

IN THE SUPREME COURT OF OHIO

STATE OF OHIO, EX REL.	:	
DR. STEWART LUCAS MURREY,	:	Case No. 2021-1437
	:	
Relator,	:	
	:	
vs.	:	Original Action in Prohibition Arising
	:	from Cuyahoga County Court of
	:	Common Pleas Case No. CV-20-937433
JUDGE DEBORAH TURNER,	:	
	:	
Respondent.	:	
	:	

**MOTION TO DISMISS ON BEHALF OF RESPONDENT
JUDGE DEBORAH M. TURNER**

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Respondent.	:	<u>RESPONDENT’S MOTION TO DISMISS</u>
	:	

Pursuant to S.Ct.Prac.R. 12.04(A)(1), and Civ.R. 12(B)(6) Respondent Judge Deborah M. Turner respectfully moves this Court for a dismissing Relator’s Petition for a Writ of Mandamus. The grounds in support of this motion are that the Complaint does not state a claim upon which relief in prohibition can be granted.

A memorandum in support of this motion is attached hereto and incorporated herein.

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MEMORANDUM IN SUPPORT OF RESPONDENT’S MOTION TO DISMISS

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INTRODUCTION

Relator Dr. Stewart Murrey (“Relator” or “Murrey”) filed this original mandamus action requesting this Court to command Respondent Judge Deborah M. Turner (“Respondent”) to issue and/or vacate several discretionary discovery orders Respondent entered in in the underlying case of *Aaron M. Minc and Minc LLC, et al. v. Stewart Lucas Murrey*, Cuyahoga County Common Pleas Court Case No. CV-20-937433 (“Underlying Case”). More specifically, Relator asks this Court to order Respondent to:

- (1) “compel Minc Law to appoint an entity representative and sit for a deposition”
(Count 1);
- (2) “compel Aaron Minc and Minc Law to respond to in complete and thorough and good faith answers to written discovery, questions at deposition of Aaron Minc and to produce documents requests at the deposition” *(Count 2)*;
- (3) “vacate [Respondent’s] order [granting] Mincs’ motion to quash discovery” *(Count 3)*; and
- (4) “sanction Aaron Minc and Minc Law for their knowing abuse of privileged speech”
*(Count 4)*¹.

(Compl. ¶¶ 36-48).

As the following will demonstrate, Relator’s Complaint inappropriately seeks to control Respondent’s judicial discretion thereby failing to state of a claim for relief. Further, Relator has an adequate remedy at law to challenge Respondent’s discovery rulings on direct appeal thereby negating the issuance of a writ. Consequently, Respondent respectfully requests that this Court dismiss Relator’s Complaint.

¹ Identified in the Complaint as “Count Three.”

STATEMENT OF FACTS AND PROCEEDINGS

The Underlying Case arises out of a contractual / attorney-client relationship between Aaron Minc and Minc LLC (“Plaintiffs”) and Murrey wherein Relator hired Plaintiffs to remove internet postings on various “revenge-porn/shaming” websites. (*See, e.g.*, Compl.). Plaintiffs commenced the action against Murrey, a former client, alleging abuse of process, breach of contract, and misappropriation of trade secrets. Murrey answered and filed a counterclaim alleging civil conspiracy, RICO violations, fraud, breach of contract and fiduciary duties, unjust enrichment, conversion, intentional infliction of emotional distress, and abuse of process. (Compl. ¶3).

The sole focus for Relator’s mandamus request is an October 14, 2021 Journal Entry with separate Opinion (“Discovery Order”) wherein Respondent resolved several discovery disputes between the parties. (Compl. ¶ 25, Ex. O). In the Discovery Order, Respondent denied Relator’s first motion to compel discovery (filed 7/26/21), Relator’s second motion to compel discovery and request for two-year extension to complete discovery (filed 9/17/21), Relator’s motion for sanctions (filed 10/4/21), and granted Plaintiffs’ motion to quash discovery (filed 09/14/21). (Compl. Ex. O).

On November 29, 2021, Relator filed his mandamus action requesting this Court to order Respondent to vacate the Discovery Order, command Respondent to compel discovery from Plaintiffs and sanction Plaintiffs. (*See, e.g.*, Compl.). However, Relator’s Complaint fails to allege facts that would entitle him to the relief sought and inappropriately uses this original action as a substitute for an interlocutory appeal. For the following reasons, Respondent respectfully submits that Relator’s Complaint should be dismissed pursuant to Civ.R. 12(B)(6).

STANDARD OF REVIEW

Dismissal of an original action is “appropriate if after presuming the truth of all material factual allegations of [Relator’s] petition and making all reasonable inferences in their favor, it appear[s] beyond doubt that they could prove no set of facts entitling them to the requested extraordinary relief.” *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, ¶ 14. However, “unsupported conclusions” in a “complaint for extraordinary relief are not considered admitted and are insufficient to withstand a motion to dismiss.” *State ex rel. Sherrills v. Cuyahoga County Court of Common Pleas*, 72 Ohio St.3d 461, 462, 1995-Ohio-26, 650 N.E.2d 899 (1995).

Even presuming all the factual allegations of the Complaint to be true, Relator has failed to state facts supporting the extraordinary relief of mandamus, and therefore, the Complaint should be dismissed pursuant to Civ.R. 12(B)(6).

LAW AND ARGUMENT

I. Requirements for Issuing a Writ of Mandamus.

A writ of mandamus is “a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station.” *State ex rel. Am. Legion Post 25 v. Ohio Civ. Rights Comm.*, 117 Ohio St.3d 441, 2008-Ohio-1261, 884 N.E.2d 589, ¶ 11 (quoting R.C. 2731.01). For a writ of mandamus to issue, the relator must demonstrate “(1) that he has a clear legal right to the relief prayed for, (2) that respondents are under a clear legal duty to perform the acts, and (3) that relator has no plain and adequate remedy in the ordinary course of the law.” *State ex rel. Westbrook v. Ohio Civ. Rights Comm.*, 17 Ohio St. 3d 215, 215, 478 N.E.2d 799 (1985), quoting *State ex rel. Harris v. Rhodes*, 54 Ohio St. 2d 41, 42,

374 N.E.2d 641 (1978). “The relator must prove entitlement to the writ by clear and convincing evidence.” *State ex rel. Marsh v. Tibbals*, 149 Ohio St.3d 656, 2017-Ohio-829, 77 N.E.3d 909, ¶ 24. Mandamus is “an extraordinary remedy that is to be exercised with caution and only when the right is clear. It should not issue in doubtful cases.” *State ex rel. Ervin v. Barker*, 8th Dist. Cuyahoga No. 98704, 2013-Ohio 376, 2013 WL 485221, citing *State ex rel. Taylor v. Glasser*, 50 Ohio St.2d 165, 364 N.E.2d 1 (1977).

While mandamus may require an inferior tribunal to exercise its judgment or proceed to the discharge its functions, it cannot control its discretion. *See* R.C. 2731.03. Mandamus will not lie to control a tribunal’s discretion, even if that discretion were abused. *State ex rel. Dreamer v. Mason*, 115 Ohio St. 3d 190, 2007-Ohio-4789, 874 N.E.2d 510. Moreover, “[a] proceeding in mandamus is not a substitute for an appeal.” *State ex rel. Woods v. Gagliardo*, 49 Ohio St.2d 196, 197, 360 N.E.2d 705, 706 (1977). “Neither mandamus nor prohibition will issue if the party seeking extraordinary relief has an adequate remedy in the ordinary course of law.” *Dzina v. Celebreeze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 12.

II. A writ of mandamus cannot be used to control judicial discretionary authority.

“[M]andamus will not lie to control judicial discretion, even if that discretion is abused.” *State ex rel. Dreamer*, 2007-Ohio-4789, citing *State ex rel. Rashada v. Pianka*, 112 Ohio St.3d 44, 2006-Ohio-6366, 857 N.E. 2d 1220, ¶ 3; R.C. 2731.03 (“The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.”).

“It is unquestioned that ‘courts have broad discretion over discovery matters.’” *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E. 2d 224, ¶ 11, citing

State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register, 116 Ohio St.3d 88, 2007-Ohio-5542; 876 N.E. 2d 913, ¶ 18; *see also Berthelot v. Dezso*, 86 Ohio St.3d 257, 259, 1999 Ohio 100, 714 N.E. 2d 888 (1999) (“given the discretionary authority vested in [the trial court judge] in discovery matters * * *, an extraordinary writ will not issue to control her judicial discretion, even if that discretion is abused”); *State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 16 (1999) (“Trial courts . . . have extensive jurisdiction over discovery, * * * so [an extraordinary writ] will not generally issue to challenge these orders”). “This discretion, which is consistent with Civ.R. 26(C) and 37(D), applies to rulings on motions for protective orders and motions for sanctions.” *State ex rel. Citizens for Open, Responsive & Accountable Govt.*, 2007-Ohio-5542, ¶ 18, citing *Ruwe v. Springfield Twp. Bd. of Trustees* (1987), 29 Ohio St.3d 59, 61, *Covington v. MetroHealth Sys.*, 150 Ohio App.3d 588, 2002-Ohio-6629 (10th Dist. 2002); *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 260, 1996-Ohio-159, 662 N.E.2d 1.

Relator argues that he is entitled to a writ of mandamus because Respondent’s Discovery Order is “an egregious failure of **judicial discretion**” preventing Murrey from obtaining “lawful discovery before trial”, including the deposition of Minc Law. (Compl. ¶¶ 25-29, 38, 42) (emphasis added). However, “[g]iven the discretionary authority vested in Judge [Turner] in discovery matters, ‘an extraordinary writ will not issue to control [her] judicial discretion, even if that discretion is abused.’” *State ex rel. Mason*, 2007-Ohio-6754 at ¶ 11. Respondent undoubtedly has jurisdiction in the Underlying Case and lawfully exercised her judicial discretion to resolve the underlying discovery dispute. Relator’s Complaint for an extraordinary writ of mandamus fails to state a claim because it is an improper attempt to control Respondent’s judicial discretion. Therefore, the Complaint should be dismissed.

III. Relator has a plain and adequate remedy at law.

Relator also has a plain and adequate remedy at law. “Mandamus is not appropriate if there is a plain and adequate remedy in the courts of law.” *State ex rel. Dreamer*, 2007-Ohio-4789 at ¶ 13. “An appeal is generally considered an adequate remedy in the ordinary course of law sufficient to preclude a writ.” *State ex rel. Love v. O'Donnell*, 150 Ohio St.3d 378, 2017-Ohio-5659, 81 N.E.3d 1250, ¶ 5, citing *Shoop v. State*, 144 Ohio St.3d 374, 2015-Ohio-2068, 43 N.E.3d 432, ¶ 8. “The availability of an appeal is an adequate remedy even if the relator fails to pursue the appeal.” *State ex rel. Davies v. Schroeder*, 160 Ohio St.3d 29, 2020-Ohio-1045, 153 N.E.3d 27, ¶ 10, citing *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 579, 2001-Ohio-1613, 757 N.E.2d 357 (2001); *Jackson v. Johnson*, 135 Ohio St.3d 364, 2013-Ohio-999, 986 N.E.2d 989, ¶ 5.

Here, Relator has an adequate remedy in that he can challenge the Discovery Order on direct appeal to the Eighth District Court. “The delay and expense caused by an appeal do not render that appeal an inadequate remedy.” *State ex rel. McGinty v. Eighth Dist. Court of Appeals*, 142 Ohio St.3d 100, 2015-Ohio-937, 28 N.E.3d 88, ¶ 16; *see also State ex rel. Banc One Corp. v. Walker*, 86 Ohio St.3d 169, 173-174, 1999-Ohio-151, 712 N.E.2d 742, citing *Fraiberg v. Cuyahoga Cty. Court of Common Pleas, Domestic Relations Div.*, 76 Ohio St. 3d 374, 379, 667 N.E.2d 1189 (1996) (“The mere fact that postjudgment appeal may be expensive to pursue does not render appeal inadequate so as to satisfy extraordinary relief.”); *State ex rel. Lyons v. Zaleski*, 75 Ohio St.3d 623, 626, 1996 Ohio 267, 665 N.E.2d 212 (1996) (“contentions that appeal from any subsequent adverse final judgment would be inadequate due to time and expense are without merit.”). Because he has an adequate remedy by way of direct appeal, Relator’s Complaint must be denied.

IV. The extraordinary writ of prohibition cannot be used as a substitute for appeal.

From the face of the Complaint, it is beyond doubt that Relator is using this instant mandamus action as a substitute for an appeal of Respondent's interlocutory Discovery Order essentially arguing that Respondent abused her discretion by denying him discovery in the Underlying Case. "[N]either mandamus nor prohibition may be employed as a substitute for an appeal from an interlocutory order." *State ex rel. Newton v. Court of Claims*, 73 Ohio St.3d 553, 555, 1995 Ohio 117, 653 N.E. 2d 366, 555 (1995), citing *State ex rel. Keenan v. Calabrese*, 69 Ohio St.3d 176, 178, 631 N.E.2d 119 (1994). Because, Relator is substituting this original action for an interlocutory appeal, his Complaint must be dismissed.

CONCLUSION

Relator has failed to state a claim upon which relief can be granted. Relator is improperly using an original mandamus action to control Respondent's judicial discretion and as a substitute for a direct appeal. Moreover, Relator has an adequate remedy at law by way of appeal. Therefore, Respondent respectfully requests that this Court dismiss Relator's Complaint for Writ of Mandamus pursuant to S.Ct.Prac.R. 12.04(C) and Civ. R. 12(B)(6).

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CERTIFICATE OF SERVICE

The undersigned certifies that this Motion to Dismiss on Behalf of Respondent Judge Deborah M. Turner was served on December 16, 2021 via email and regular mail on the following:

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