

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

STATE OF OHIO ex rel. BRIAN KOLKOWSKI,	:	OPINION
	:	
Petitioner-Appellant,	:	CASE NO. 2008-L-138
- VS -	:	
	:	
BOARD OF COMMISSIONERS OF LAKE COUNTY, OHIO,	:	
	:	
Respondents-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 08 CV 002068.

Judgment: Affirmed.

Neil R. Wilson, Neil R. Wilson Co., L.P.A., FirstMerit Bank Building, 56 Liberty Street, #205, Painesville, OH 44077 (For Petitioner-Appellant).

Charles E. Coulson, Lake County Prosecutor, and *Michael L. DeLeone*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Respondents-Appellees).

MARY JANE TRAPP, P.J.

{¶1} Mr. Brian Kolkowski appeals from the judgment of the Lake County Court of Common Pleas granting the Lake County Board of Commissioner's motion to dismiss.

{¶2} We affirm, determining that the issues raised in this appeal have been decided by the Supreme Court of Ohio in a then pending, now settled, mandamus action. Thus, these issues are now moot.

{¶3} Substantive and Procedural History

{¶4} Mr. Kolkowski, as a taxpayer of Lake County, filed a complaint against the board for a preliminary and permanent injunction, alleging that the board was acting unlawfully by failing to appropriate the proper amount of funds for the operation of the Lake County Juvenile Court, as directed by Judge Weaver's appropriation request and subsequent order. Specifically, Mr. Kolkowski alleged the board misapplied and/or illegally used public funds when it passed a supplemental resolution deleting most of the previous salary appropriations for the juvenile court and then passing bi-weekly supplemental appropriation resolutions in violation of R.C. 309.12.

{¶5} Pending Cases Concerning the Same Controversy

{¶6} At the time Mr. Kolkowski's action was filed, two cases concerning the budget dispute were pending; one in this court, *In re: 2008 Operating Budget Lake County Juvenile Court*, 11th Dist. No. 2008-L-044, 2008-Ohio-4048, and a petition for a writ of mandamus filed in the Supreme Court of Ohio in *State ex rel. Weaver v. Board of Commissioners of Lake County*, No. 2008-0697.

{¶7} In *In re: 2008 Operating Budget Lake County Juvenile Court*, we granted Judge Weaver's motion to dismiss the board's appeal from his order compelling the board to appropriate additional funds for the court's 2008 operating budget. We found that the ex parte order he issued without further contempt proceedings, at which an evidentiary record for appellate review is made, was not a final appealable order.

{¶8} Judge Weaver did not take any further steps to enforce his order by way of contempt proceedings, but instead chose the other option afforded a trial court. The judge brought an original action in the Supreme Court of Ohio.

{¶9} Judge Weaver retired, and his successor filed an application for dismissal of the mandamus action in the Supreme Court of Ohio on February 12, 2009, citing a settlement of all issues between the parties. Thus, the issues brought before us, notwithstanding the questions presented as to whether Mr. Kolkowski had standing to bring his action or whether his complaint was sufficient to survive a Civ.R. 12(B)(6) challenge, are now moot.

{¶10} The Taxpayer Suit

{¶11} Mr. Kolkowski's taxpayer's action alleged that the board was misapplying and/or illegally using funds in violation of R.C. 309.12 by deleting most of an earlier salary appropriation for the juvenile court and then, instead, passing bi-weekly appropriation resolutions. Mr. Kolkowski sought preliminary and permanent injunction relief.

{¶12} There was no dispute that at the time the action was filed Mr. Kolkowski was a taxpayer of Lake County, and it was stipulated that he was not an employee of the Lake County Juvenile Court, did not have a case pending before it, and that he was not a public official.

{¶13} After a hearing on the preliminary injunction and submission of briefs relative to the motion to dismiss or in the alternative, motion for summary judgment, the trial court granted the board's motion to dismiss, finding that the "factual allegations of the complaint, and the reasonable inferences drawn therefrom" did not constitute violations of R.C. 309.12.

{¶14} Addressing the statutory taxpayers' cause of action, the trial court found the allegations of Mr. Kolkowski's suit insufficient to state a cause of action under R.C.

309.12 under any of the four arguments advanced: express violations of R.C. 309.12; violation of R.C. 5705.38(A) regarding supplemental appropriations; rejection on one occasion of a request to pay overtime and salary obligations of the court due to lack of sufficient funds in violation of R.C. 309.12; and the failure to provide sufficient funds to pay overtime pursuant to R.C. 4111.03 in violation of R.C. 309.12.

{¶15} There are six express triggers for a civil action under R.C. 309.12: misapplication of public funds; illegally drawing or withholding public funds from the county treasurer; illegally or fraudulently entering into a contract; illegally using or occupying county property; violating the terms of a contract; or depriving the court of money due it. The court found that there were no allegations the funds had been misapplied because there were no allegations that the funds were directed to any recipient other than the juvenile court. The court further found there were no allegations that the funds were illegally drawn or withheld from the treasurer or allegations of violations of public contracts or illegal use or occupancy of county property. While the court found that passing salary appropriations on a bi-weekly basis “may be unusual *** time-consuming and inefficient,” it found no statutory prohibition for such a procedure.

{¶16} As for the argument that passing the supplemental appropriations violated R.C. 5705.38(A), the court found that the limitations on supplemental appropriations are found at R.C. 5705.40, and inasmuch as the complaint failed to allege violations of that section, the complaint failed to state a viable cause of action.

{¶17} The court further found that the complaint failed to allege how the rescheduling of disbursement of appropriated funds without any net reduction in the total appropriated amount constituted a violation of R.C. 309.12. Specifically, the court

found that the allegation of a failure on one occasion to pay the requested amount for overtime and salaries when there were insufficient funds to cover the requested amount did not constitute a violation of R.C. 309.12.

{¶18} Finally, the trial court found that even if the allegation that the board failed to provide sufficient funds to pay overtime as required by R.C. 4111.03 is taken as true, the complaint failed to allege how such failure constituted a violation of R.C. 309.12.

{¶19} Turning to Mr. Kolkowski's common law taxpayers' cause of action, the trial court found that he failed to allege that he had a special interest in the public funds or property that was allegedly being misapplied or illegally used by the board; thus, he lacked standing to bring this cause of action.

{¶20} Furthermore and most fundamentally, the trial court found that the issues raised in the complaint, that the board was unreasonably hindering the proper operation of the juvenile court, were already before the Supreme Court of Ohio through Judge Weaver's petition for a writ of mandamus, contrary to Mr. Kolkowski's allegation that "the issues raised by this complaint are not presently before any other court." Thus, the court also dismissed the complaint for reasons of judicial economy.

{¶21} Mr. Kolkowski appealed the ruling on November 28, 2008, and as we noted above, the original action before the Supreme Court of Ohio was dismissed on February 12, 2009, when the parties reached a settlement.

{¶22} Mr. Kolkowski raises the following assignment of error:

{¶23} "The trial court erred in dismissing the complaint of the appellant for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted."

{¶24} Motion to Dismiss

{¶25} “An appellate court’s standard of review for a trial court’s actions regarding a motion to dismiss is de novo.” *Bliss v. Chandler*, 11th Dist. No. 2006-G-2742, 2007-Ohio-6161, ¶91, quoting *State ex rel. Malloy v. City of Girard*, 11th Dist. No. 2006-T-0019, 2007-Ohio-338, ¶8, citing *Clark v. Alberini*, 11th Dist. No. 2001-T-0015, 2001 Ohio App. LEXIS 5665, 4.

{¶26} The “[d]ismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in [the nonmoving] party’s favor, it appears beyond doubt that [the nonmoving] party can prove no set of facts warranting relief.” *Id.* at ¶92, quoting *Malloy* at ¶9, citing *Clark v. Connor* (1998), 82 Ohio St.3d 309, 311.

{¶27} In his sole assignment of error, Mr. Kolkowski contends that the trial court erred in granting the board’s motion to dismiss because he sufficiently alleged standing to bring such a suit, and further, his complaint sufficiently alleged causes of action for both statutory and common law taxpayers’ actions. Mr. Kolkowski also argues that the trial court improperly based its decision on “testimony, evidence, arguments, motion for summary judgment and facts admitted by the parties.” We need only address Mr. Kolkowski’s last issue to dispose of this case as the substantive issues raised in his complaint are now moot.

{¶28} Mr. Kolkowski argues that the trial court erred in basing its decision on matters outside of the four corners of the complaint. At the outset, we note that “courts may take judicial notice of appropriate matters in determining [a] Civ.R. 12(B)(6) motion

without converting it to a motion for summary judgment.” *State ex rel. Findlay Publishing Co. v. Schroeder* (1996), 76 Ohio St.3d 580, 581, citing *State ex rel. Neff v. Corrigan* (1996), 75 Ohio St.3d 12, 16. The trial court appropriately took notice that the issues Mr. Kolkowski raised were already before the Supreme Court of Ohio in *Weaver*.

{¶29} During the preliminary injunction hearing the trial court announced that it would consider the documents submitted, which included a certified copy of the amended complaint filed in the Supreme Court of Ohio by Judge Weaver in deciding the motions before the court. No objection was interposed by Mr. Kolkowski.

{¶30} It is readily apparent from the trial court’s order granting the motion to dismiss that the court did, indeed, consider a matter outside of the pleading, specifically, Judge Weaver’s amended complaint filed in the original action pending in the Supreme Court of Ohio, in arriving at its conclusion regarding judicial economy. But we find that the court did not err in considering this document when ruling on a motion to dismiss.

{¶31} When confronted with similar procedural facts, the Tenth Appellate District found that a court may generally take judicial notice of at least some matters outside of the pleadings such as copies of other court’s decisions and judgment entries related to a case before it and copies of statutes in effect at the time the governmental agency issued the decision at issue. This is especially the case where the “trial court permitted the parties to attach exhibits to their respective memoranda regarding the Civ.R. 12(B)(6) motion to dismiss, and the court stated it would consider all appropriate material in deciding the motion.” *Springfield Fireworks Inc., v. Ohio DOC*, 10th Dist. No. 03AP-330, 2003-Ohio-6940, ¶15.

{¶32} A review of the allegations contained in Judge Weaver's Amended and Supplemented Complaint filed in the Supreme Court of Ohio reveals that Judge Weaver raised the same issues as Mr. Kolkowski regarding the board's bi-weekly appropriations for the juvenile court.

{¶33} Thus, we agree with the trial court's finding that "petitioner's complaint falsely asserts that 'the issues raised by this complaint are not presently before any other court.' However, it is quite obvious to this court that the issues raised by the complaint - focused as they are on whether the commissioners have taken actions that have unreasonably hindered the proper operation of the Juvenile Court - are already before the Ohio Supreme Court in Judge Weaver's petition for an order in mandamus to enforce his March 19, 2008 order."

{¶34} The docket in *Weaver* reflects that upon Judge Weaver's retirement, his successor settled the budgetary dispute and filed a motion to dismiss on February 12, 2009, which was granted the same day. Thus, regardless of whether Mr. Kolkowski had standing to bring such a suit or whether his complaint was sufficient to survive a Civ.R. 12(B)(6) challenge, the issues have already been decided in another, indeed, superior court. In light of this settlement, no controversy remains to be decided by this court and the doctrine of res judicata precludes further review.

{¶35} "The duty of this court, as of every judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. (Internal quotation marks

and citations omitted.)” *In the Matter of Reeher*, 7th Dist. No. 02 BE 68, 2004-Ohio-802, ¶21, quoting *State ex rel. Eliza Jennings, Inc. v. Noble* (1990), 49 Ohio St.3d 71, 74.

{¶36} “The doctrine of res judicata encompasses the two related concepts of claim preclusion, also known as res judicata or estoppel by judgment, and issue preclusion, also known as collateral estoppel.” *State ex rel. Ormond v. Solon*, 8th Dist. No. 92272, 2009-Ohio-1097, ¶13, quoting *Grava v. Parkman Twp.* (1995), 73 Ohio St.3d 379, 381. “Claim preclusion prevents subsequent actions, by the same parties or their privies, based upon any claim arising out of a transaction that was the subject matter of a previous action.” *Id.*, citing *Fort Frye Teachers Assn., OEA/NEA v. State Emp. Relations Bd.* (1998), 81 Ohio St.3d 392, 395. “Where a claim could have been litigated in the previous suit, claim preclusion also bars subsequent actions on that matter.” *Id.*, citing *Grava* at 382.

{¶37} “Issue preclusion, on the other hand, serves to prevent relitigation of any fact or point that was determined by a court of competent jurisdiction in a previous action between the same parties or their privies. *Fort Frye* at 395. Issue preclusion applies even if the causes of action differ. *Id.*” *Id.* at ¶14, quoting *O’Nesti v. DeBartolo Realty Corp.*, 113 Ohio St.3d 59, 61, 2007-Ohio-1102. See, also, *State ex rel. Davis v. Public Employees Ret. Bd.*, 174 Ohio App.3d 135, 2007-Ohio-6594, “wherein the court held that issue preclusion precludes relitigation of an issue that has been actually and necessarily litigated and determined in a prior action.” *Id.*

{¶38} “Although this court’s ability to take judicial notice is not unbridled, we may take judicial notice of findings and judgments as rendered in other Ohio cases.” *Id.* at ¶15, citing *Morgan v. Cincinnati* (1986), 25 Ohio St.3d 285; *In re Adoption of Lassiter*

(1995), 101 Ohio App.3d 367. In the case sub judice, we take judicial notice of the Supreme Court of Ohio's judgment as rendered in *Weaver*. The judge of the juvenile court and the board settled the budgetary dispute, and the Supreme Court of Ohio subsequently dismissed the original action upon that settlement.

{¶39} Thus, we determine this appeal has been rendered moot by *Weaver*.

{¶40} Mr. Kolkowski's assignment of error is without merit.

{¶41} The judgment of the Lake County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.