[Cite as *State ex rel. Busby v. O'Connell*, 2015-Ohio-1050.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO, EX RELATOR JIMMIE A. BUSBY, et al.

Petitioners

v.

JUDGE TIMOTHY O'CONNELL

Respondent

Appellate Case No. 26292

DECISION AND FINAL JUDGMENT ENTRY
March 16, 2015

PER CURIAM:

{¶ 1} Petitioners, Jimmie A. Busby a/k/a Jimmie Busby and Pattie Busby a/k/a Pattiann I. Busby ("the Busbys"), filed this original action on June 24, 2014. On August 29, 2014, the Busbys filed an "Amended Petition in Mandamus and Prohibition for Violation of Mandatory Bankruptcy Stay and Failure to Assign Case to Mediation in the Face of Blatant Forgery and Fraud," naming the Honorable Judge Timothy O'Connell ("Judge O'Connell") as Respondent.

{¶ 2} The dispute arose from a foreclosure action filed against the Busbys in Montgomery County Common Pleas Court Case No. 2009 CV 10420. In their Amended Petition, the Busbys seek writs of mandamus or prohibition to compel Judge O'Connell to:

> One: Reinstate the Busby Motion to Vacate, Answer, Affirmative Defenses and Emergency Motion to Stay[.]
>
> Two: Reinstate all documents that were willfully stricken from the record.
>
> Three: Hold all of the above filings in abeyance until the Motion [to] Vacate has been heard and adjudicated.
>
> Four: Order the case to Mediation as consistent with principles of Fair Play, Justice and Equity per the directives of the Hon. Chief Justice Moyer (RIP).

{¶ 3} The matter is currently before the court on Judge O'Connell's motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6). The Busbys filed a memorandum in opposition to the motion, as well as a "Supplement to the Record." The matter is ripe for decision.

{¶ 4} Before addressing the substance of the motion, we note that it was filed out of time on November 3, 2014. Counsel for Judge O'Connell seeks leave to file the delayed response. Counsel states that the amended petition was delivered to Judge O'Connell's Bailiff, who did not forward a copy to counsel. The Busbys challenge whether this neglect is excusable.

{¶ 5} We grant leave to file the response out of time, as we have discretion to do under Civ.R. 6(B)(2)'s "less stringent" standard. *Scott v. McCluskey*, 9th Dist. Summit No. 25838, 2012-Ohio-2484, 972 N.E.2d 626, ¶ 8. We are "mindful of the admonition that cases should be decided on their merits, where possible, rather than procedural grounds."

State ex rel. Lindenschmidt v. Butler Cty. Bd. of Commrs., 72 Ohio St.3d 464, 466, 1995-Ohio-49, 650 N.E.2d 1343. Considering all the circumstances, Judge O'Connell's response to the amended petition is accepted as filed. We also note that this court may resolve the issues below sua sponte, even without a motion from a respondent. *State ex rel. Jones v. Garfield Hts. Mun. Court*, 77 Ohio St.3d 447, 448-49, 1997-Ohio-256, 674 N.E.2d 1381 (finding no error in appellate court's sua sponte resolution of an original action complaint).

{¶ 6} Original actions in mandamus and prohibition "ordinarily proceed as civil actions under the Ohio Rules of Civil Procedure." Loc.App.R. 8(A). Judge O'Connell here has moved to dismiss the amended petition for failure to state a claim pursuant to Civ.R. 12(B)(6). The purpose of such a motion is to test a claim's legal sufficiency. *MacConnell v. Dayton*, 2d Dist. Montgomery No. 25536, 2013-Ohio-3651, ¶ 11. With respect to original actions, the Ohio Supreme Court has held that

> Civ.R. 12(B)(6) dismissals may be based on "merits" issues such as the availability of an adequate remedy in the ordinary course of law. The applicable Civ.R. 12(B)(6) standard is whether, after presuming the truth of all material factual allegations in the complaint and all reasonable inferences therefrom in relators' favor, it appears beyond doubt that relators can prove no set of facts warranting relief.

State ex rel. Hummel v. Sadler, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 20.

{¶ 7} Judge O'Connell argues that the Busbys "have failed to state how and in what manner each of their requests should be enforced by either" mandamus or prohibition. He also argues that the Busbys appear to want their foreclosure case decided

differently, which this court understands to be an argument that the Busbys have an adequate remedy at law by way of appeal.

{¶ 8} This original action appears to arise from several filings in the trial court in June of 2014. The Busbys note that they raised issues concerning their desire for mediation, lack of service of process, and the foreclosure plaintiff's standing to the trial court. They also note that they filed for Chapter 13 bankruptcy the morning of June 12, 2014, of which the trial court was advised, by way of a filing by the Sheriff cancelling the Sheriff's sale at 1:34 p.m., and by way of the foreclosure plaintiff's motion to withdraw the sale filed at 4:34 p.m. Despite this knowledge, the Busbys argue, the trial court issued a decision and entry at 5:05 p.m. The decision and entry overruled their motions to stay and to vacate the judgment, struck their answer (filed with a request for mediation), and granted the foreclosure plaintiff's motion to strike the Busbys' emergency motion to stay.

{¶ 9} Although somewhat difficult to decipher, the Busby's main factual assertion appears to be that the trial court's June 12, 2014 decision and entry contravened the automatic, mandatory bankruptcy stay. They also include arguments – not relevant to this Respondent – directed to the foreclosure plaintiff's standing and concerning the foreclosure plaintiff's counsel's action in other cases. They ask this court to order the trial court to:

> One: Reinstate the Busby Motion to Vacate, Answer, Affirmative Defenses and Emergency Motion to Stay[.]
>
> Two: Reinstate all documents that were willfully stricken from the record.
>
> Three: Hold all of the above filings in abeyance until the Motion [to] Vacate has been heard and adjudicated.

> Four: Order the case to Mediation as consistent with principles of Fair Play, Justice and Equity per the directives of the Hon. Chief Justice Moyer (RIP).

These remedies appear to correlate with the actions taken by the trial court during the bankruptcy stay.

{¶ 10} "Section 362 of the Bankruptcy Code * * * provides a general automatic stay for certain proceedings against the debtor who files a bankruptcy petition." *Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, 855 N.E.2d 856, ¶ 41.

> Generally, actions taken in violation of the automatic stay are void and without force and effect even if the person violating the stay had no notice or knowledge of the filing of the bankruptcy petition or of the automatic stay; thus, actions taken by nonbankruptcy fora in violation of the stay, like the post-petition entry of judgments, are legal nullities without force or effect.

Curtis v. Payton, 2d Dist. Greene No. 98-CA-49, 1999 WL 57763, *5 (Feb. 5, 1999), citing 9A American Jurisprudence 2d (1991) 390 Bankruptcy, Section 1544.

{¶ 11} In the context of this Civ.R. 12(B)(6) motion to dismiss, and on the limited facts before us, we conclude the Busbys have sufficiently alleged that the order entered during the bankruptcy stay was void. However, we do not resolve the merits of the issue in this procedural posture. We note that Judge O'Connell does not argue the order is not void, or assert that an exception to the bankruptcy stay applies. Rather, Judge O'Connell appears to argue that the Busbys' claims should be dismissed because they have an adequate legal remedy.

{¶ 12} The absence of an adequate remedy at law is an element of both mandamus and prohibition claims. *See State ex rel. Plain Dealer Pub. Co. v. Barnes*, 38

Ohio St.3d 165, 167, 527 N.E.2d 807 (1988) (lack of a plain and adequate remedy is an element of a mandamus claim); *State ex rel. Jones v. Garfield Hts. Mun. Court*, 77 Ohio St.3d 447, 448, 1997-Ohio-256, 674 N.E.2d 1381 (prohibition claim requires relator to show that "no other adequate legal remedy exists"). Based on the facts alleged in the amended petition, we agree that the Busbys have an adequate remedy as a matter of law.

{¶ 13} We see no reason the Busbys could not raise the bankruptcy stay to the trial court and allege that the order entered during the stay was void. Because "[a] court has the inherent authority to vacate its own void judgments," the trial court could readily resolve the issue. *Lingo v. State*, 138 Ohio St.3d 427, 2014-Ohio-1052, 7 N.E.3d 1188, paragraph three of the syllabus.

{¶ 14} We further see no reason the Busbys could not appeal from an adverse decision on such a motion, assuming the trial court enters a final appealable order. *See State ex rel. Ervin v. Barker*, 136 Ohio St.3d 160, 2013-Ohio-3171, 991 N.E.2d 1146, ¶ 10 (party could file direct appeal and/or appeal denial of motion to vacate). Foreclosure defendants may also generally appeal from the confirmation of sale. *CitiMortgage, Inc. v. Roznowski*, 139 Ohio St.3d 299, 2014-Ohio-1984, 11 N.E.3d 1140, ¶ 43. The Busbys indicate this court has already heard an appeal from their underlying case, quoting from this court's May 10, 2013 opinion. There, the Busbys appealed the trial court's denial of their amended motion to vacate an allegedly void judgment. *BAC Home Loans Servicing LP v. Busby*, 2d Dist. Montgomery No. 25510, 2013-Ohio-1919, ¶ 1, *appeal not allowed sub nom. BAC Home Loans Servicing, L.P. v. Busby*, 136 Ohio St.3d 1511, 2013-Ohio-4657, 995 N.E.2d 1213, and *appeal not allowed sub nom. BAC Home Loans Servicing,*

L.P. v. Busby, 137 Ohio St.3d 1461, 2013-Ohio-4657. Under the circumstances alleged here, we conclude the Busbys have an adequate remedy at law.

{¶ 15} A motion to dismiss in an original action should be granted where, "presuming the truth of all material factual allegations in the complaint and all reasonable inferences therefrom in relators' favor, it appears beyond doubt that relators can prove no set of facts warranting relief." *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 20. Here, the Busbys cannot show that they lack an adequate remedy at law. We therefore SUSTAIN Judge O'Connell's motion to dismiss. The Amended Petition in Mandamus and Prohibition is DENIED, and the matter is DISMISSED.

SO ORDERED.

JEFFREY E. FROELICH, Presiding Judge

MIKE FAIN, Judge

MICHAEL T. HALL, Judge

To The Clerk: Within three (3) days of entering this judgment on the journal, you are directed to serve on all parties not in default for failure to appear notice of the judgment and the date of its entry upon the journal, pursuant to Civ.R. 58(B).

JEFFREY E. FROELICH, Presiding Judge

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