODUCTION

Relator Claugus Family Farm, L.P. filed this suit seeking writs of mandamus and prohibition against the Seventh District Court of Appeals and three of its judges: Judge Gene Donofrio, Judge Joseph J. Vukovich, and Judge Mary DeGenaro (Respondents). Relator challenges a September 26, 2013 tolling order that Respondents issued in underlying oil and gas lease case, to which Relator is not a party. Specifically, Relator has entered into a new oil and gas lease that will be impacted by the tolling order if it does not clear its title. Relator first learned about the tolling order in October 2013 and Relator has until June 27, 2014 to clear its title pursuant to the new contract. Since October 2013, Relator has made no attempt to intervene in the underlying case. Relator has an adequate remedy at law by way of motion to intervene and subsequent appeal if necessary. As argued below, because Relator has an adequate remedy at law, this Court must deny its writ for mandamus and prohibition against Respondents.

II. STATEMENT OF THE FACTS

The relevant facts of Relator's complaint, assumed to be true for purposes of this motion, are as follows:

Underlying this lawsuit is an ongoing oil and gas lease dispute between landowner plaintiffs and Beck Energy Company in the Monroe County Common Pleas Court, *Hupp v. Beck Energy Company*, Case No. 2011-345. Complaint, ¶ 9. Relator is not a party to that lawsuit and it has never been served notice of that lawsuit. *Id.* at ¶ 42. A prior owner of Relator's land had entered into an oil and gas lease with Beck Energy Company on February 4, 2004. *Id.* at ¶ 30. Relator believed that the lease would expire on its own terms ten years later, at midnight on February 3, 2014. *Id.* at ¶ 31.

On August 2, 2013, the Monroe County Common Pleas Court issued a tolling order of disputed mineral rights leases held by Beck Energy Company, the defendant in the underlying case, pending its appeal of one of the court's decisions and contingent upon payment of bond. Relator's Exhibit 6.¹ On September 26, 2013, in response to motions filed in the Seventh District Court of Appeals—an emergency motion for injunctive relief, an emergency motion to set aside *supersedeas* bond, and the plaintiffs-landowners' motion to dismiss—Respondents modified the tolling order (“Tolling Order”). Complaint, ¶ 6; Relator's Exhibit 7. The September 26, 2013 Tolling Order specifically tolled the leases pursuant to “proposed defined class members” and set the tolling start date at October 1, 2012, the date the Beck Energy Company originally moved the common pleas court to toll the leases. Complaint, ¶¶ 15, 25.

On September 30, 2013, Relator entered into an oil and gas lease with Gulfport Energy Corporation for mineral rights (“Gulfport Lease”). *Id.* at 29. The Gulfport Lease included a 90 day “title period” from September 30, 2013 to December 29, 2013 during which Gulfport reviewed Relator's property title for defects. *Id.* at 34. The Gulfport Lease then provides a 180 day cure period following the title period during which Relator may cure any title defects, ending on June 27, 2014. *Id.* at 36.

In October 2013, Relator's counsel became aware of the Tolling Order. Complaint Memorandum, 8. Relator immediately contacted Gulfport to notify it about the Tolling Order, which Gulfport determined to be a defect on Relator's title. *Id.*

On March 18, 2014, Relator filed this complaint.

¹ Documents attached to or incorporated into the complaint may be considered on a motion to dismiss pursuant to Civ.R. 12(B)(6), without converting the motion into a motion for summary judgment. *State ex rel. Crabtree v. Franklin Cty. Bd. of Health*, 77 Ohio St.3d 247, 249, 673 N.E.2d 1281.

III. ARGUMENT

A. Standard of Review

A motion to dismiss for failure to state a claim upon which relief can be granted challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgmt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. When considering a motion to dismiss, a court must accept the factual allegations of the complaint as true. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Finally, a court should dismiss the case if it finds that the plaintiff's complaint does not provide relief on any possible theory. Civ. R. 12(B)(6); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.*, 108 Ohio St.3d 540, 2006-Ohio-1713, 844 N.E.2d 1999, ¶ 8.

B. Relator's Requests for Extraordinary Relief Fail because it has an Adequate Remedy in the Ordinary Course of Law.

Relator does not satisfy the requirements for either a writ of mandamus or a writ of prohibition to issue. "Neither prohibition nor mandamus will issue if appellants have an adequate remedy in the ordinary course of law." *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 21. Realtor has an adequate remedy in the ordinary course of law by way of intervention, and if motion to intervene is denied, by way of appeal of that motion. *State ex rel. Denton v. Bedinghaus*, 98 Ohio St.3d 298, 2002-Ohio-1424, 784 N.E.2d 99; *State ex rel. Gaydosh v. City of Twinsburg*, 93 Ohio St.3d 576, 757 N.E.2d 357 (2001).

In *State ex rel. Denton*, relators sought writs of mandamus and prohibition in the First District Court of Appeals. Relators sued several juvenile court judges challenging their application of relators' bail postings for third party delinquent child support debtors towards those debtors' child-support arrears. 2002-Ohio-1424, ¶¶ 1-4, 12. The court of appeals denied

those debtors' child-support arrears. 2002-Ohio-1424, ¶¶ 1-4, 12. The court of appeals denied relators' writs and relators appealed, arguing the appellate judges incorrectly denied relators' writs because they had no alternative remedy to raise these claims because they were not parties to the juvenile case proceedings. *Id.* at ¶ 27. The Court rejected relators' argument, determining that "upon discovering the juvenile court magistrates' alleged improper application of the bail money to the arrearages, [relators] could have moved to intervene to seek release of their funds. Appeal from any adverse judgment on either of these motions would have constituted an adequate remedy at law." *Id.* at ¶ 28 citing *State ex rel. Gaydosh*, 93 Ohio St.3d at 578 (determining that appeal of an order denying intervention after a final judgment is an adequate remedy in the ordinary course of law). Accordingly, the Court denied relators' writs because they had an adequate remedy at law by way of intervention and subsequent appeal.

Here, Relator has been aware of the Respondents' September 26, 2013 Tolling Order since October 2013 (Complaint Memorandum, 8), but took no action to intervene in the underlying case. Instead, without explanation, Relator waited until March 18, 2014 to file this action seeking extraordinary relief. Relator has until June 27, 2014 to comply with the terms of its contract with a third party, over three months after it filed this complaint and six months after learning of the Tolling Agreement. Complaint Memorandum, 8. Relator has an adequate remedy at law through which it may stave off any injury: it may still motion to intervene and appeal any denial of that motion. Accordingly, Relator is not entitled to extraordinary relief in either mandamus or prohibition.

IV. CONCLUSION

For the reasons argued above, Respondents Judge Gene Donofrio, Judge Joseph J. Vukovich, and Judge Mary Degenaro respectfully ask this Court to grant its motion to dismiss Relator's complaint.

Respectfully submitted,

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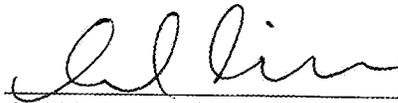
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Judge Mary DeGenaro*

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Dismiss of Respondents was served by U.S. mail on April 11, 2014 upon the following:

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