

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BENJAMIN PANKEY	:	JUDGES:
	:	
Petitioner/Relator	:	Hon. W. Scott Gwin, P.J.
-vs-	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
	:	
COURT OF COMMON PLEAS	:	
	:	CASE NO. 10CA19
Respondent	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Writ of Procedendo

JUDGMENT: WRIT DENIED

DATE OF JUDGMENT ENTRY: March 16, 2010

APPEARANCES:

For Petitioner – Pro Se:

For Respondent:

Benjamin Pankey - #521-327
Box 788
Mansfield, Ohio 44901

No Appearance

Delaney, J.,

{¶1} Petitioner, Benjamin Pankey, has filed a “Motion in Procedendo” requesting this Court order Respondent, Court of Common Pleas, to rule on a motion filed in the Richland County Court of Common Pleas. According to the Motion in Procedendo, Petitioner filed a declaratory judgment action in the Richland County Court of Common Pleas on June 9, 2008 which remains pending.

{¶2} As an initial matter, we find Petitioner has failed to properly initiate an action in procedendo. Loc.R. 4(A) provides,

{¶3} RULE 4. ORIGINAL ACTIONS

{¶4} How Instituted. Service in original actions shall be made and the action shall commence upon the filing of a complaint and proceed as a civil case under the Ohio Rules of Civil Procedure unless those rules are clearly inapplicable.

{¶5} Petitioner has not filed a complaint but instead has filed a motion. For this reason, Petitioner’s filing of a motion does not comply with Loc.R. 4 as well as Civ.R. 3(A).

{¶6} The Ninth District Court of Appeals has examined the difference between a motion and a complaint stating,

{¶7} “For the purposes of Civ.R. 3(A), the filing of a motion cannot substitute for the filing of a complaint. The Second Appellate District Court has explained that “Civ.R. 7 distinguishes a *pleading* from a *motion*. ‘Under Civ.R. 7(A), only complaints, answers and replies constitute pleadings.’ (Emphasis original.) *State v. Wilkins* (1998), 127 Ohio App.3d 306, 310, 712 N.E.2d 1255, dismissed (1999), 85 Ohio St.3d 1213, 709 N.E.2d

169, quoting *State ex rel. Hanson v. Guernsey Cnty. Comrs.* (1992), 65 Ohio St.3d 545, 549, 605 N.E.2d 378. A complaint is a pleading that need only contain a short and plain statement of the claim showing that the party is entitled to relief. Civ.R. 8(A)(1). Whereas a “motion” is defined as an application to the court for an order. Civ.R. 7(B)(1). A motion is not a pleading. *State Edison Co. v. Oehler* (Oct. 4, 1995), 9th Dist. No. 17167, at 9, appeal not allowed (1996), 75 Ohio St.3d 1405. Thus, in the context of this case, a party cannot initiate an action by filing a motion. See Civ.R. 7(A) (stating that the only pleadings allowed to be filed with the court are: a complaint, an answer, a reply to a counterclaim, an answer to a cross-claim, a third-party complaint, a third-party answer, or a court-ordered reply to an answer or third-party answer). *Martin v. Wayne County Nat. Bank Trust*, 2004 WL 1778822, 3 (Ohio App. 9 Dist.).”

{¶8} Petitioner’s failure to properly initiate a cause in procedendo is sufficient reason to deny the requested writ.

{¶9} Further, in examining the motion, Petitioner has failed to name a proper respondent. A court is not sui juris. “A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power, by the proper officer or officers, at a time and place appointed by law.” *Todd v. United States* (1895), 158 U.S. 278, 284, 15 S.Ct. 889, 891, 39 L.Ed. 982. Absent express statutory authority, a court can neither sue nor be sued in its own right. *State ex rel. Cleveland Municipal Court v. Cleveland City Council* (1973), 34 Ohio St.2d 120, 296 N.E.2d 544. For this reason, the requested writ is also denied.

{¶10} Finally, a review of the complaint reveals Petitioner has failed to comply with R.C. 2969.25, which requires Petitioner to attach an affidavit to the complaint for

writ of procedendo describing every civil action or appeal filed within the previous five years in any state or federal court.

{¶11} The failure to comply with R.C. 2969.25 requires the dismissal of this complaint for writ of procedendo. *State ex rel. Zanders v. Ohio Parole Bd.*, 82 Ohio St.3d 421, 1998-Ohio-218, 696 N.E.2d 594; *Alford v. Winters*, 80 Ohio St.3d 285, 1997-Ohio-117, 685 N.E.2d 1242.

For these reasons, the requested writ of procedendo is denied.

{¶12} WRIT DENIED.

{¶13} CAUSE DISMISSED.

{¶14} COSTS TO PETITIONER.

{¶15} IT IS SO ORDERED.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

BENJAMIN PANKEY

Petitioner/Relator

-vs-

STATE OF OHIO

Respondent

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CASE NO. 10CA19

JUDGMENT ENTRY

For the reasons stated in the Memorandum-Opinion on file, Petitioner/Relator's
Petition for Writ of Procedendo is hereby denied. Costs taxed to Petitioner.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. WILLIAM B. HOFFMAN