

IN THE SUPREME COURT OF OHIO

STATE <i>ex rel.</i>	:
ARISTIDES JURADO, <i>pro se</i> ,	:
	:
<i>Relator</i> ,	: Case No. 2015-0240
	:
v.	: Mandamus and Prohibition Action
	:
FRANKLIN COUNTY COURT OF	:
COMMON PLEAS, <i>et al.</i> ,	:
	:
<i>Respondents.</i>	:

**MOTION TO DISMISS OF RESPONDENT
THE TENTH DISTRICT COURT OF APPEALS**

Respectfully submitted,

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Pursuant to Sup.Ct.Prac.R. 12.04(A) and Civ.R. 12(B)(6), Respondent the Tenth District Court of Appeals hereby moves this Court to dismiss Relator’s Complaint for a writ of mandamus and prohibition. This Motion is more fully supported by the attached Memorandum in Support.

Respectfully submitted,
MICHAEL DEWINE
Ohio Attorney General

/s/ Nicole M. Koppitch

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MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

Relator Aristides Jurado brings this current mandamus and prohibition action seeking to compel this Respondent, the Tenth District Court of Appeals (“Tenth District”), to issue a stay pending Relator’s domestic relations appeal.¹ This action, for the reasons set forth below, is improper under Civ.R. 12(B)(6) for failure to state a claim for which relief can be granted. Therefore, the Court should dismiss the Complaint.

I. STATEMENT OF FACTS

The present action arises from an underlying custody case pending in the Franklin County Court of Common Pleas, Domestic Relations Division (Case No. 12JU-11-14479). *See* Compl. ¶ 1. Relator has also filed three appeals stemming from that underlying custody case with the Tenth District Court of Appeals (Case Nos. 14-AP-000872, 15-AP-0026 and 15-AP-0080) addressing various decisions of the domestic court. Compl. ¶ 1; 16. All three appeals and the underlying custody case are currently pending.

Most recently, on February 6, 2015, Relator appealed a January 22, 2015 order of the domestic court holding the Relator in contempt of a court order (Case No. 15-AP-0080). Compl. ¶ 31. As part of that contempt order Relator was sentenced to ten days in jail; however, that sentence was suspended on the condition that Relator purge his contempt (the failure to return certain medical authorizations) on or before January 30, 2015. The court set the matter for “review of compliance” on February 12, 2015 at 9:00am.² *Id.* at ¶ 31 and p. 3 of Relator’s unmarked exhibit (Entry dated January 22, 2015). On February 11, 2015, Relator filed an “Emergency Motion for Stay pending appeal” in appellate case nos. 15-AP-0026 and 15-AP-

¹ Although Relator’s Complaint is captioned as an action in mandamus and prohibition, Relator does not seek a writ of prohibition against this Respondent. Rather, Relator’s petition for writ of prohibition is sought against the Franklin County Court of Common Pleas, Domestic Relations Division, Juvenile Branch—which has separately filed its own motion to dismiss.

² Relator refers to this review of compliance as a “purge hearing” throughout his Complaint.

0080 asking the Tenth District to stay the February 12, 2015 “purge hearing” while his appeals are pending. Compl. ¶ 37 and Exhibit 1.

On February 11, 2015, the Tenth District denied Relator’s Motion. *Id.* at ¶ 39. On February 12, 2015, Relator filed his Complaint for Mandamus and Prohibition seeking a writ of mandamus compelling the Tenth District to issue a stay of the domestic court’s scheduled review of compliance on February 12, 2015. Of course, the review was scheduled for the same day. The Tenth District is unaware of whether the review went forward as scheduled.

II. STANDARD OF REVIEW

“A court can dismiss a mandamus action under Civ.R. 12(B)(6) for failure to state a claim upon which relief can be granted.” *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, 856 N.E.2d 966, ¶ 9. In order to succeed on a motion to dismiss, it must appear beyond doubt that the relator can prove no set of facts warranting him the requested writ of mandamus. *Id.* 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. *Id.* This does not allow, however, unsupported conclusions to be admitted or to be sufficient. *State ex rel. Seikbert v. Wilkinson*, 69 Ohio St.3d 489, 490, 633 N.E. 2d 1128 (1994). In fact, a relator “must plead specific facts to withstand dismissal of a complaint for writ of mandamus.” *Id.*, citing *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989).

Here, even when construing Relator’s Complaint in a light most favorable to him, and affording him all reasonable inferences possibly derived from his allegations, his Complaint cannot be read to state any claim against the Tenth District for which mandamus relief can be granted. Accordingly, the claims against the Tenth District must be dismissed.

III. LAW AND ARGUMENT

To prevail in a mandamus case, a relator must establish (1) a clear legal right to the requested relief, (2) a clear legal duty on the part of the respondent to provide it, and (3) the lack of an adequate remedy in the ordinary course of the law. *State ex rel. O'Grady v. Griffing*, 140 Ohio St.3d 290, 2014-Ohio-3687, 17 N.E.3d 574, ¶ 11. Here, Relator's action for a writ of mandamus against the Tenth District fails because it is moot and it also seeks relief the Tenth District has no obligation to provide.

A. Relator's Complaint is Moot.

The Relator currently seeks a writ of mandamus compelling the Tenth District to stay a hearing in the Franklin County Court of Common Pleas, Domestic Relations Division which was scheduled for **February 12, 2015 at 9:00am**. *See* Compl. p. 17 (Prayer for Relief). That date and time has long since passed. In fact, based upon the file stamp on Relator's Complaint, it appears his Complaint may have been filed after the time set for the hearing at issue.

"Actions are moot when they involve no actual genuine controversy which can definitely affect the parties' existing legal relationship." *McFrederick v. Ohio Dep't of Job & Family Sers.*, 5th Dist. Stark No. 2006 CA 00357, 2008-Ohio-4057, ¶ 25, citing *Lingo v. Ohio Central Railroad, Inc.*, 10th Dist. Franklin No. 05AP-206, 2006-Ohio-2268, ¶ 20 (citations deleted). "Black's Law Dictionary defines a case as 'moot . . .when a determination is sought on a matter, which, when rendered, cannot have any practical effect on the existing controversy.'" *Shelko v. Dolinar*, 11th Dist. Lake No. 88-L-13-161, 1990 WL 93127, *5 (June 29, 1990), quoting *Black's Law Dictionary* (5th Ed. 1979). Ohio courts have long recognized a court should not entertain jurisdiction over cases without actual controversies. *Tschantz v. Ferguson* (1991), 57 Ohio St.3d 131, 566 N.E.2d 655.

Here, the only relief Relator seeks against the Tenth District is to stay a hearing, the date for which has already passed. Granting a stay now would serve no purpose because the hearing date has already passed. Relator admits as much in his Complaint: “If the Juvenile Court proceeds with the purge hearing [the February 12, 2015 review of compliance] and enforces the sentence of jail, the 3rd Appeal of the Contempt Order becomes moot automatically.” Compl. ¶ 42. Resultantly, a determination on this matter, at this time, would have no practical effect on Relator because the hearing date has passed; his claims against the Tenth District are moot. For this reason alone, Relator’s Complaint against the Tenth District must be dismissed.

B. Respondent does not have a clear legal duty to provide the relief requested.

Even if Relator’s Complaint was not moot, Relator is still not entitled to the relief requested against the Tenth District. Mandamus will issue only “to compel performance of duties which are ministerial in nature and which do not call for the exercise of official judgment and discretion.” *State ex rel. Armstrong v. Davey*, 130 Ohio St. 160, 163, 198 N.E. 180 (1935); *see also Adamson v. Wetz*, 69 Ohio Law Abs. 281, 285-86, 124 N.E.2d 832 (2d Dist. 1952). Relief in mandamus must be supported by a clear legal duty conferred upon the respondent. *State ex rel. O’Grady*, 2014-Ohio-3687, ¶ 11. Here, Relator fails to demonstrate that the Tenth District had a clear legal duty to stay the underlying review of compliance hearing.

Civil Rule 62(B) provides: “When an appeal is taken the appellant may obtain a stay of execution of a judgment or any proceedings to enforce a judgment by giving an adequate supersedeas bond. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is approved by the court.” However, the provisions of this rule “do not limit any power of an appellate court . . . to stay proceedings during the pendency of an appeal or to suspend, modify, restore, or grant an injunction during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of

the judgment subsequently to be entered.” Civ.R. 62(D). In fact, the Staff Notes to Civ.R. 62 point out that section (D) is an admonitory rule which “points out that an *appellate court*, once having assumed jurisdiction, has power to modify any stay order granted at a prior time.” (Emphasis added.) Staff Note 1970, Civ.R. 62.

An “appeal does not operate as a stay of execution until a stay of execution has been obtained pursuant to the Rules of Appellate Procedure or in another applicable manner, and a supersedeas bond is executed by the appellant to the appellee” R. C. § 2505.09. And, Appellate Rule 7(A) provides that “[a]pplication for a stay of the judgment or order of a trial court pending appeal . . . must ordinarily be made in the first instance in the trial court. A motion for such relief . . . may be made to the court of appeals [and] . . .the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has, by journal entry, denied an application or failed to afford the relief which the applicant requested.”

Nothing obligates the Tenth District to automatically stay the domestic court’s review for compliance. An appellant must satisfy the requirements of App.R. 7(A) and R.C. § 2505.09. Pursuant to Civ.R. 62(D), the appellate court has the *discretion* to modify or adjust a stay order as necessary to protect the interest of both parties. Here, the domestic court’s entry is not a final, appealable order because it only imposes a conditional punishment coupled with an opportunity to purge the contempt. *Bd. of Trustees of Concord Twp. v. Baumgardner*, 11th Dist. Geauga No. 2002–G–2430, 2003–Ohio–4361, ¶ 12. Until the opportunity to purge has been removed, there is no final, appealable order. As such, there is currently no judgment which is or can be executed and therefore, there is no requirement to stay the domestic court’s review for compliance. Moreover, even assuming a stay would have been appropriate in this case, the Relator did not and has not given a supersedeas bond as required by R.C. § 2505.09. *See* Compl. Eh. 1 at p. 11.

The Tenth District had no duty to grant Relator's "Emergency Motion to Stay." Because the Tenth District has not refused or delayed in exercising any mandatory legal duty, Relator is not entitled to a writ of mandamus against the Tenth District. Relator's claims against the Tenth District must be dismissed.

IV. CONCLUSION

For the foregoing reasons, Respondent the Tenth District Court of Appeals respectfully moves this Court to dismiss the Relator's extraordinary action.

Respectfully submitted,

MICHAEL DEWINE
Ohio Attorney General

/s/ Nicole M. Koppitch

NICOLE M. KOPPITCH (0082129)*

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Tenth District Court of Appeals

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing *Motion to Dismiss of Respondent the Tenth District Court of Appeals* was filed with the Court and served by U.S.

Mail on March 10, 2015 to the following:

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Relator Pro Se

/s/ Nicole M. Koppitch

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