[Cite as *State ex rel. Welt v. Doherty*, 2020-Ohio-6684.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO ex rel.
RICHARD J. WELT,

Relator,

- vs -

THE HONORABLE BECKY L. DOHERTY,

Respondent.

PER CURIAM OPINION

CASE NO. 2020-P-0018

Original Action for Writs of Prohibition and Mandamus.

Judgment: Petition dismissed.

Lawrence G. Reinhold, 525 Rocky Hollow Drive, Akron, Ohio 44313-5945 (For Relator).

Victor V. Vigluicci, Portage County Prosecutor, *Theresa M. Scahill*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, Ohio 44266 (For Respondent).

PER CURIAM.

{¶1} Respondent, Portage County Court of Common Pleas Judge Becky L. Doherty, moves to dismiss the amended petition for writs of prohibition and mandamus for failure to state claims upon which relief can be granted. For the following reasons, we dismiss.

{¶2} In his amended petition, relator, Attorney Richard J. Welt, alleges the underlying action began in the Portage County Municipal Court in 2008 when Dodeka,

L.L.C. filed suit against Cindy Keith seeking to recover a credit card debt that Keith's ex-husband had incurred. After some delay, Keith answered the complaint and asserted three counterclaims against Dodeka.

{¶3} Although relator was not a plaintiff, he is the attorney who filed the complaint on behalf of Dodeka, and Keith named him as a defendant in the counterclaim. Dodeka's complaint seeks both recovery of a debt and attorney fees. Keith alleges in one of her counterclaims that Ohio law prohibits the recovery of attorney fees in a debt collection case and that relator therefore violated federal law.

{¶4} Under Ohio law, a counterclaim can only be asserted against an opposing party. *Hampton v. Ahmed*, 7th Dist. Belmont No. 02 BE 66, 2005-Ohio-1115, ¶ 23. Because relator was not a plaintiff in the complaint, the three claims Keith asserts are third-party claims. Civ.R. 14. Relator's allegations, however, fail to properly characterize Keith's claims as third-party claims and instead labels them counterclaims. And he does not challenge the service as improper.

{¶5} Due to the amount of damages Keith sought, the case was transferred to the Portage County Court of Common Peas. The trial court ruled that Dodeka failed to attach the required documentation concerning the account. Accordingly, Dodeka filed an amended complaint and Keith filed an answer. Keith did not, however, restate or reference her claims against relator or Dodeka.

{¶6} In September 2019, relator moved to dismiss under Civ.R. 12(B) and for summary judgment alleging that there were no pending claims against him. In addition to noting that Keith never filed a third-party complaint against him, relator argues the counterclaims are no longer pending because Keith did not reassert them when she

filed her amended answer.

{¶7} In January 2020, respondent overruled both motions concluding that Keith's claims remained pending against relator. The trial court treated those claims as counterclaims despite being third-party claims. In response, relator brought this original action.

{¶8} In his first petition, relator requested a writ of mandamus ordering respondent to dismiss the underlying case against him due to no pending claims against him. Respondent moved to dismiss the mandamus claim under Civ.R. 12(B)(6) because relator has an adequate legal remedy through an appeal of the January 2020 judgment.

{¶9} In response to the motion, relator filed an amended petition in which he alternatively seeks a writ of mandamus or prohibition. He alleges that respondent patently and unambiguously lacks jurisdiction over him due to a lack of pending claims.

{¶10} Respondent then filed a second, supplemental motion to dismiss the prohibition claim, asserting that the trial court does not patently and unambiguously lack jurisdiction.

{¶11} "'A writ of prohibition can only be issued where the relator establishes * * *: (1) a judicial officer or court intends to exercise judicial power over a pending matter; (2) the proposed use of that power is unauthorized under the law; and (3) the denial of the writ will result in harm for which there is no other adequate remedy in the ordinary course of the law. *State ex rel. Florence v. Zitter*, 106 Ohio St.3d 87, * * *, 2005-Ohio-3804, ¶ 14; *State ex rel. Sliwinski v. Unruh*, 118 Ohio St.3d 76, * * * , 2008-Ohio-1734, ¶ 7. A writ of prohibition is a legal order under which a court of superior jurisdiction

enjoins a court of inferior jurisdiction from exceeding the general scope of its inherent authority. *State ex rel. Feathers v. Hayes*, 11th Dist. No. 2006-P-0092, 2007-Ohio-3852, ¶ 9; *State ex rel. Tubbs Jones v. Suster*, 84 Ohio St.3d 70 * * * (1998). The writ is an extraordinary remedy which should not be issued in a routine manner. *State ex rel. The Leatherworks Partnership v. Stuard*, 11th Dist. No. 2002-T-0017, 2002-Ohio-6477, ¶ 15.' (Parallel citations omitted.)" *Beers v. Falkowski*, 11th Dist. Lake No. 2017-L-044, 2017-Ohio-4380, ¶ 5, quoting *State ex rel. Caszatt v. Gibson*, 11th Dist. Lake No. 2012-L-107, 2013-Ohio-213, ¶ 15.

{¶12} "In regard to the 'adequate remedy' element of the writ, * * * a direct appeal of the trial court's jurisdictional determination is a sufficient legal remedy which acts as a bar to a prohibition claim. *Feathers*, 2007-Ohio-3852, at ¶ 10, citing *Hughes v. Calabrese*, 95 Ohio St.3d 334, 767 N.E.2d 725, 2002-Ohio-2217. * * *

{¶13} "'As to the second and third elements for the writ, * * * the absence of an adequate legal remedy is not necessary when the lack of judicial authority to act is patent and unambiguous; i.e., if the lack of jurisdiction is clear, the writ will lie upon proof of the first two elements only. * * * However, if the lack of jurisdiction is not patent and unambiguous, the fact that a party can appeal a lower court's decision bars the issuance of the writ because, when a court has general jurisdiction over the subject matter of a case, it has the inherent authority to decide whether that jurisdiction has been properly invoked in a specific instance. * * *' (Citations omitted). *State ex rel. Godale v. Geauga Cty. Ct. of Common Pleas*, 166 Ohio App.3d 851, 853 N.E.2d 708, 2006-Ohio-2500, at ¶ 6." *State ex rel. Jurczenko v. Lake Cty. Ct. of Common Pleas*, 11th Dist. Lake No. 2009-L-178, 2010-Ohio-3252, ¶ 25-26.

{¶14} A trial court's lack of jurisdiction will generally be deemed patent and unambiguous when:

{¶15} "'there are no set of facts under which a trial court or judge could have jurisdiction over a particular case, the alleged jurisdictional defect will always be considered patent and unambiguous. On the other hand, if the court or judge generally has subject matter jurisdiction over the type of case in question and [her] authority to hear that specific case will depend on the specific facts before [her], the jurisdictional defect is not obvious and the court/judge should be allowed to decide the jurisdictional issue.'" *State ex rel. Huntington Natl. Bank v. Kontos*, 11th Dist. Trumbull No. 2013-T-0089, 2014-Ohio-1374, ¶ 12, quoting *Leatherworks*, 2002-Ohio-6477, at ¶ 19.

{¶16} Here, relator does not challenge respondent's subject matter jurisdiction. He also does not challenge whether he was properly served when Keith first asserted her claims against him in April 2009. Instead, his prohibition claim is based solely on the allegation that the claims are no longer pending because Keith waived them by not restating them in her April 2010 amended answer.

{¶17} As noted, Keith's claims against relator are third-party claims because relator was not a party to the case when they were filed. Civ.R. 14(A). As third-party claims, Keith had no duty to restate them against relator when she filed her amended answer. Therefore, Keith's claims against relator are pending, and respondent does not patently and unambiguously lack jurisdiction to proceed.

{¶18} Alternatively, even if Keith's claims were deemed counterclaims, dismissal is still warranted. In his amended petition, relator cites *Steiner v. Steiner*, 85 Ohio App.3d 513, 519, 620 N.E.2d 152 (4th Dist.1993), for the proposition that an amended

pleading acts a substitute for the original pleading. Building upon this, he cites *Flemco, LLC v. 12307 St. Clair, Ltd.*, 8th Dist. Cuyahoga No. 105956, 2018-Ohio-588, ¶ 33, for the holding that when a defendant fails to restate in an amended answer a counterclaim asserted in a prior answer, that counterclaim is no longer pending.

{¶19} However, two appellate districts have reached the opposite conclusion, i.e., it is not necessary for a defendant to restate a counterclaim as part of an amended answer. *Abrams & Tracy, Inc. v. Smith*, 88 Ohio App.3d 253, 263-264, 623 N.E.2d 704 (10th Dist.1993); *EMC Mtge. Corp. v. Atkinson*, 9th Dist. Summit No. 27283, 2015-Ohio-1800, ¶ 12. While acknowledging the general principle that an amended pleading supersedes the original, the Tenth Appellate District noted that an answer and a counterclaim are separate pleadings under the Ohio Rules of Civil Procedure even when set forth in a single document. *Abrams & Tracy*, at 263. However, the Eighth Appellate District in *Timock v. Bolz*, 8th Dist. Cuyahoga No. 67623, 1995 WL 322304, reached the opposite conclusion than its determination in *Flemco*.

{¶20} And while this court has acknowledged that a counterclaim is a pleading under the civil rules, *Caszatt v. Gibson*, 11th Dist. Lake No. 2012-L-107, 2013-Ohio-213, ¶ 27-28, we have not addressed the precise issue of whether a defendant must restate a counterclaim as part of an amended answer. Given the lack of controlling precedent, respondent was authorized to address the issue and render a decision. To this extent, even if we ultimately disagree with respondent's determination, any error in respondent's analysis would not rise to the level of patent and unambiguous.

{¶21} Accordingly, although respondent's decision overruling relator's motions to dismiss and for summary judgment is not a final judgment that is immediately

appealable, *U.S. Bank, N.A. v. Courthouse Crossings, Acquisitions, LLC*, 2017-Ohio-9232, 103 N.E.3d 300, ¶ 11-12 (2d Dist.); *Klein v. Portage Cty.*, 139 Ohio App.3d 749, 751, 745 N.E.2d 532 (11th Dist.2000), relator can appeal the decision when respondent issues final judgment. And an appeal from the judgment concluding the case is an adequate legal remedy barring issuance of a writ of prohibition. *State ex rel. Edwards v. Tompkins*, 5th Dist. Muskingum No. CT2010-0035, 2011-Ohio-32, ¶ 9, 14 (holding that a prohibition will not lie because a direct appeal of the final judgment in the case constitutes an adequate legal remedy).

{¶22} The foregoing analysis is also dispositive of relator's mandamus claim. Like a writ of prohibition, a writ of mandamus will lie where there is no adequate remedy the relator could pursue to obtain the same relief. *Id*. at ¶ 6. Thus, when the relator can contest the interlocutory order in a direct appeal from final judgment, he has an adequate legal remedy. *Id*. at ¶ 9.

{¶23} Dismissal of a claim for failure to state a viable claim for relief is warranted "when the nature of the relator's allegation are such that even if those allegations are construed in a manner most favorable to the relator, they are insufficient to demonstrate that he will be able to prove a set of facts under which he would be entitled to the writ." *Hamilton v. Collins*, 11th Dist. Lake No. 2003-L-106, 2003-Ohio-5703, ¶ 6.

{¶24} Here, dismissal of relator's prohibition and mandamus claims is warranted because he cannot prove a set of facts showing he has no other adequate legal remedy to obtain the requested relief. Accordingly, we grant respondent's motions to dismiss the prohibition and mandamus claims.

{¶25} Relator's amended petition for writs of prohibition and mandamus is dismissed.

TIMOTHY P. CANNON, P.J., THOMAS R. WRIGHT, J., MATT LYNCH, J., concur.