[Cite as *State ex rel. D&D Bonding, Ltd. v. Johnston*, 2005-Ohio-6797.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
JACKSON COUNTY

STATE OF OHIO ex rel. D&D BONDING, LTD., et al.,	:	
Relators,	:	Case No. 04CA10
vs.	:	
JUDGE LORENE G. JOHNSTON, et al.,	:	DECISION AND JUDGMENT ENTRY
Respondents.	:	**Released 12/13/05**

APPEARANCES:

David J. Winkelmann, Biddleston & Winkelmann, Athens, Ohio, for Relators.

Jonathan D. Blanton, Jackson, Ohio, for Respondent, Judge Lorene G. Johnston.

Timothy P. Gleeson, Special Jackson County Assistant Prosecuting Attorney, Jackson, Ohio, for Respondent, Kimberly A. Riegel.

Abele, P.J.

{¶1} Relators D&D Bonding, Ltd. ("D&D Bonding"), Lisa Pauley, Donald R. Venatter, Brenda Venatter, and Dewey McDaniel seek a writ of prohibition preventing Judge Lorene G. Johnston from interfering with their ability to post surety bonds in the Jackson County Municipal Court and a writ of mandamus directing Jackson County Municipal Court

Clerk Kimberly Riegel to accept surety bonds tendered by them.[1]

{¶2} In Count One of their first amended complaint, the relators allege that, between January 1 and January 23, 2004, Judge Johnston unlawfully caused Clerk Riegel to refuse to accept any surety for bonds imposed by the

{¶3} Municipal Court. Relators further allege that, beginning on June 16, 2004, Judge Johnston caused the Municipal Court Clerk to refuse to accept surety tendered by them. Relators claim that Judge Johnston's actions are directed toward damaging their business and seek a writ of prohibition ordering her to stop preventing them from filing surety bonds with the Clerk's Office.

{¶4} In Count Two of their first amended complaint, relators seek a writ of mandamus ordering Clerk Riegel to accept surety bonds tendered by them. Relators assert that Clerk Riegel has refused to accept their surety even though she lacks discretion to deny them the right to post criminal appearance bonds and that her actions have caused damage to their business.

{¶5} Having carefully reviewed the record and the arguments made by counsel, we deny relators' complaint in

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[1] The individual relators are licensed bail bond agents who are employed by or own D&D Bonding.

its entirety. Relators' request for a writ of prohibition based on Judge Johnston's issuance of a "cash only" bond schedule on January 1, 2004 is moot because Judge Johnston has already modified the bond schedule to allow the posting of surety bonds. The request for a writ of prohibition based on Judge Johnston's alleged actions on June 16, 2004 and thereafter is denied because relators have not demonstrated that Judge Johnston is exercising any judicial power to interfere with their ability to post surety bonds, that Judge Johnston is not within her judicial authority to prevent them from filing surety bonds, or that they have no other remedies available to them. Finally, relators' request for a writ of mandamus instructing Clerk Riegel to accept their surety bonds is denied because they have not presented evidence that Clerk Riegel has rejected any surety bonds they have attempted to file.

FACTUAL BACKGROUND

{¶6} Effective January 1, 2004, Judge Johnston imposed a standard bond schedule that did not permit the posting of surety bonds. In mid-January 2004, Attorney William Martin met with Judge Johnston. Attorney Martin informed Judge Johnston that he represented D&D Bonding and that he believed the bond schedule she issued violated the Ohio Supreme Court's holding in State ex rel. Jones v. Hendon

(1993), 66 Ohio St.3d 115, 609 N.E.2d 541. In Hendon, the Supreme Court held that, although a judge has discretion to set the amount of a defendant's bond, the judge cannot require the bond to be posted in "cash only." On January 23, 2004, Judge Johnston issued a new bond schedule that allowed a defendant to post 10% of the bond amount in cash or a surety for the full bond amount.

{¶7} In June 2004, Ridge Flanders contacted Judge Johnston and requested a meeting. Mr. Flanders met with Judge Johnston and her bailiff, Urias "Buster" Hall, Jr., on June 16th. At that meeting, Mr. Flanders told Judge Johnston and Mr. Hall that he was the general agent over D&D Bonding, that D&D Bonding owed him money, and that he was revoking the authority of the individual relators to post surety. Judge Johnston informed Mr. Flanders that he needed to provide written notice of this revocation to the Municipal Court Clerk's Office. The relators concede that they had a business relationship with Mr. Flanders at some point, but state that the relationship ended before June 2004.

{¶8} According to Mr. Hall, he contacted the Clerk's Office and the Jackson County Sheriff's Department to advise them that Mr. Flanders would be coming over to file the revocation. (The Jackson County Sheriff's Department

is charged with accepting bond when the Clerk's Office is closed.) Mr. Hall denies instructing either the Clerk's Office or the Sheriff's Department to stop accepting surety bonds posted by D&D Bonding or any of the individual relators. However, Orval Fee, the former jail administrator for the Sheriff's Department who spoke to Mr. Hall, testified that Mr. Hall told him not to accept bond from D&D Bonding until the situation was straightened out.

{¶9} After meeting with Judge Johnston and Mr. Hall, Mr. Flanders filed handwritten notices with the Sheriff's Department and the Clerk's Office stating that the individual relators "have no authority to post surety bail bonds in Jackson County until further notice." According to Peggy Howell, a dispatcher with the Sheriff's Department whose responsibilities include accepting bond, someone hung the notice in the dispatch office and she believed she could no longer accept surety bonds from the individual relators based on that notice. However, on July 2, 2004, the Sheriff instructed Ms. Howell to accept bond from D&D Bonding. Ms. Riegel testified that she was on medical leave when Mr. Ridge filed the notice with the Clerk's Office; but, to her knowledge, the notice was never posted there.

{¶10} On June 24, 2004, relators filed their original complaint for prohibition and mandamus, which is substantively similar to the first amended complaint. On June 28, 2004, Judge Johnston mailed Mr. Flanders a letter informing him that the individual relators "have more than one surety bond power of attorney filed with [the] court" and that his "revocation does not state which company is revoking their authority. Nor have you given us any documentation of your authority to revoke their authority." Judge Johnston informed Mr. Flanders that the court would continue to accept D&D Bonding's surety as permitted by the powers of attorney on file with the Municipal Court Clerk's Office unless he provided additional documentation.

COMPLAINT FOR WRIT OF PROHIBITION

{¶11} A writ of prohibition is an extraordinary judicial writ; its purpose is to restrain inferior courts and tribunals from exceeding their jurisdiction. State ex rel. Jones v. Suster, 84 Ohio St.3d 70, 1998-Ohio-275, 701 N.E.2d 1002. A writ of prohibition is customarily granted with caution and restraint, and is issued only in cases of necessity arising from the inadequacy of other remedies. Id.; see, also, State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas, 74 Ohio St.3d 536, 540, 1996-Ohio-286, 660 N.E.2d 458, 461 ("Prohibition is an

extraordinary writ and we do not grant it routinely or easily.")

{¶12} Additionally, a writ of prohibition "tests and determines 'solely and only' the subject matter jurisdiction" of the lower court. Tubbs Jones at 73, citing State ex rel. Eaton Corp. v. Lancaster (1988), 40 Ohio St.3d 404, 409, 534 N.E.2d 46, 52. But see State ex rel. News Herald v. Ottawa Cty. Court of Common Pleas, 77 Ohio St.3d 40, 1996-Ohio-354, 671 N.E.2d 5 (writ of prohibition was appropriate remedy to challenge lower court's gag order because once the order was enforced and the hearing conducted, relator would have no adequate remedy at law), and State ex rel. Connor v. McGough (1989), 46 Ohio St.3d 188, 546 N.E.2d 407 (writ of prohibition issued where trial court had subject matter jurisdiction but patently and unambiguously lacked personal jurisdiction over the defendant, a resident of Germany).

{¶13} In order for a writ of prohibition to issue, the relator must establish that: (1) the lower court is about to exercise judicial or quasi-judicial powers; (2) the exercise of the power is unauthorized by law; and (3) the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists.

State ex rel. Henry v. McMonagle, 87 Ohio St.3d 543, 2000-Ohio-477, 721 N.E.2d 1051.

{¶14} Relators seek a writ of prohibition based on Judge Johnston's actions during two different time periods: (1) between January 1 and January 23, 2004, and (2) from June 16, 2004 until an unspecified date. Relators contend that Judge Johnston caused the Municipal Court Clerk to refuse to accept any surety bonds during the first period, and to refuse to accept surety bonds from D&D Bonding and its agents during the second period. We consider these two time periods separately.

1. Period from January 1 to January 23, 2004

{¶15} Relators contend that Judge Johnston unlawfully required "cash only" bonds between January 1 and January 23, 2004. Judge Johnston does not dispute that she issued a bond schedule effective January 1, 2004 that required defendants to post "cash only" bonds, and relators concede that Judge Johnston revised the bond schedule to allow surety bonds after meeting with relators' previous counsel. Nonetheless, relators request a writ of prohibition precluding Judge Johnston from requiring "cash only" bonds in the future.

{¶16} Relators claim that their request for a writ is not moot because Judge Johnston's actions are capable of

repetition. We disagree. In State ex rel. Denton v. Bedinghaus, 98 Ohio St.3d 298, 2003-Ohio-861, 784 N.E.2d 99, the relators sought a writ of prohibition against juvenile judges ordering them to end their policy requiring that posted bond be applied to child support arrearages, in violation of R.C. 2937.40(B). The Ohio Supreme Court concluded that the prohibition claim was moot because the juvenile judges had instructed the magistrates to comply with R.C. 2937.40(B) before the writ action was even filed. Id. at ¶25. The Court found that the relators' claim was moot to the extent it sought to prevent a policy already discontinued by the judges. Id.

{¶17} Likewise, relators seek a writ of prohibition preventing a policy that Judge Johnston has already discontinued. Therefore, we conclude that their request for a writ of prohibition preventing Judge Johnston from requiring "cash only" bonds is moot.

2. Period beginning June 16, 2004

{¶18} Relators assert that, following her June 16, 2004 meeting with Ridge Flanders, Judge Johnston caused the Municipal Court Clerk's Office to refuse to accept their surety bonds but do not clearly indicate whether this alleged interference ended with Judge Johnston's letter of June 28, 2004 to Mr. Flanders or continues to the present.

For the sake of argument, we will assume Judge Johnston's alleged actions are ongoing. Nonetheless, we conclude that relators have failed to prove they are entitled to a writ of prohibition.

{¶19} First, relators have not demonstrated that Judge Johnston is "about to exercise" or exercising judicial powers to prevent the Clerk's acceptance of surety from D&D Bonding. Relators have produced no written orders from Judge Johnston instructing the Clerk's Office not to accept surety bonds from D&D Bonding, and Judge Johnston testified that she never instructed the Clerk's Office to reject surety bonds filed by D&D Bonding. Clerk Riegel testified that she never received such instruction and relators have not produced any independent evidence demonstrating that Judge Johnston issued such orders either orally or in writing. Therefore, relators have not proven that Judge Johnston is exercising her judicial power to interfere with their ability to post surety bonds.

{¶20} And, even assuming that Judge Johnston is exercising her judicial power to prevent the Jackson County Municipal Court Clerk from accepting relators' surety bonds, we cannot conclude that such action is unauthorized by law. In State ex rel. Brown v. Garfield Heights Municipal Court (1990), 49 Ohio St.3d 14, 550 N.E.2d 454, a

bail bondsman sought a writ of mandamus ordering the municipal court to accept bonds written by him. The municipal court refused to accept bonds from the relator because his payments on bond forfeitures were usually late and he was consistently rude and uncooperative towards the court's staff. The Ohio Supreme Court concluded that the municipal court had judicial discretion to determine whether to accept the bondsman's surety bonds and was not required to permit him to post surety, so long as the court did not prohibit the posting of all surety bonds.

{¶21} Therefore, even if Judge Johnston did instruct the Clerk's Office not to accept surety from the relators, she was within the bounds of her judicial discretion. Mr. Flanders informed Judge Johnston that the relators were no longer authorized to post surety and she had no reason to disbelieve these claims. Because Judge Johnston had a basis for her belief that relators could no longer guarantee their bonds, she had a legitimate reason to suspend the relators' bond activity until she was certain that they were authorized to post surety bonds. It would have been within Judge Johnston's judicial discretion to instruct the Clerk's Office not to accept surety bonds tendered by the relators until she confirmed their authority to post bonds. Relators have not demonstrated

that, even if Judge Johnston had exercised judicial power to prevent them from posting bond after her meeting with Ridge Flanders, such action was unauthorized by law.

{¶22} Finally, relators have not established that the denial of the writ will cause injury for which no other adequate remedy in the ordinary course of law exists. If, as relators allege, Ridge Flanders' representations caused Judge Johnston to suspend relators' ability to post bonds and Mr. Flanders' claim that he could revoke relators' authority to post surety bonds is false, relators can file a civil action against Mr. Flanders for interfering with their business. Therefore, relators have not proven that they have no other adequate remedy to pursue.

{¶23} Relators also argue that Judge Johnston has interfered with their ability to post bond by issuing a bond schedule requiring that sureties be posted for the full bond amount while allowing cash deposits of 10% of the bond amount. Judge Johnston contends that the relators agreed that this bond schedule was lawful through their former counsel and cannot now argue that it is improper. Although relators spend much of their brief arguing this claim, they failed to raise it in their original or first amended complaints. And, relators have not requested a writ prohibiting Judge Johnston from requiring that they

post surety bonds in the full amount or a writ instructing the Municipal Clerk to accept sureties in the amount of 10% of the scheduled bond amount. See Saylor v. Providence Hosp. (1996), 113 Ohio App.3d 1,4, 680 N.E.2d 193 (although pleading need not state all elements of claim, person or entity sued must be given adequate notice of the nature of the action). Therefore, this claim is not properly before the Court and we will not consider it.

{¶24} Relators have failed to demonstrate that they are entitled to a writ of prohibition relating to Judge Johnston's actions beginning June 16, 2004.

{¶25} As to Count One of their first amended complaint, relators' request for a writ of prohibition ordering Judge Johnston not to interfere with their ability to post bond in the Jackson County Municipal Court is denied.

COMPLAINT FOR WRIT OF MANDAMUS

{¶26} Relators also seek a writ of mandamus ordering Clerk Riegel to accept surety from them. In order for this Court to grant a writ of mandamus, the relators must establish: (1) a clear legal right to the requested relief; (2) a clear legal duty to perform these acts on the part of respondent; and (3) the lack of a plain and adequate remedy in the ordinary course of law. State ex rel. Neff v. Corrigan, 75 Ohio St.3d 12, 16, 1996-Ohio-231, 661 N.E.2d

170. The "function of mandamus is to compel the performance of a present existing duty as to which there is a default. It is not granted to take effect prospectively, and it contemplates the performance of an act which is incumbent on the respondent when the application for a writ is made." State ex rel. Willis v. Sheboy (1983), 6 Ohio St.3d 167, 451 N.E.2d 1200, paragraph two of the syllabus.

{¶27} Relators simply have not demonstrated any neglect of duties by Clerk Riegel to warrant mandamus. We cannot compel action on the part of any officer of government, by mandamus or otherwise, unless the "officer has so far failed to act as to constitute a violation of official duty." City of Wapokeneta v. Helpling (1939), 135 Ohio St. 98, 19 N.E.2d 772, at paragraph one of the syllabus. Although relators claim that Clerk Riegel informed Dewey McDaniel that she would not accept bonds from D&D Bonding, Clerk Riegel testified that she was on medical leave at the time Mr. McDaniel says he spoke with her and her timesheets support this contention. Further, relators have not produced any surety bonds that Clerk Riegel has refused to accept and Clerk Riegel has produced copies of several surety bonds posted by relators since June 16, 2004 that have been accepted by the Jackson County Municipal Clerk's Office. Absent evidence of a neglect of duties, we will

not issue a writ of mandamus instructing Clerk Riegel to perform her duties.

{¶28} As to Count Two of relators' first amended complaint, the request for a writ of mandamus instructing Clerk Riegel to accept surety bonds issued by them is denied.

{¶29} Finding no merit in either count of relators' first amended complaint, we deny the request for a writ of prohibition and the request for a writ of mandamus. Any motions currently pending in this matter are denied as moot.

WRITS DENIED. COSTS TO RELATORS. SO ORDERED.

Kline, J. & McFarland, J.: Concur

FOR THE COURT

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Peter B. Abele, Presiding Judge