

IN THE SUPREME COURT OF OHIO

PAMELA LEMASTERS	*	CASE NO. 2015-2012
Relator,	*	IN MANDAMUS AND PROHIBITION
-vs.	*	
THE CELINA MUNICIPAL COURT, et al.	*	
Respondents.	*	

RELATOR PAMELA LEMASTERS' MEMORANDUM IN RESPONSE TO RESPONDENTS'
MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction

This action raises two critical issues related to Ohio landlord tenant law. The legal question before the Court is narrow: does Civ. R. 62(B), as interpreted by this Court, require the trial court to grant a motion for stay of an eviction judgment pending an appeal with the setting of an adequate supersedeas bond. The second issue concerns the real life consequences for tenants when judges misapply Civ. R. 62(B), denying a tenant's motion for a stay of the eviction judgment without addressing an adequate supersedeas bond, subjecting the tenant to the loss of their home without the right to proceed on their appeal due to mootness should the landlord seek to enforce the judgment. For reasons set forth below, Respondents' Motion for Judgment on the Pleadings must be denied.

II. Facts

Pamela LeMasters is a tenant at Gorsuch Homes, Inc. DBA Williamsburg Square Apartments ("landlord"), a federally subsidized housing complex, located in Celina, Ohio. (Compl. ¶5). Ms. LeMasters' entire rent amount is subsidized by the U.S. Department of Housing and Urban

Development (“HUD”). (Id). On October 26, 2015, Respondents granted an eviction judgment against Ms. LeMasters and ordered that she be removed from the rental premises no later than November 22, 2015. (Compl. ¶9). The Respondents scheduled a contempt hearing for November 23, 2015 where Ms. LeMasters could be fined or jailed for failure to vacate her residence as ordered. (Compl. ¶10). On November 17, 2015, Ms. LeMasters appealed the eviction judgment and moved Respondents for a stay of the eviction judgment pursuant to Rule 62(B) of the Ohio Rules of Civil Procedure. (Compl. ¶11). Ms. LeMasters requested that the stay be granted pending the appeal, without the posting of bond since Ms. LeMasters’ rent amount was \$0 and the landlord was receiving the entire rent amount from HUD. (Compl. ¶12). On November 19, 2015, Respondents denied the motion for stay and provided no basis for the denial. (Compl.¶13).

That same day, Ms. LeMasters moved for stay of the eviction judgment in the 3rd District Court of Appeals pursuant to Rule 62(B) of the Ohio Rules of Civil Procedure and Rule 7 of the Ohio Rules of Appellate Procedure. (Compl. ¶14). On November 20, 2015, the Respondents issued an entry continuing the show cause hearing until the Court of Appeals renders a decision on Ms. LeMasters’ motion for stay. (Compl. ¶15). In the landlord’s response opposing the motion for stay, the landlord conceded that they would suffer no economic harm if the stay was granted. (Compl. ¶15). On December 3, 2015, the Appellate Court denied the stay, setting no bond amount, and foreclosing an opportunity for Ms. LeMasters to stay the eviction judgment. (Compl. ¶18, 19). On December 26, 2015, the landlord informed Ms. LeMasters of their intent to seek a writ of restitution or move for contempt proceedings to enforce the eviction, such as fine or jail time, if Ms. LeMasters did not vacate by January 4, 2016. (Compl. ¶20). Ms.

LeMasters then filed her Complaint for Writs of Prohibition and Mandamus on December 30, 2015 with this Court.

III. Law and Argument

A. MS. LEMASTERS HAS PLED SUFFICIENT FACTS TO SUPPORT HER CLAIMS FOR RELIEF AND A HEIGHTENED PLEADING STANDARD IS NOT APPROPRIATE IN THIS CASE

This Court should not apply a heightened pleading standard in this case. Respondents argue that this Court should adopt a heightened pleading standard set forth in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). To support their position, Respondents cite two appellate cases involving Civ.R. 12(B)(6) motions, not Civ.R. 12(C) motions as we have in the case before this Court, that have allegedly adopted the standard set forth in *Twombly*. However, this argument is misplaced. In *Vagas v. City of Hudson*, while the court cited to *Twombly* for the proposition that complaints must contain more than mere “labels and conclusions”, the court then applied the traditional Civ.R. 12(B)(6) standard. 9th Dist. Summit No. 24713, 2009-Ohio 6794, ¶13. *Vagas* is distinguishable from the case at bar in that the complaint failed to set forth the claim sought and also failed to provide factual support for that claim. *Id.* Specifically, the plaintiffs incorporated by reference allegations in a prior complaint but failed to attach the prior complaint to the complaint at issue. *Id.* These are not issues in this case as Ms. LeMasters clearly set forth the claims for relief and factual support for each claim, including multiple exhibits to support her claims.

Respondents also cite to *Fink v. Twentieth Century Homes, Inc.* as example of another Ohio case that has adopted a heightened pleading standard. This too is incorrect. While the court in *Fink* stated that the right to relief shown in the complaint must be more than speculative, the court still applied the traditional Civ.R. 12(B)(6) standard. 8th Dist. Cuyahoga No. 94519, 2010-

Ohio-5486. As Respondents indicate in their Motion, this Court has not adopted a heightened pleading standard for Ohio and has declined to take jurisdiction to address this issue. (Motion at 5).

Even if this Court were to apply the heightened pleading standard suggested by the Respondents, the Complaint clearly meets that standard as Ms. LeMasters' supports her claims for Mandamus and Prohibition with specific facts set out in her Complaint and supported by the exhibits attached to her Complaint. Further, Respondents have pointed to nothing in the Complaint that could be considered merely "labels and conclusions."¹

"The determination [of whether a moving party is entitled to judgment as a matter of law] is restricted solely to the allegations of the pleadings and the nonmoving party is entitled to have all material allegations in the complaint, with all reasonable inferences to be drawn therefrom, construed in her favor as true". *State ex rel. Pirman v. Money*, 69 Ohio St.3d 591, 635 N.E.2d 26 (1994). Moreover, the court should only grant a judgment on the pleadings where the court "finds beyond doubt, that the [relator] could prove no set of facts in support of [her] claim that would entitle [her] to relief." *Spears v. Bush*, Marion App. No. 9-10-05, 2010-Ohio-3547 ¶1. Ms. LeMasters has pled sufficient facts to support her claims for relief and Respondents Motion for Judgment on the Pleadings should be overruled.²

¹ It should be noted that respondents assert numerous facts that are not supported by any document in the record before this Court. Since a court speaks through its journal entry, *State ex rel. Geauga Cty Bd of Commerce v. Milligan*, 100 Ohio St.3d 366, 2003-Ohio-6608, 800 N.E.2d 361, Ms. LeMasters requests that this Court strike Respondents' unsupported facts from the record pursuant to Civ. R. 12(F).

² Ms. LeMasters does not dispute that the Celina Municipal Court is not *sui juris* and therefore should be dismissed as a Respondent.

B. RESPONDENTS' MOTION FOR JUDGMENT ON THE PLEADINGS SHOULD BE DENIED AS MS. LEMASTERS' COMPLAINT SETS FORTH A PRIMA FACIE CASE FOR RELIEF

1. WRIT OF MANDAMUS

Ms. LeMasters set forth a prima facie case for a writ of mandamus in her complaint. Ms. LeMasters seeks a writ of mandamus to compel Respondents to issue a stay with an adequate supersedeas bond pending her appeal to the Third District Court of Appeals. The three elements are as follows: (1) a clear legal right to the requested relief; (2) a clear legal duty to perform the relief by the respondent; and, (3) no adequate remedy at law. *State ex rel. Pressley v. Industrial Commission*, 11 Ohio St. 2d 141, 228 N.E.2d 631 (1967).

First, Ms. LeMasters has a clear legal right to the requested relief. This Court has repeatedly held under Civ.R. 62(B), an appellant is entitled to a stay of the judgment as a matter of right. *See State ex. rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 722 N.E.2d 73 (2000); *State ex rel. Ocasek v. Riley*, 54 Ohio St.2d 488, 377 N.E.2d 792 (1978). Further, this Court has explained that the trial court is “devoid of discretion when considering a motion for stay”³ and the only requirement on the part of the appellant pursuant to Civ.R. 62(B) is the posting of an adequate supersedeas bond as set by the court. *Curl* at 575 (Douglas J, dissenting) (“[I]t is clear to me that today’s decision applies to all parties, governmental or private, who might be seeking a stay of a trial court’s judgment.”); *Ocasek* at 490.

Respondents argue that a right to a stay only applies to government officials and since Ms. LeMasters is not one, she is not entitled to stay as a matter of right. (Motion at 10). Respondents’ argument is misplaced. This Court held in *Ocasek* and confirmed in *Curl* that this

³ Public policy dictates that the trial court should be divested of discretion in ruling on a motion for stay of their judgment. If the trial court had discretion on whether a stay should be granted, they could deny stays in all cases where they didn’t want their judgment reviewed. This would deprive all appellants the ability to challenge the judgment through appellate review process.

right to a stay applies to all appellants, and that the only function of the trial court with respect to stays is the setting of the adequate supersedeas bond. *Id.* In the case of a government official, there is no need to determine bond since it is not required under Civ. R. 62(C).

This has remained the law in Ohio for 36 years with nearly all Ohio appellate courts following the *Curl* and *Ocasek* holdings and applying them to appellants who are nongovernmental officials. *Fifth Third Bank v. Wallace Group, Inc.*, 1st Dist. Hamilton No. C-930699, 1994 WL 603149 (Nov. 2, 1994); *Dayton City School Dist. Bd. Of Edn. v. Dayton Edn. Assn.* 80 Ohio App. 3d 758, 610 N.E.3d 615 (2nd Dist. 1992); *Peoples Bank of Point Pleasant v. Yeager*, 4th Dist. Gallia No. 91CA34, 1993 WL 63458 (Mar. 2, 1993); *Sand Beach Conservancy District v. Abood*, 6th Dist. Ottawa No. OT-07-039, 2007-Ohio-6521; *Francis David Corp. v. Mac Auto Mart, Inc.*, 8th Dist. Cuyahoga No. 93951, 2010-Ohio-1215; *LaFarciola v. Elbert*, 9th Dist. Lorain No. 98CA007134, 1999 WL 1215115; *Kelm v. Hess*, 8 Ohio App.3d 488, 457 N.E.2d 911 (10th Dist. 1983); *Hagood v. Gail*, 105 Ohio App.3d 780, 664 N.E.2d 1373 (11th Dist. 1995). Ms. LeMasters timely sought a stay in the trial court requesting that the adequate supersedeas bond be waived or set at \$0 since her landlord was receiving her full rent payment from HUD. (Compl. ¶12). Respondents denied the stay and failed to set a bond amount. (Compl. ¶13).

Respondents argue that they “properly maintained the status quo by denying the stay to justly protect the landlord’s interest in its real property as Ms. LeMasters admitted that she allowed an unauthorized person to reside in the apartment she leased from the landlord.” (Motion at 10). This statement must be stricken from the record under the Civ. R. 12(F) standard as it is mere speculation as it is not supported by any document in the record before this Court. A court of record speaks only through its journal entries and therefore, Respondents cannot rely on

unsupported conjecture. *State ex rel. Geauga Cty. Bd. Of Commrs. v. Milligan*, 100 St. 3d 366, 2003-Ohio-6608, 800 N.E.2d 361, ¶4 (2003). Respondents' Order denying Ms. LeMasters' stay states no reasoning and cannot be explained now by this conjecture. (Compl. ¶13). Furthermore, the underlying basis for the eviction is not a factor in the analysis as to whether the stay should be granted on appeal. The only issue is whether a stay has been requested by the appellant and an adequate supersedeas bond has been set by the trial court. Ms. LeMasters sought her stay and therefore has a clear legal right to the relief requested.

Second, the Respondents have a clear legal duty to provide the requested relief. The trial court's only role with respect to stays sought by an appellant is the setting of the supersedeas bond. *Olen Corp. v. Franklin Cty. Bd of Elections*, 43 Ohio App. 3d 189, 198, 541 N.E. 2d 80 (10th Dist. 1988) ("There was no need for the trial court to grant a stay since Civ.R. 62 expressly provides that the only function of the trial court with respect to stays is setting of the supersedeas bond"). In this case, Ms. LeMasters sought a stay from Respondents requesting that no bond be required since her landlord was receiving the full rent amount from HUD; therefore, her landlord would suffer no economic harm. Respondents argue that Ms. LeMasters has unclean hands because she did not ask for a bond. (Motion at 10). This argument is a red herring.

The supersedeas bond must be sufficient to pay "all money costs and damages" that the appellee may be awarded in the appeal." R.C. 2505.14 Ordinarily, a landlord may only recover those damages caused by the delay in enforcing the eviction order and those potential damages to the landlord are solely the loss of rent during that period. *Langford v. Danolfo*, No. 43917, 1982 WL 5265, at *1 (Ohio App., Cuyahoga Cty., Apr. 1, 1982). For an assisted housing landlord, the potential loss of rent is the tenant's portion of the contract rent, not the full contract rent. *Forest City Mgmt., Inc. v. Lauderback*, No. 91-CA-1972 (Ohio App., Scioto Cty., Mar. 15, 1991).

Since HUD had continued to pay - and the landlord continued to accept - the full contract rent here, the adequate bond amount in this case is \$0, the amount sought by Ms. LeMasters. Respondents argue that Ms. LeMasters never sought a bond. This is a distinction without a difference. A supersedeas bond of \$0 is adequate and appropriate under the circumstances; HUD pays the entire portion of Ms. LeMasters rent, the landlord will continue to receive that payment from HUD, and the HUD subsidy is sufficient to pay all costs and damages that may be awarded to the landlord after the appeal. (Compl. ¶12). Further, it is undisputed that the landlord will not suffer economic harm. (Compl. ¶16). If the Respondents disagreed with the requested bond amount, they could have set a higher amount but they failed to do so. The Respondents were required to grant the stay and set an adequate supersedeas bond. See *Curl* and *Ocasek*. The Respondents had a clear legal duty to grant the stay and set an adequate supersedeas bond, which Ms. LeMasters asked to be set at \$0.

Third, Ms. LeMasters has no adequate remedy at law. Respondents present this Court with two options that they maintain would provide Ms. LeMasters with an adequate remedy at law. Neither of these options are viable or an adequate remedy at law. Initially, Respondents argue that Ms. LeMasters could continue with her appeal in the 3rd District Court of Appeals while asking for a bond to be set. (Motion at 6). This is a curious argument given that Ms. LeMasters has already done so. Ms. LeMasters has already moved for stay with a bond to be set at \$0 in both the trial and appellate courts. (Compl. ¶12, 14). Both of these motions were denied and no new bond amount was set by either court. (Compl. ¶13, 17).

Respondents also argue that Ms. LeMasters could “seek discretionary review by this Court upon issuance of final judgment entry by the Third District Court of Appeals.” (Motion at 6-7). While it is accurate that a discretionary appeal to this Court constitutes an adequate remedy at

law, *State ex rel. Corrigan v. McAllister*, 18 Ohio St.3d 329, 480 N.E.2d 788 (1985), such an appeal for Ms. LeMasters will be too late. It is undisputed that her landlord intends on enforcing the eviction judgment (Compl. ¶20) and Ms. LeMasters was recently informed that such enforcement may be imminent, as she was recently served with Praecipe for Writ of Restitution. (Ex. I). When the Respondents enforce the eviction judgment and Ms. LeMasters is removed from her home, the pending appeal of the eviction judgment in the Third District Court of Appeals will likely be dismissed because the issues on appeal could be considered moot. *Blodgett v. Blodgett*, 49 Ohio St. 3d 243, 551 N.E. 2d 1249 (1990). Moreover, a court's order staying an action is not a final order subject to appeal pursuant to R.C. 2505.02. *Community First Bank & Trust v. Dafoe*, 108 Ohio St. 3d 472, 2006-Ohio-1503, 844 N.E. 2d 825. Therefore, Ms. LeMasters could not appeal the denial of her stay to this Court. Ms. LeMasters has no other adequate remedy of law.

Since Ms. LeMasters has met the elements for a Writ of Mandamus, Respondents' Motion for Judgment on the Pleadings regarding Ms. LeMasters claim for a Writ of Mandamus should be denied.

2. WRIT OF PROHIBITION

Ms. LeMasters set forth a prima facie case for a writ of prohibition in her complaint. Ms. LeMasters seeks this writ to restrain the Respondents from taking any action to enforce and/or execute on the eviction judgment against Ms. LeMasters, issued on October 26, 2015. The three elements are as follows: (1) the Respondents are about to exercise judicial authority; (2) the exercise of judicial authority is not authorized by law; and, (3) the denial of the writ results in an injury to Ms. LeMasters for which there is no adequate remedy at law. *McAuley v. Smith*, 82 Ohio St. 3d 393, 696 N.E. 2d 572 (1988).

First, at the time Ms. LeMasters filed her action in this Court, she believed that the Respondents were about to exercise judicial authority. She has a reasonable belief based on the fact that the previously scheduled contempt hearing had been continued by the Respondents until the Court of Appeals ruled on Ms. LeMasters' motion for stay and since that ruling had occurred, the hearing could be reset at any time. (Compl. ¶15). Moreover, Ms. LeMasters' landlord had given her notice that if she did not vacate by January 4, 2016, they would take legal action before Respondents to have her removed from her home. (Compl. ¶20). Ms. LeMasters was recently informed that such removal may be imminent since her landlord served her with a Praecipe for a Writ of Restitution. (Ex. I). Respondents do not dispute this element rather they dispute that the action would be unauthorized by law.

Second, for the reasons set out above, Ms. LeMasters was entitled to stay as a matter of right while her appeal is pending and the sole duty of the Respondents was to set an adequate supersedeas bond. *See State ex. rel. State Fire Marshal v. Curl*, 87 Ohio St.3d 568, 722 N.E.2d 73 (2000); *State ex rel. Ocasek v. Riley*, 54 Ohio St.2d 488, 377 N.E.2d 792 (1978). Respondents failed to do so. Respondents argue that Ms. LeMasters' "request for stay was properly denied by the Court of Appeals, a court with unlimited power to preserve justice and the status quo pending appeal under Ohio Civil Procedure Rule 62(D)." (Motion at 10). While it is true that the appellate court may have additional powers regarding stays under Civ. R. 62(D), this original action is not about the role of the appellate court rather it is about the limited power of the trial court in ruling on motions for stay. The Respondents failed to grant a stay with an adequate supersedeas bond; therefore, any judicial action by the Respondents to enforce the eviction judgment is unauthorized by law.

Third, the denial of this writ would result in an injury to Ms. LeMasters to which there is no adequate remedy at law. Respondents appear to cite *State ex rel. Pullins v. Eyster* for the proposition that Ms. LeMasters had an adequate remedy at law. 5th Dist. Knox No. 2009-CA-09, 2009-Ohio-2846. In *Pullins*, the relator failed to request a stay from the appellate court pursuant to App.R. 7(A). *Id.* at ¶14. Unlike *Pullins*, Ms. LeMasters properly requested a stay from the appellate court. (Compl. ¶14). Ms. LeMasters currently has an appeal pending before the Third District regarding the underlying eviction judgment. (Compl. ¶11). Ms. LeMasters raises important issues in her appeal including but not limited to a meritorious defense under the Violence Against Women Act and procedural due process issues relating to the landlord's reliance on grounds for eviction outside the notice of termination. (Compl. Ex. D at 5-6).

If this Court denies her writ of prohibition, the Respondents can enforce the eviction judgment against Ms. LeMasters. Once Ms. LeMasters is removed from her home, she will become homeless and lose her housing subsidy that pays for her entire rent. (Compl. Affidavit of LeMasters ¶6, 8). Moreover, the pending appeal of the eviction judgment in the Third District Court of Appeals will likely be dismissed, depriving Ms. LeMasters of the ability to challenge her eviction, because the issues on appeal could be considered moot. *Blodgett v. Blodgett*, 49 Ohio St. 3d 243, 551 N.E. 2d 1249 (1990). Ms. LeMasters will be left with no adequate remedy to appeal her eviction.

Since Ms. LeMasters has met the elements of a writ of prohibition, Respondents' Motion for Judgment on the Pleadings regarding Ms. LeMasters claim for a Writ of Prohibition should be denied.

C. RESPONDENTS' SUGGESTION OF SANCTIONS IS WITHOUT MERIT

Respondents appear to ask this Court to sanction Ms. LeMasters and her attorneys for repetitive litigation tactics and “‘overly persistent’ tactics[.]” (Motion at 7). This attempt to intimidate Ms. LeMasters and counsel serves no legitimate purpose in the matter; a response to such allegations is appropriate.

Respondents’ legal basis for such intimidation is misplaced. In *State ex rel. Bell v. Madison County Board of Commissioners*, this Court heard the appeal from a party and attorney “in numerous court proceedings” originating from a 2003 appropriate action initiated by the Board of Commissioners. 139 Ohio St. 3d 106, 2014-Ohio-1564, 9 N.E.3d 1016, ¶4. In 2008, after losing on the merits, which included this Court declining a discretionary appeal, the party and attorney filed a new action against the numerous defendants. *Bell* at ¶4-5. The mandamus action referenced by Respondents was at least the third lawsuit, filed after seven years of litigation, involving this same issue and parties. *Id.* Ultimately the Court upheld sanctions due to the merits of the action being litigated to finality in the two previous lawsuits. *Id.*

Unlike *Bell*, this matter involves different parties and different legal questions than the separately pending appeal on the merits of the underlying eviction. Neither that litigation nor the present Complaint has been litigated to finality. The current dispute before this Court is the only action involving the Respondents. Ms. LeMasters has merely followed the Rules of Civil and Appellate Procedure, asking for a stay in both the trial and appellate courts. Her request for a stay was filed with the Respondents less than three months ago. As discussed in detail above, the Respondents failed to grant the stay with the posting of an adequate supersedeas bond. This filing with the Ohio Supreme Court is the only venue for Ms. LeMasters to ensure her position for a right to a stay of the eviction judgment can be heard.

Ms. LeMasters seeks Writs of Mandamus and Prohibition, because they are the only adequate remedies available to her so that she can preserve her right to challenge the underlying eviction judgment on the merits. Ms. LeMasters has availed herself of all legal recourse and her filing of the original action in this Court was her last legal option to stay her unjust forcible removal from the premises. Without this Court granting either a Writ of Mandamus, ordering the Respondents to grant the stay, or a Writ of Prohibition, prohibiting the Respondents from taking any action to enforce the underlying eviction judgment, Ms. LeMasters will be removed from her residence, lose her subsidy and become homeless. (Compl. Affidavit of LeMasters ¶6, 8). This will result not only in Ms. LeMasters being evicted from her home because she was a victim of domestic violence but also will deprive her of the ability to challenge this injustice through appellate review. Ms. LeMasters has the right and her counsel has the responsibility to seek appropriate available relief from this Court.

IV. Conclusion

Considering the allegations in the Complaint in the light most favorable of the nonmoving party, Respondents' Motion for Judgment on the Pleadings should be DENIED.

Respectfully Submitted,

s/ Debra A. Lavey

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CERTIFICATE OF SERVICE

We hereby certify that we served a copy of the foregoing, via electronic mail, on the 4th day February, 2016 to Lynette Dinkler and Jamey Pregon, Counsel for Respondents, lynette@dinklerpregon.com and Jamey@dinklerpregon.com

s/ Debra A. Lavey _____

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IN THE CELINA MUNICIPAL COURT

Gorsuch Homes, Inc

Case # 15 CVG 0000709

v.

Pamela LeMasters

Defendant

To The Clerk:

By Entry filed on October 26, 2016, the Court Ordered that a Writ of Restitution shall issue in this matter.

Please issue a Writ of Restitution to return the premises to Plaintiff

James A. Tesno, #0007416
Attorney for the
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PROOF OF SERVICE

I certify that a copy of the foregoing was served upon Attorney Debra Lavey by US Mail on January 28, 2016