

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Masjid Omar Ibn El Khattab Mosque, :
Plaintiff-Appellant, :
v. : No. 12AP-807
Hamid Salim et al., : (C.P.C. No. 11CVH-14615)
Defendants-Appellees. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on June 27, 2013

Reash Law Offices, LLC, and Maryellen Corna Reash, for appellant.

Rosenberg & Ball Co., LPA, and David T. Ball; Blaugrund, Herbert, Kessler, Miller, Myers, Postalakis, Inc., and Fazeel S. Khan, for appellees.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Plaintiff-appellant, Masjid Omar Ibn El Khattab Mosque ("Omar Mosque"), appeals a judgment of the Franklin County Court of Common Pleas that dismissed its action against defendants-appellees, Hamid Salim, Khaled Khamees, Nihad Al Khalidi, Fouad ElFaour, Dina Y. Ali, Hagar Diab, and Mohammed Allouche. For the following reasons, we affirm in part and reverse in part.

{¶ 2} Omar Mosque is an Ohio nonprofit corporation that operates a place of worship for believers of Islam in Columbus. In 2007, the Islamic Society of Greater Columbus incorporated Omar Mosque and selected the members of Omar Mosque's board of directors. Originally, each board member was to serve only two years, until

December 31, 2009. Five of the original seven board members, however, remained in their offices beyond the expiration of their original terms. Two members left the board, but were not replaced.

{¶ 3} The board decided to renovate and expand the mosque. By September 2011, they had raised approximately \$360,000 for their construction project, and they chose Maverick Builders, Inc. ("Maverick") to be their general contractor.

{¶ 4} Meanwhile, defendants began to challenge the board's decisions. Defendants demanded an election of new board members to replace the original board. In response to defendants' demand, the board scheduled an election for October 8, 2011. In the election, mosque members would vote for one of two options. Under the first option, Omar Mosque would hold an election in April 2012 to add four more members to the already existing board. Under the second option, Omar Mosque would hold an election in April 2012 to elect nine new board members to replace the existing board. In order to vote in the October 8, 2011 election, members had to sign an oath agreeing to accept the results of the election and cease argument. The majority of members who voted in the October 8, 2011 election chose the first option.

{¶ 5} Dissatisfied with the October 8, 2011 election, defendants scheduled a special meeting of mosque members for October 22, 2011. At that meeting, mosque members held an election for all new board members and elected defendants to the board. Immediately thereafter, the newly-elected board met and appointed Salim president and ElFaour treasurer.

{¶ 6} Pursuant to a resolution of the second board, Salim and ElFaour notified JPMorgan Chase Bank, N.A. ("Chase Bank"), at which Omar Mosque maintained bank accounts, of the election of the new board. Salim and ElFaour then transferred signing authority for Omar Mosque's bank accounts to themselves. The second board also notified Maverick of their election and informed Maverick that the original board no longer had authority to act on Omar Mosque's behalf.

{¶ 7} When the president of the original board discovered what had occurred, he contested the second board's actions. In response, Chase Bank froze Omar Mosque's accounts. This prohibited the original board from paying Maverick as invoices for Maverick's services became due.

{¶ 8} On November 23, 2011, Omar Mosque, at the instigation of the original board, filed suit against the members of the second board. The complaint included claims for fraudulent misrepresentation, intentional interference with business relationships, and civil conspiracy. The original board alleged that the second board fraudulently attempted to gain control over Omar Mosque's governance and bank accounts, and unlawfully interfered with Omar Mosque's business relationships with Chase Bank and Maverick. In addition to seeking damages, the original board requested that the trial court grant an injunction requiring the members of the second board to disclose to Chase Bank, Maverick, and others that "they have no authority to control, conduct, or direct the affairs of Omar Mosque, and restraining them from representing to the members of the Mosques [sic] and any other third parties that they have such authority." (R. 5 at 11.)

{¶ 9} The members of the second board answered the complaint and filed a counterclaim. The counterclaim requested that the trial court issue a declaratory judgment stating that the legitimate board of the Omar Mosque was the second board, and not the original board. The counterclaim also asked for injunctive relief prohibiting the original board from acting as Omar Mosque's board of directors.

{¶ 10} On February 16, 2012, the trial court signed and entered on the record an "Agreed Entry to Interplead Funds." In that entry, the trial court directed Chase Bank to deposit with the clerk of courts the funds in Omar Mosque's accounts, which amounted to \$432,313.19. The entry also stated that the original board and the second board would proceed to establish their respective claims to the funds in the instant action. "Until such time [that the trial court] order[ed] and direct[ed] how and to whom the Interpleader Funds [would be] delivered," the clerk of courts was required to maintain possession of the funds. (R. 94 at 2.)

{¶ 11} In early April 2012, the original board announced that an election for new board members would be held on April 21, 2012. At the April 21, 2012 election, mosque members elected a new board of seven members. No member of the original or second board was elected to the third board.

{¶ 12} The second board challenged the validity of the third board on the basis that the original board did not have the authority to hold the April 21, 2012 election. Immediately prior to the April 21, 2012 election, the second board filed a complaint

seeking a writ of quo warranto in this court. *See State ex rel. Salim v. Ayed*, 10th Dist. No. 12AP-356 (filed Apr. 20, 2012). In that action, the second board requested that this court determine that it is the legitimate board of Omar Mosque and oust the members of the other boards from the second board's seats. That action is ongoing.

{¶ 13} In a judgment issued August 16, 2012, the trial court sua sponte dismissed the instant action for lack of subject-matter jurisdiction. The trial court held that the core issue that would determine the action was which board had the authority to govern Omar Mosque. Only a quo warranto action could resolve that issue. Because jurisdiction over quo warranto actions is restricted to courts of appeals and the Supreme Court of Ohio, the trial court found that it did not possess the jurisdiction necessary to decide the parties' dispute.

{¶ 14} Omar Mosque now appeals the August 16, 2012 judgment, and it assigns the following errors:

I. The trial court erred in dismissing Plaintiff-Appellant's claims below for lack of subject matter jurisdiction because quo warranto is unavailable as a remedy to Appellant.

II. Even if quo warranto were available to Plaintiff-Appellant, it does not provide a complete remedy for Plaintiff-Appellants [sic]. The trial court should have stayed the action below pending a decision in a quo warranto action.

{¶ 15} A trial court must dismiss for lack of subject-matter jurisdiction if the complaint fails to raise a cause of action cognizable by the forum. *State ex rel. Bush v. Spurlock*, 42 Ohio St.3d 77, 80 (1989). Because whether a court possesses subject matter jurisdiction is a question of law, appellate courts review a dismissal for lack of subject-matter jurisdiction de novo. *Crosby-Edwards v. Ohio Bd. of Embalmers and Funeral Dirs.*, 175 Ohio App.3d 213, 2008-Ohio-762, ¶ 21 (10th Dist.).

{¶ 16} By its first assignment of error, Omar Mosque argues that the trial court has jurisdiction over its claims because it cannot seek relief through a quo warranto action. We disagree.

{¶ 17} The modern-day quo warranto action traces its origin to early English common law, where a quo warranto proceeding provided the means by which the crown could question unlawful intrusion into governmental interests. *Ohio Hosp. Assn. v.*

Community Mut. Ins. Co., 31 Ohio St.3d 215, 218 (1987); *State ex rel. Cain v. Kay*, 38 Ohio St.2d 15, 16 (1974). "A proceeding in the nature of quo warranto was an action by the crown inquiring by what authority a claimant of any office or franchise supported his claim." *Id.*

{¶ 18} Today, quo warranto actions are governed by R.C. Chapter 2733 and serve as the exclusive means by which to try the right and title to an office in a corporation created by the authority of the state. *Greater Temple Christian Church v. Higgins*, 9th Dist. No. 23022, 2006-Ohio-3284, ¶ 17; *Carlson v. Rabkin*, 152 Ohio App.3d 672, 2003-Ohio-2071, ¶ 35 (1st Dist.); *Peace-U.S.A. v. Abbott*, 10th Dist. No. 88AP-487 (Nov. 10, 1988); *Capri v. Johnson*, 32 Ohio App.2d 95, 98 (10th Dist.1972). In a quo warranto action against a person for usurping a corporate office, the court will render judgment on the rights of the claimants to hold that office, and oust and exclude a usurper from the office. R.C. 2733.08; 2733.14.

{¶ 19} Courts of common pleas do not have the authority to hear actions in quo warranto; only the Supreme Court of Ohio and appellate courts can issue such a writ. *State ex rel. Battin v. Bush*, 40 Ohio St.3d 236, 238 (1988). Thus, courts of common pleas lack jurisdiction over actions that seek quo warranto relief, even when the prayer for such relief is in the form of equitable or declaratory relief. *Conley v. Brown Cty. Rural Water Assn., Inc.*, 12th Dist. No. CA98-04-015 (Oct. 12, 1998); accord *Beasley v. East Cleveland*, 20 Ohio App.3d 370, 373 (8th Dist.1984) ("Common pleas courts cannot order declaratory or injunctive relief which effectively provides quo warranto relief and thereby circumvents this specialized remedy.").

{¶ 20} To determine whether a party seeks relief that must be pursued through a quo warranto action, courts identify the core issues raised by the parties for judicial resolution. If the principal or primary issue is the validity of the election of corporate officers, then the action, no matter how pleaded, is actually a quo warranto action. *State ex rel. Babione v. Martin*, 97 Ohio App.3d 539, 544 (6th Dist.1994); *Goldberg v. Rite Rug Co.*, 10th Dist. No. 82AP-135 (June 23, 1983); see also *Ohio Hosp. Assn. v. Community Mut. Ins. Co.*, 10th Dist. No. 85AP-1049 (June 5, 1986), *aff'd*, 31 Ohio St.3d 215 (1987) (looking to the principal issues involved to determine whether the action challenged the corporate existence of the defendants, a challenge that could only be made in a quo

warranto action). Moreover, courts examine the core of relief sought and/or granted. If that relief is a declaratory judgment stating which claimant has a right to office and/or an injunction ordering the removal of a person from office, then the action must be pursued through a quo warranto action. *Greater Temple Christian Church* at ¶ 17-18; *Strah v. Lake Cty. Humane Soc.*, 90 Ohio App.3d 822, 828 (11th Dist.1993); *Hendershot v. Conner*, 48 Ohio App.2d 335, 337 (9th Dist.1974); *Capri* at 98.

{¶ 21} Here, the trial court considered the substance of the parties' dispute, and it determined that the core issue it would have to decide was the validity of the election of the second board. The trial court thus concluded that the dispute would have to be resolved through a quo warranto action. Omar Mosque argues that the court should have instead focused on the remedy sought and, because Omar Mosque did not seek ouster of the second board, the court should have decided that the action was not actually in the nature of quo warranto. We disagree. In its complaint and motion for a temporary restraining order, Omar Mosque requested that the trial court require defendants to declare that they had no authority to control, conduct, or direct the affairs of Omar Mosque and restrain defendants from representing to anyone that they had that authority. Thus, Omar Mosque wanted an order that would, in essence, force the members of the second board to oust themselves from the offices they claim title to. Omar Mosque can only achieve that remedy through a quo warranto action.

{¶ 22} Additionally, Omar Mosque argues that the trial court must have jurisdiction over its action because the statutory restrictions regarding who has the authority to bring a quo warranto action preclude Omar Mosque from seeking a writ of quo warranto. In other words, Omar Mosque contends that, as it cannot pursue a quo warranto action, the only forum available to it is the court of common pleas, so that court must decide the dispute over the validity of the second board.

{¶ 23} "The right to bring an action in quo warranto remains, as at common law, a right of the state, and, except where title to a public office is involved, the use of quo warranto remains in the state or its officers." *Cain*, 38 Ohio St.2d at 17. Thus, only the attorney general or a prosecuting attorney may bring a quo warranto action challenging the holder of an office of a nonprofit corporation. R.C. 2733.05; *State ex rel. Hawthorne v. Russell*, 107 Ohio St.3d 269, 2005-Ohio-6431, ¶ 6. This restriction, however, does not

preclude the resolution of the parties' dispute in a quo warranto action. Rather, this restriction obligates Omar Mosque (or defendants) to convince the attorney general or prosecuting attorney to assert a quo warranto action. The attorney general and prosecuting attorney have a duty to review allegations that a person has usurped a corporate office and determine whether those allegations warrant a quo warranto action. *State ex rel. Morris v. Soltez*, 11th Dist. No. 2002-T-0016, 2002-Ohio-3714, ¶ 19. Additionally, Omar Mosque (or defendants) may overcome any reluctance on behalf of the attorney general or prosecuting attorney to pursue a quo warranto action by seeking a directive from the governor, Supreme Court of Ohio, secretary of state, or General Assembly to commence such an action. R.C. 2733.04 ("When directed by the governor, supreme court, secretary of state, or general assembly, the attorney general, or a prosecuting attorney, shall commence an action in quo warranto.").

{¶ 24} To be fair, we recognize that the attorney general and the prosecuting attorney may decline to prosecute a quo warranto action, but we are bound to follow R.C. Chapter 2733 and the applicable case law. Previously, we addressed an appellant's argument that the attorney general's and prosecuting attorney's refusal to act might deprive the appellant of any remedy. *Goldberg v. Rite Rug Co.*, 10th Dist. No. 82AP-135 (June 23, 1983). We concluded that the argument raised a question for the legislature's consideration, not a reason to allow appellant to proceed outside of a quo warranto action. *Id.*; see also *Morris* at ¶ 21 ("Until the Ohio General Assembly or the Supreme Court decides to extend the scope of the remedy [of quo warranto], a private citizen will not have the right to invoke this remedy as to a corporate office.").

{¶ 25} In sum, we reject both of Omar Mosque's arguments that the trial court erred in determining that it lacked subject-matter jurisdiction over the instant action. The trial court does not possess the authority necessary to determine which board of directors is validly in office. Accordingly, we overrule Omar Mosque's first assignment of error.

{¶ 26} By Omar Mosque's second assignment of error, it argues that the trial court should have stayed its action instead of dismissing it. Initially, Omar Mosque contends that a stay was necessary so that the trial court could determine its claims for damages after a decision in a quo warranto action. We disagree.

{¶ 27} The determination of whether to issue a stay of proceedings generally rests within the trial court's discretion and will not be disturbed absent a showing of abuse of discretion. *State ex rel. Verhovec v. Mascio*, 81 Ohio St.3d 334, 336 (1998). Here, a stay for the purpose of a later determination of damages was not necessary, and thus, the failure to grant a stay for that purpose was not an abuse of discretion. If, at the conclusion of a quo warranto action, the judgment is that the second board has no valid claim to office, then Omar Mosque may initiate a new action in the court of common pleas for damages against the members of the second board. In such an action, Omar Mosque may seek the damages it sustained by reason of the second board's usurpation of office. R.C. 2733.18. Additionally, the new action could include refiled claims for fraudulent misrepresentation, intentional interference with business relationships, and civil conspiracy.

{¶ 28} We recognize that the trial court dismissed Omar Mosque's claims "with prejudice," which would normally bar the refiled of such claims under the doctrine of res judicata. *Tower City Properties v. Cuyahoga Cty. Bd. of Revision*, 49 Ohio St.3d 67, 69 (1990). We find, however, that the trial court erred in dismissing Omar Mosque's claims with prejudice. The trial court dismissed Omar Mosque's claims because it lacked subject-matter jurisdiction over them. A dismissal for lack of subject-matter jurisdiction operates as a failure otherwise than on the merits. Civ.R. 41(B)(4). Thus, the trial court should have dismissed Omar Mosque's claims without prejudice.

{¶ 29} Omar Mosque also argues that the trial court should have stayed the action because the clerk of courts retains the interpleaded funds from Omar Mosque's Chase Bank accounts. We find this reason for a stay persuasive. The clerk of courts holds funds that it will not release "until such time as [the trial court] orders and directs how and to whom the Interpleader Funds are to be delivered." (R. 94 at 2.) By dismissing instead of staying, the trial court eliminated the only action in which the parties could file a motion seeking such an order. The clerk of courts cannot hold the funds indefinitely. Once a judgment in quo warranto is obtained, the prevailing side must be able to file a motion with the trial court requesting an order awarding the interpleaded funds to it. Alternatively, if the parties settle their dispute, they must be able to approach the court with an agreed entry regarding the disposition of the funds. Thus, we conclude that the

trial court abused its discretion in not staying the instant action pending a determination in a quo warranto action. Accordingly, we sustain Omar Mosque's second assignment of error.

{¶ 30} For the foregoing reasons, we overrule Omar Mosque's first assignment of error, and we sustain Omar Mosque's second assignment of error. We affirm in part and reverse in part the judgment of the Franklin County Court of Common Pleas. We remand this matter to that court so that it may remove the order of dismissal and instead enter an order staying the instant action.

*Judgment affirmed in part; reversed in part;
case remanded with instructions.*

BRYANT and TYACK, JJ., concur.
