

COURT OF APPEALS
KNOX COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DEUTSCHE BANK NATIONAL	:	JUDGES:
	:	
Respondent	:	Hon. Julie A. Edwards, P.J.
	:	Hon. John W. Wise, J.
-vs-	:	Hon. Patricia A. Delaney J.
	:	
WILLIAM AUSTERMILLER	:	
	:	CASE NO. 10-CA-15
Relator	:	
	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Petition for Writ of Mandamus

JUDGMENT: WRIT DENIED

DATE OF JUDGMENT ENTRY: January 20, 2011

APPEARANCES:

For Relator – Pro se:

William Austermiller
61 Marion Street
Mount Vernon, Ohio 43050

For Knox County Treasurer:

John C. Thatcher
Knox County Prosecuting Attorney
117 E. High Street, Suite 234
Mount Vernon, Ohio 43050

Delaney, J.,

{¶1} Petitioner, William Austermiller, has filed a “Writ of Mandamus” which appears to be a complaint requesting this Court to issue a writ of mandamus requiring the trial court to hold a jury trial in a foreclosure case filed in the Knox County Court of Common Pleas. Further, Petitioner requests the trial court judge be ordered to recuse himself from the foreclosure case.

{¶2} Petitioner is the defendant in a foreclosure action brought in the Knox County Court of Common Pleas by Deutsche Bank National Trust Company. The trial court granted summary judgment in favor of Deutsche Bank. Petitioner is dissatisfied with the judgment rendered against him and has filed the instant action as a result. The Knox County Prosecutor has filed a Motion to Dismiss the complaint on the basis Relator has an adequate remedy at law.

{¶3} Prior to reaching the merits of the Petition or motion to dismiss, we find Petitioner has not properly brought this action. R.C. 2731.04 provides, “Application for the writ of mandamus must be by petition, in the name of the state on the relation of the person applying, and verified by affidavit.” Failure to comply with these requirements is grounds for dismissal. *Thorne v. State*, 8th Dist., 2004-Ohio-6288; *Maloney v. Court of Common Pleas of Allen County* (1962), 173 Ohio St. 226, 181 N.E.2d 270. Petitioner herein has not properly brought this complaint. *Blankenship v. Blackwell*, 103 Ohio St.3d 567, 2004-Ohio-5596, 817 N.E.2d 382; *Perotti v. Mahoning County Clerk*, 7th Dist. No. 05-MA-202, 2006-Ohio-673. See also, *Selway v. Court of Common Pleas Stark County*, 2007 WL 2482621, *1 (Ohio App. 5 Dist.).

{¶14} Petitioner has not named any party other than Deutsche Bank in the complaint. Although he seeks to have the trial court judge removed from the case, he has failed to name the trial court judge as a party to this action. Further, Petitioner has not brought this action in the name of the state as required by R.C. 2731.04. Nor has Petitioner included an affidavit in support of his complaint in compliance with this statute.

{¶15} We find Petitioner's failure to comply with R.C. 2731.04 warrants dismissal of the petition.

{¶16} Even if we had considered the merits of the complaint, we would not find the issuance of a writ of mandamus would be warranted.

{¶17} For a writ of mandamus to issue, Austermiller must establish (1) a clear legal right to the relief prayed for, (2) the respondents are under a clear legal duty to perform the requested act, and (3) Austermiller must have no plain and adequate remedy in the ordinary course of law. *State, ex rel. Berger, v. McMonagle* (1983), 6 Ohio St.3d 28, 6 OBR 50, 451 N.E.2d 225.

{¶18} In his first claim, Petitioner argues he was deprived of his right to a jury trial.

{¶19} We would find the claim lacks merit. The Petitioner did not have a jury trial in the underlying case because the trial court granted summary judgment in favor the plaintiff. In *State Farm Mutual Auto Insurance Co. v. Loken*, Fairfield App. No. 04CA40, 2004-Ohio-5074, this court found it has long been the law that a summary judgment does not infringe upon a party's right to a jury trial. *Loken* at paragraph 27, citing *Fidelity & Deposit Company v. United States* (1902), 187 U.S. 315, 23 S.Ct. 120, 47 L.Ed. 194. See also *Tschantz v. Ferguson* (1994), 97 Ohio App.3d 693, 713, 647 N.E.2d 507.

{¶10} Petitioner's second claim, which is that the trial court judge should be Ordered to recuse himself because the judge has the same last name as one of the lawyers for Deutsche Bank, would also be denied.

{¶11} The Supreme Court has held a litigant has an adequate remedy of law by way of filing an affidavit of disqualification to challenge any prejudice on the part of a common pleas court judge, *State ex rel. Hach v. Summit Cty. Court of Common Pleas* (2004), 102 Ohio St.3d 75, 806 N.E.2d 554.

{¶12} For these reasons, we decline to issue a writ of mandamus and Dismiss the Instant cause of action for failure to abide by the requisite procedural Requirements for filing a writ of mandamus.

{¶13} CAUSE DISMISSED.

{¶14} COSTS TO PETITIONER.

{¶15} IT IS SO ORDERED.

By: Delaney, J.
Edwards, P.J. and
Wise, J. concur

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE

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DEUTSCHE BANK NATIONAL

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-vs-

WILLIAM AUSTERMILLER

Relator

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CASE NO. 10-CA-15

JUDGMENT ENTRY

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

HON. PATRICIA A. DELANEY

HON. JULIE A. EDWARDS

HON. JOHN W. WISE