

[Cite as *In re McCulloch v. Freidman*, 2012-Ohio-2777.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97748

IN RE: CEDRIC MCCULLOCH, ET AL.

RELATORS

vs.

JUDGE STUART A. FRIEDMAN

RESPONDENT

**JUDGMENT:
WRIT DENIED**

Writ of Mandamus
Motion Nos. 451570 and 452035
Order No. 455625

RELEASE DATE: June 20, 2012

FOR RELATORS

Cedric McCulloch, Pro Se
Laurie McCulloch, Pro Se
2820 Lander Road
Pepper Pike, Ohio 44124

ATTORNEYS FOR RESPONDENT

William D. Mason, Esq.
Cuyahoga County Prosecutor
By: Charles E. Hannan, Jr., Esq.
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶1} Relators, Cedric and Laurie McCulloch, are parties in *BAC Home Loans Servicing LP v. McCulloch*, Cuyahoga C.P. Case No. CV-761872, which has been assigned to respondent judge. Relators aver that they filed a counterclaim in Case No. CV-761872 and filed motions for summary judgment and default judgment on their counterclaim. They request that this court compel respondent to grant summary judgment or a default judgment on their counterclaim.

{¶2} Relators and respondent have filed motions for summary judgment. Respondent observes that relators did not file a counterclaim in Case No. CV-761872. He correctly observes that respondents filed a counterclaim in *Third Fed. S. & L. Assn. v. McCulloch*, Cuyahoga C.P. Case No. CV-753811. Indeed, relators acknowledge in their motion for summary judgment that they filed the counterclaim in the wrong case.

{¶3} Attached to respondent's motion for summary judgment is a copy of his January 4, 2012 memorandum of opinion and order in Case No. CV-761872 denying relators' motions for summary judgment and default judgment on the ground that there was no counterclaim pending in Case No. CV-761872. To the extent that relators seek a ruling on their motions for summary judgment and default judgment in Case No. CV-761872, respondent has discharged his duty and this action is moot. To the extent that relators request that this court compel respondent to grant those motions, relief in mandamus is not appropriate. Mandamus does not lie to control judicial discretion.

See, e.g., In re Barksdale, 8th Dist. No. 94221, 2010-Ohio-269, ¶ 4. As a consequence, we grant respondent's motion for summary judgment and deny relators' motion for summary judgment.

{¶4} Additionally, R.C. 2731.04 requires that an action in mandamus be brought in the name of the state on relation of the person applying. Failure to comply with this requirement is a ground for dismissal. *See, e.g., Brooks v. State*, 8th Dist. No. 97678, 2012-Ohio-1361.

{¶5} Accordingly, respondent's motion for summary judgment is granted and relators' motion for summary judgment is denied. Relators to pay costs. The court directs the clerk of court to serve all parties with notice of this judgment and its date of entry upon the journal as required by Civ.R. 58(B).

{¶6} Writ denied.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR