

IN THE SUPREME COURT OF OHIO

CARLEAN DATES,

Relator,

v.

**OHIO FIRST APPELLATE COURT OF
APPEALS, et al.,**

Respondents.

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: Case No. 2015-0238
:
: **Original Action in Mandamus**
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STATE RESPONDENTS' MOTION TO DISMISS

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STATE RESPONDENTS' MOTION TO DISMISS

Pursuant to Sup.Ct.Prac.R. 12.04 and Civ.R. 12(B)(6), State Respondents, the First District Court of Appeals and its Judges, hereby move this Court to dismiss Relator's petition for writ of mandamus. A memorandum in support of this motion is attached.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Relator Carlean Dates brings this current mandamus action seeking to compel the Respondents, Judges Lee H. Hildebrandt, Jr., Patrick F. Fischer, Patrick T. Dinkelacker, Penelope R. Cunningham, Richard P. DeWine, and Sylvia S. Hendon of the First District Court of Appeals (collectively, "First District" or "First District Court of Appeals"), to reverse its prior decision to dismiss her appeal. The Complaint asks this Court to require Respondents to avoid the appellate procedures enumerated in Revised Code Chapter 2505. This action, then, is improper under Civ.R. 12(B)(6) for failure to state a claim for which relief may be granted. Accordingly, the Court should dismiss Relator's Complaint.

I. STATEMENT OF FACT

In January 2012, HSBC Bank USA, National Association ("HSBC") initiated foreclosure proceedings against Relator Carlean Dates in the Hamilton County Court of Common Pleas. Respondents' Ex. A (entry dated 1/26/12).¹ In January 2014, the Court found in favor of HSBC. Ex. A (entry dated 1/29/14). On February 6, 2014, Relator filed an "Affidavit in Support of Motion for New Trial and Specific Negative Averment." Ex. A (entry dated 2/6/14). Relator's motion was denied by a magistrate on March 24, 2014, and affirmed by the Hamilton County Court of Common Pleas on April 30, 2014. Ex. A (entry dated 5/1/14).

Relator appealed the decision of the Hamilton County Court of Common Pleas to deny her motion for a new trial. Ex. A (entry dated 5/5/14). The First District Court of Appeals issued a scheduling order requiring the complete record to be filed by August 5, 2014.

¹ This Court has concluded that courts may take judicial notice of appropriate matters in determining a Civ.R. 12(B)(6) motion to dismiss without converting it to a motion for summary judgment. *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, 859 N.E.2d 923, ¶ 26. The Court has further recognized that courts can take judicial notice of filings that are readily accessible from the court's website. *State ex rel. Everhart v. McIntosh*, 115 Ohio St.3d 195, 2007-Ohio-4798, 974 N.E.2d 516, ¶¶ 8, 10. The following filings are accessible via the Hamilton County Clerk of Court's website under *HSBC Bank USA v. Carlean Dates*, A 1200734, and are attached to this Motion as Respondents' Exhibit A, for the Court's convenience.

Respondents' Ex. B (entry dated 5/5/14). When that date came and passed, Relator had failed to file a transcript of proceedings. On September 2, 2014, Relator filed two "mandatory judicial notices" but failed to file a transcript of proceedings. Ex. B (entry dated 9/2/14). Accordingly, The First District dismissed the case for failure to file a transcript of proceedings. Ex. B (entry dated 9/24/14).

In early October 2014, Relator filed a motion for reconsideration of dismissal. Ex. B (entry dated 10/6/14). That motion was granted on October 29, 2014, and gave the Relator until November 12, 2014, to file the original transcript of proceedings signed by the court reporter. Ex. B (entry dated 10/29/14). Instead, Relator filed an "initial brief" and a *copy* of a transcript of the proceedings. Ex. B (entry dated 11/12/14). Opposing counsel filed a motion to dismiss on December 5, 2014. Ex. B (entry dated 12/5/14). The Relator filed another "affidavit" in an attempt to re-file the transcript—once again with a *copy* of a transcript of proceedings attached. Ex. B (entry dated 12/19/14). The First District granted the motion to dismiss on December 22, 2014. Ex. B (entry dated 12/22/14). After dismissal of her case, Relator filed a "Praecipe Demand on Oaths and Bonds." Ex. B (entry dated 1/5/15).

Relator filed the present action with this Court on February 11, 2015. Relator brings this action in mandamus seeking to compel the First District to reverse their decision to dismiss her case, to make available certified copies of their oaths of office, and to remand and reverse all decisions made after Relator's "Praecipe Demand on Oath and Bond" was filed.

II. STANDARD OF REVIEW

Courts are permitted to dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted. *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. A motion to dismiss for failure to state a claim upon

which a court may grant relief challenges the sufficiency of the complaint itself, not evidence outside of the complaint. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11. The court must consider and accept all factual allegations of the complaint as true and afford all reasonable inferences in the nonmoving party's favor. *Russell*, 2006-Ohio-5858, at ¶ 9. Unsupported conclusions, however, are not sufficient and should not be admitted. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E.2d 1128 (1994). Ultimately, a court must find that the 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 1199, ¶ 8.

III. LAW AND ARGUMENT

A. Relator's petition for mandamus fails because mandamus is not appropriate to control judicial discretion.

Mandamus is an extraordinary legal remedy. *State ex rel. Gerspacher v. Coffinberry*, 157 Ohio St. 32, 36, 104 N.E.2d 1 (1952). The essential purpose of mandamus is to command the performance of an act or duty which the law especially enjoins upon an office or tribunal. *Id.* To be entitled to a writ of mandamus, the relator must establish three elements: (1) a clear legal right to the requested relief; (2) a corresponding clear legal duty on the part of the respondent; and, (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Richard v. Mohr*, 135 Ohio St.3d 373, 2013-Ohio-1471, 987 N.E.2d 650, ¶ 4. The burden of proof in mandamus rests with the moving party. *State ex rel. Van Gundy v. Indus. Comm.*, 111 Ohio St.3d 395, 2006-Ohio-5854, 856 N.E.2d 951, ¶ 13. If a relator fails to establish one of these elements, the court has discretion to dismiss the action. *Id.* at ¶ 1.

A writ of mandamus may be used to compel an office or tribunal to discharge its duty. It cannot, however, control judicial discretion. R.C. 2731.03; *State ex rel. Richfield v. Laria*, 138

Ohio St.3d, 2014-Ohio-243, 4 N.E.3d 1040, ¶ 11. Indeed, mandamus will not lie to control even abused judicial discretion. *State ex rel. Richfield*, 138 Ohio St.3d at ¶ 11; *State ex rel. Rashada v. Pianka*, 112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E.2d 1220, ¶ 3.

In addition, when an adequate remedy at law exists, mandamus will not lie. In order for an adequate remedy at law to exist, the alternative must be “complete, beneficial, and speedy.” *State ex rel. Smith v. Cuyahoga Cty. Court of Common Pleas*, 106 Ohio St.3d 151, 2005-Ohio-4103, 832 N.E.2d 126, ¶ 19. This Court has held that the right to a direct appeal qualifies as an adequate remedy at law. *State ex rel. Dix v. McAllister*, 81 Ohio St.3d 107, 108, 689 N.E.2d 561 (1998).

Here, Relator seeks a writ of mandamus to compel the First District to reverse and remand their prior decision dismissing her appeal. Relator thus seeks relief with this Court for a ruling that reverses the Court’s decision to dismiss Relator’s appeal. Yet, the First District was clear in their reasoning for dismissing Relator’s appeal—she failed to file a certified copy of the transcript of proceedings. Pursuant to Revised Code Chapter 2505, a court of appeals may “compel transcripts of actions or proceedings” insofar as they are related to a final order, judgment or decree that is sought to be reversed. R.C. 2505.44. The First District gave Relator *multiple* opportunities to file the transcript of proceedings—including the initial scheduling order, Ex. B (entry dated 6/19/14), and granting a motion for reconsideration and extending time to file the transcript of proceedings, Ex. B (entry dated 10/29/14). At each opportunity, Relator failed to file a certified copy of the transcript of proceedings. Thus, the First District appropriately dismissed Relator’s appeal. Therefore, because mandamus will not lie to control judicial discretion, Relator has failed to state a claim for relief.

And, too, mandamus is not appropriate when an adequate remedy at law exists. Relator seeks to compel Respondents through a writ of mandamus to reverse their decision to dismiss her appeal. Rather than mandamus, other remedies at law exist. Indeed, Relator could have directly appealed Respondents' decision to this Court. Instead, she seeks to do that through mandamus. This is not appropriate. Because Relator has an adequate remedy at law, her request for a writ of mandamus should be dismissed because there are no claims for which relief may be granted by this Court.

B. Relator's petition for mandamus fails because she did not make a proper public records request.

Relator also alleges—quite extensively—in her Complaint that she is entitled to certified copies of the First District Judges' oaths of office. Relator alleges that this public records request was made via the “Praecipe Demand on Oaths and Bonds” filed with the First District in her appellate case, *HSBC Bank USA v. Dates*, 1st Dist. Hamilton No. C140429. Ex. B (entry dated 1/5/15). In Relator's January 5, 2015 filing, Relator argues that her filing “is an exhaustion of all statutory and administrative remedies prior to compelling your performance by an extraordinary writ.” Ex. B (entry dated 1/5/15). Relator demands the “Oath and Bond of the judges of the Ohio First Appellate Court of Appeals . . . who will act in the Appeal no above.” Ex. B (entry dated 1/5/15). Thus, Relator—as part of the appellate case which she initiated—filed a pleading in an attempt to make a public records request.

But, the filing of a pleading is not the type of public records request contemplated by Ohio's Public Records Act, R.C. 149.43. Indeed, Ohio courts have hesitated to permit filings in a court proceeding to constitute a valid public records request. *See, e.g., State v. Phillips*, 9th Dist. Summit No. 18940, 1999 WL 436274 (June 25, 1999). The Twelfth District Court of Appeals specifically found that when a public records request was made in an underlying case,

respondents were “under no obligation to comply with [the] request for public records.” *State ex rel. Plowman v. Butler Cty. Clerk of Courts*, 103 Ohio App.3d 77, 78, 658 N.E.2d 812 (12th Dist. 1995).

Here, Relator similarly appears to make a public records request in her underlying appellate case. Yet, Relator fails to properly make a public records request. Respondents’ position is not that what Relator seeks is not a public record, but only that Relator has not made a proper public records request. Because she has failed to make a proper public records request, Relator possesses no legal right to the requested relief; and thus, mandamus is improper. Relator, then, fails to state a claim upon which relief may be granted and her Complaint should be dismissed.

IV. CONCLUSION

For the foregoing reasons, Respondents Judges Lee H. Hildebrandt Jr., Patrick F. Fischer, Patrick T. Dinkelacker, Penelope R. Cunningham, Richard P. DeWine, and Sylvia S. Hendon (collectively, the First District Court of Appeals) respectfully move this Court to dismiss Relator’s extraordinary action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing *Motion to Dismiss* was served by first class mail via the U.S. Postal Service on March 9, 2015, upon the following:

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