

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

The State ex rel. Robert L. Hillman, :
Relator, :
v. : No. 16AP-436
[The Honorable Colleen O'Donnell], : (REGULAR CALENDAR)
Respondent. :

D E C I S I O N

Rendered on December 22, 2016

Robert L. Hillman, pro se.

Ron O'Brien, Prosecuting Attorney, and Jesse W. Armstrong, for respondent.

IN PROCEDENDO
ON OBJECTION TO THE MAGISTRATE'S DECISION

KLATT, J.

{¶ 1} Relator, Robert L. Hillman, an inmate at the Chillicothe Correctional Institution, commenced this original action in procedendo seeking an order compelling respondent, the Honorable Colleen O'Donnell, a judge of the Franklin County Court of Common Pleas, to rule on his Civ.R. 60(B) motion filed on January 25, 2016 in Franklin C.P. No. 15CV-4626. Respondent has filed a motion for summary judgment to which relator has not responded.

{¶ 2} Pursuant to Civ.R. 53 and Loc.R. 13(M) of the Tenth District Court of Appeals, we referred this matter to a magistrate who issued a decision, including findings of fact and conclusions of law, which is appended hereto. The magistrate found that respondent has ruled on relator's Civ.R. 60(B) motion. Because procedendo will not

compel the performance of a duty that has already been performed, the magistrate has recommended that we grant respondent's motion for summary judgment.

{¶ 3} Relator has filed an objection to the magistrate's decision. Relator appears to argue that because he never received the trial court's judgment denying his Civ.R. 60(B) motion, we should issue a writ of procedendo compelling the respondent to issue another judgment. We disagree.

{¶ 4} Relator's complaint seeks an order compelling respondent to rule on his Civ.R. 60(B) motion. It is undisputed that respondent ruled on relator's Civ.R. 60(B) motion. As noted by the magistrate, a writ of procedendo cannot issue to compel the performance of a duty that has already been performed. Therefore, regardless of whether relator received a copy of the judgment denying his Civ.R. 60(B) motion, a writ of procedendo cannot issue because the respondent has ruled on the motion. Relator can challenge the denial of his Civ.R. 60(B) motion and any potential due process violation by direct appeal. For these reasons, we overrule relator's objection.

{¶ 5} Following an independent review of this matter, we find that the magistrate has properly determined the facts and applied the appropriate law. Therefore, we adopt the decision as our own, including the findings of fact and conclusions of law contained therein. In accordance with the magistrate's decision, we deny relator's request for a writ of procedendo.

Objection overruled; writ of procedendo denied.

LUPER SCHUSTER and HORTON, JJ., concur.

APPENDIX**IN THE COURT OF APPEALS OF OHIO****TENTH APPELLATE DISTRICT**

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|--------------------------------------|---|--------------------|
| The State ex rel. Robert L. Hillman, | : | |
| | : | |
| Relator, | : | |
| | : | |
| v. | : | No. 16AP-436 |
| | : | |
| [The Honorable Colleen O'Donnell], | : | (REGULAR CALENDAR) |
| | : | |
| Respondent. | : | |

MAGISTRATE'S DECISION**Rendered on July 28, 2016**

*Robert L. Hillman, pro se.**Ron O'Brien, Prosecuting Attorney, and Jesse W. Armstrong, for respondent.*

**IN PROCEDENDO
ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT**

{¶ 6} In this original action, relator, Robert L. Hillman, an inmate of the Chillicothe Correctional Institution ("CCI"), requests a writ of procedendo ordering respondent, the Honorable Colleen O'Donnell, a judge of the Franklin County Court of Common Pleas, to rule on his Civ.R. 60(B) motion for relief from judgment filed on January 25, 2016 in Franklin C.P. No. 15CV-4626.

Findings of Fact:

{¶ 7} 1. On June 9, 2016, relator, a CCI inmate, filed this original action against respondent. In his complaint, relator requests a writ of procedendo ordering respondent to rule on his Civ.R. 60(B) motion for relief from judgment filed on January 25, 2016 in the common pleas court.

{¶ 8} 2. On July 1, 2016, respondent filed a motion to dismiss. In support, respondent submitted a copy of her decision and entry filed on June 28, 2016 in the common pleas court in Franklin C.P. No. 15CV-4626. In her decision and entry, respondent denies relator's January 25, 2016 Civ.R. 60(B) motion for relief from judgment.

{¶ 9} 3. On July 6, 2016, the magistrate issued an order converting respondent's motion to dismiss to one for summary judgment.

{¶ 10} 4. Also, on July 6, 2016, the magistrate issued notice that respondent's July 1, 2016 motion to dismiss converted to one for summary judgment is set for submission to the magistrate on July 27, 2016.

{¶ 11} 5. Relator has not responded to respondent's motion for summary judgment.

Conclusions of Law:

{¶ 12} It is the magistrate's decision that this court grant respondent's motion for summary judgment.

{¶ 13} In this action, relator seeks a writ of procedendo ordering respondent to rule on his January 25, 2016 Civ.R. 60(B) motion for relief from judgment filed in the common pleas court. Subsequent to the filing of this action, respondent has ruled on relator's motion.

{¶ 14} Procedendo will not compel the performance of a duty that has already been performed. *State ex rel. Walker v. Koch*, 98 Ohio St.3d 295, 2003-Ohio-856, ¶ 14.

{¶ 15} Summary judgment is appropriate when the movant demonstrates that: (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, said party being entitled to have the evidence construed most strongly in his favor. *Turner v. Turner*, 67 Ohio St.3d 337, 339-40 (1993); *Bostic v. Connor*, 37 Ohio St.3d 144, 146 (1988); *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66 (1978). The moving party bears the burden of proving no genuine issue of material fact exists. *Mitseff v. Wheeler*, 38 Ohio St.3d 112, 115 (1988).

{¶ 16} Clearly, respondent is entitled to judgment as a matter of law.

{¶ 17} Accordingly, it is the magistrate's decision that this court grant respondent's motion for summary judgment.

/S/ MAGISTRATE
KENNETH W. MACKE

NOTICE TO THE PARTIES

Civ.R. 53(D)(3)(a)(iii) provides that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b).