

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Edward F. Whipps, Trustee,	:	
	:	
Plaintiff-Appellee,	:	Nos. 12AP-509
	:	and 12AP-685
v.	:	(C.P.C. No. 05CVH-10-11685)
	:	
James M. Ryan,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	
	:	
Sky Bank et al.,	:	
	:	
Plaintiffs-Appellees,	:	
	:	No. 12AP-722
v.	:	(C.P.C. No. 06CVH-01-1244)
	:	
Michael F. Colley et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees,	:	
	:	
(James M. Ryan,	:	
	:	
Defendant-Appellant).	:	
	:	

D E C I S I O N

Rendered on June 28, 2013

James M. Ryan, pro se.

APPEALS from the Franklin County Court of Common Pleas

CONNOR, J.

{¶ 1} Defendant-appellant, James M. Ryan ("Ryan"), appeals from an August 1, 2012 orders of the Franklin County Court of Common Pleas in which the court granted

the motion of DB Midwest, LLC ("DB Midwest"), asking that Ryan be declared a vexatious litigator pursuant to R.C. 2323.52.

{¶ 2} This is a consolidation of three appeals arising from two consolidated civil actions filed in the trial court. In October 2005, Edward F. Whipps, trustee, filed a partition action against Ryan and Ryan as trustee. In January 2006, Sky Bank filed an action for money damages against Ryan and Michael F. Colley ("Colley") alleging they had defaulted on promissory notes.

{¶ 3} In February 2006, Sky Bank moved to intervene in the partition action, alleging that Colley and Ryan were in default on a promissory note and other obligations secured by a mortgage on the property subject to the partition action. The trial court granted Sky Bank's motion to intervene.

{¶ 4} In August 2006, Sky Bank moved to consolidate the partition action with its action for damages against Ryan and Colley. The trial court granted consolidation of the two actions. Sky Bank later moved to substitute DB Midwest for Sky Bank in the consolidated case. The trial court granted the substitution request.

{¶ 5} On June 18, 2012, DB Midwest filed a motion pursuant to R.C. 2323.52 asking the court to declare Ryan a vexatious litigator. In response, Ryan filed a Civ.R. 12(E) motion for a definite statement. On August 1, 2012, the trial court granted DB Midwest's motion and entered an order declaring Ryan a vexatious litigator under R.C. 2323.52.

{¶ 6} Ryan appeals from the trial court's August 1, 2012 orders, assigning the following errors:

[I.] The Trial Court Erred in granting DB Midwest LLC's Motion to Declare Defendant, James M. Ryan, A Vexatious Litigator r-334. and docketing its Order Declaring James M. Ryan a Vexatious Litigator r-332/255 as the Trial Court lacked subject matter jurisdiction over the case and personal jurisdiction over James M. Ryan as the case was on appeal to the Tenth District Court of Appeals at the time the Trial Court ruled on the motion and issued its Order.

[II.] The Trial Court Erred by Granting DB Midwest LLC's Motion To Declare Defendant, James M. Ryan, A Vexatious Litigator r-334 and Erred in issuing and docketing its Order Declaring James M. Ryan a Vexatious Litigator r-332/256.

The Trial Court abused its discretion in Granting DB Midwest LLC's Motion and by Issuing and Docketing its Order Declaring James M. Ryan a Vexatious Litigator.r-332/256.

{¶ 7} We find Ryan's second assignment of error dispositive of this appeal. In his second assignment of error, Ryan asks this court to vacate the trial court's order finding him to be a vexatious litigator on the ground that DB Midwest initiated the vexatious litigator proceeding by motion rather than by commencing a civil action. R.C. 2323.52 provides:

(B) A person * * * who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator. The person * * * may commence this civil action while the civil action or actions in which the habitual and persistent vexatious conduct occurred are still pending or within one year after the termination of the civil action or actions in which the habitual and persistent vexatious conduct occurred.

(C) A civil action to have a person declared a vexatious litigator shall proceed as any other civil action, and the Ohio Rules of Civil Procedure apply to the action.

{¶ 8} In *Kinstle v. Union Cty. Sheriff's Office*, 3d Dist. No. 14-07-16, 2007-Ohio-6024, ¶ 10, the court held that R.C. 2323.52 "unambiguously requires the commencement of a 'civil action,' and * * * a motion is not the equivalent of a complaint." *Id.* One of the defendants in *Kinstle* filed a motion asking the court to declare Kinstle a vexatious litigator. The trial court entered judgment declaring Kinstle a vexatious litigator, and the Third District Court of Appeals reversed.

{¶ 9} The appellate court's holding relied on the language of R.C. 2323.52. The court noted that R.C. 2323.52(B) states that a person "may commence a civil action" and that R.C. 2323.52(C) provides that the civil action should proceed as any other civil action. The court further noted that pursuant to Civ.R. 3, a civil action is commenced by filing a complaint with the court. Thus, the court held that "filing a *motion* in a pending cause of action is not the equivalent of 'commencing a civil action' as intended by both R.C.

2323.52 and Civ.R. 3." (Emphasis sic.) *Id.* at ¶ 9. *See also Helfrich v. Madison*, 5th Dist. No. 2011-CA-89, 2012-Ohio-3701, ¶ 52 (noting that "[a] party seeking to have a person declared a vexatious litigator may not do so merely by motion filed in the underlying case"). *Compare State ex rel. Tauwab v. Ambrose*, 8th Dist. No. 97472, 2012-Ohio-817 (ruling on a writ of prohibition, the appellate court concluded that, because a common pleas court is a court of general jurisdiction, and R.C. 2323.52 specifically vests the common pleas court with the power to declare a person a vexatious litigator, the common pleas court did not patently and unambiguously lack jurisdiction to rule on a vexatious litigator claim brought by way of motion, as an appeal from such ruling would be "an adequate remedy at law which preclude[d] granting the writ").

{¶ 10} Under the plain language of R.C. 2323.52, a party must commence a civil action by filing a complaint to have a court declare a person a vexatious litigator. The filing of a motion in a pending case does not satisfy the requirements of the statute. *See Kinstle*. Accordingly, we sustain Ryan's second assignment of error and remand the cause to the trial court. Our disposition of Ryan's second assignment of error renders the first assignment of error moot.

{¶ 11} Having sustained Ryan's second assignment of error, rendering the first assignment of error moot, we reverse the judgments of the Franklin County Court of Common Pleas granting DB Midwest's motion to declare Ryan a vexatious litigator under R.C. 2323.52.

*Judgments reversed;
cause remanded.*

TYACK and SADLER, JJ., concur.
