

[Cite as *Tisdale v. A-Tech Automotives Mobile Serv. & Garage*, 2009-Ohio-5382.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92825

VENIS TISDALE

RELATOR

VS.

**A-TECH AUTOMOTIVES MOBILE
SERVICE AND GARAGE, ET AL.**

RESPONDENTS

**JUDGMENT:
WRIT ALLOWED**

WRIT OF MANDAMUS
MOTION NOS. 419401 and 420379
ORDER NO. 426409

RELEASED: October 6, 2009

FOR RELATOR:

Venis Tisdale, pro se
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Richmond Heights, Ohio 44143

**ATTORNEYS FOR RESPONDENTS:
JUDGE DEBORAH LEBARRON and
MAGISTRATE VETUS J. SYRACUSE**

L. Christopher Frey
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RESPONDENT:

Robert J. Slaughter, III, pro se
A-Tech Automotives Mobile
Service and Garage
21900 St. Clair Avenue
Euclid, Ohio 44117

MARY EILEEN KILBANE, J.:

{¶ 1} Relator, Venis Tisdale, is the plaintiff in *Tisdale v. A-Tech Automotives Mobile Serv. and Garage*, Euclid Mun. Court Case No. 08CVI03287.

Respondents, Judge Deborah LeBarron and Magistrate Vetus J. Syracuse (“municipal court respondents”), have presided over Case No. 08CVI03287. Respondent A-Tech Automotives Mobile Service and Garage (“A-Tech”) is the defendant in the underlying action.

{¶ 2} Tisdale avers that, after the municipal court entered judgment against him in Case No. 08CVI03287, he presented for filing a notice of appeal, praecipe, docketing statement and affidavit of indigency but “the magistrate then had [sic] refused to file the appeal ***.” Complaint at 7. In magistrate’s decisions dated December 19, 2008 and January 16, 2009, Magistrate Franklin Beni denied Tisdale’s request for indigency status on appeal. In each entry, Magistrate Beni stated “the requested appeal should not be accepted for filing until such time as the court costs for such filing are paid.” Tisdale requests that this court issue a writ of mandamus “compelling and ordering [respondents] to file [Case No. 08CVI03287] with the appeals court and allow the waiving of the fees due to the plaintiff showing that he is indigent and is not able to pay the fees to file this case.” Complaint, ad damnum clause, at 11.¹

{¶ 3} In the complaint, Tisdale discusses in detail the automobile repair dispute which is the subject of Case No. 08CVI03287. In response, this court received a letter from Robert J. Slaughter, III as owner of A-Tech. Tisdale has requested that this court strike Slaughter’s letter. By separate entry, we have denied the motion to strike.

{¶ 4} Tisdale has requested that this court compel the judicial officers of the Euclid Municipal Court to accept his notice of appeal and related documents

¹ The parties have not discussed the fact that Magistrate Syracuse presided over the underlying case in chief and Magistrate Beni disposed of Tisdale’s request for indigency status. Regardless, the adjudication of an action involving a public officer applies to the successor to that office. Civ.R. 25(D)(1).

for filing and to transmit them to the clerk of the court of appeals. Clearly, A-Tech cannot effect the relief requested. As a consequence, we dismiss Tisdale's claim in mandamus against A-Tech sua sponte.

{¶ 5} The municipal court respondents filed a motion to dismiss and argue that the determination of whether Tisdale is indigent is within the discretion of the municipal court and that he has or had an adequate remedy by way of appeal from the decisions denying his indigency status. Cf. *State v. Fair* (Sept. 2, 1999), Franklin App. No. 98-AP-1503, at 1 (the standard of review *for an appeal* from a denial of a motion for leave to proceed in forma pauperis is abuse of discretion). Tisdale filed a brief in opposition to the motion to dismiss and argued extensively his position on the merits of the underlying case as well as the facts which he asserts establish his indigency status.

{¶ 6} This court also issued a sua sponte order compelling the municipal court respondents to show cause:

{¶ 7} “1. To indicate whether Euclid Municipal Court requires a filing fee for filing a notice of appeal in addition to the \$125 filing fee required by this court and, if so, to demonstrate by what authority that court requires a filing fee for filing a notice of appeal.

{¶ 8} “2. To demonstrate by what authority that court refuses to transmit a notice of appeal to the clerk of this court when the notice of appeal is accompanied by an affidavit of indigency. See Loc.App.R. 3(a)(1).” Entry No. 421928, dated May 28, 2009.

{¶ 9} R.C. 1901.26(A)(1)(a) provides, in pertinent part: “The municipal court shall require an advance deposit for the filing of any new civil action or proceeding * * * and in all other cases, by rule, shall establish a schedule of fees and costs to be taxed in any civil or criminal action or proceeding.” Attached to the response of the municipal court respondents to the show cause order is the schedule of fees of the Euclid Municipal Court which includes a filing fee of \$50 for filing a notice of appeal. “Respondents would agree that if Relator paid the local filing fee or obtained a local determination of indigency, that the appeal would be docketed and transmitted to this Honorable Court.” Municipal Court Respondents’ Response to Show Cause Order, at unnumbered 4. Tisdale responded and primarily argued the merits of his indigency claim.

{¶ 10} This action presents what appears to be a case of first impression. That is, we must determine whether relief in mandamus lies to compel a trial court to accept for filing and transmittal to the court of appeals a notice of appeal, praecipe, docketing statement, and affidavit of indigency when the trial court has determined that the appellant in a civil case is not indigent.

{¶ 11} The requirements for mandamus are well established: (1) the relator must have a clear legal right to the requested relief; (2) the respondent must have a clear legal duty to perform the requested relief; and (3) there must be no adequate remedy at law. Mandamus may compel a court to exercise judgment or discharge a function, but it may not control judicial discretion, even if that discretion is grossly abused. Additionally, mandamus is not a substitute for

appeal and does not lie to correct errors and procedural irregularities in the course of a case. If the relator has or had an adequate remedy, relief in mandamus is precluded – regardless of whether the relator used the remedy. *State ex rel. Smith v. Fuerst*, Cuyahoga App. No. 86118, 2005-Ohio-3829, at ¶4.

{¶ 12} Initially, we consider whether Tisdale has a clear legal right to the relief requested and whether the municipal court respondents have a corresponding duty. “The right to file an appeal, as it is defined in the Appellate Rules, is a property interest and a litigant may not be deprived of that interest without due process of law.” *Atkinson v. Grumman Ohio Corp.* (1988), 37 Ohio St.3d 80, 523 N.E.2d 851, paragraph one of the syllabus.

{¶ 13} The Ohio Rules of Appellate Procedure implement the right to appeal. App.R. 3(A) provides, in part: “**Filing the notice of appeal.** *An appeal as of right shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal.*” (Emphasis added.) App.R. 3(A) clearly states that: an appeal to the court of appeals is an *appeal as of right*; the filing of a timely notice of appeal is the sole requirement for invoking the jurisdiction of the court of appeals; and only the court of appeals may determine whether other procedural defects require “action.”

{¶ 14} Loc.App.R. 3(A) requires that a party filing a notice of appeal also deposit \$125 with the clerk. “But, the clerk will receive and file the appeal or action without the payment of \$125: (1) If the appellant files with the clerk a sworn affidavit or affirmation of inability to secure costs by prepayment * * *.” Id.

{¶ 15} Tisdale had a clear legal right to file a timely notice of appeal from the judgment entered against him in Case No. 08CVI03287 if he tendered either the requisite filing fee(s) or an affidavit of indigency. Under App.R. 3(A), only the court of appeals may adjudicate whether any purported defect in Tisdale’s filings should prevent Tisdale from maintaining his appeal. Necessarily, Euclid Municipal Court had a corresponding duty to accept for filing Tisdale’s notice of appeal and accompanying materials as well as to transmit all filings to the clerk of the court of appeals. See App.R. 3 and Loc.App.R. 3. Otherwise, this court would never be able to adjudicate the propriety of those filings. The municipal court respondents have not provided this court with any controlling authority which exempts them from this duty.

{¶ 16} Similarly, we reject the argument in their motion to dismiss that Tisdale has an adequate remedy in the ordinary course of the law by appealing the magistrate’s determination that he is not indigent. That is, Tisdale asserts that he does not have sufficient funds to provide security for costs, but – according to respondents’ argument – he would have to provide security for costs to appeal the denial of his request to proceed in forma pauperis on the case in

chief. “For an alternate remedy to constitute an adequate remedy so as to preclude the requested extraordinary relief in mandamus, it must be complete, beneficial, and speedy. *State ex rel. Vaughn Industries, L.L.C. v. Ohio Dept. of Commerce*, 109 Ohio St.3d 482, 2006-Ohio-2994, 849 N.E.2d 31, ¶18.” *State ex rel. Gilmour Realty Inc. v. Mayfield Hts.*, 119 Ohio St.3d 11, 2008-Ohio-3181, 891 N.E.2d 320, at ¶14. Requiring Tisdale to provide security for costs to appeal the denial of indigency status is not a complete, beneficial or speedy remedy for refusing to file the notice of appeal and accompanying materials pertaining to the case in chief.

{¶ 17} The parties do not dispute the facts giving rise to this action. After the Euclid Municipal Court entered judgment against Tisdale in his small claims action, he presented for filing a notice of appeal, praecipe, docketing statement, and affidavit of indigency. The municipal court refused to file these materials and ultimately denied Tisdale’s request for indigency status. All of these facts are matters of record in Case No. 08CVI03287, and this court may take judicial notice of those proceedings. *State ex rel. Coles v. Granville*, 116 Ohio St.3d 231, 2007-Ohio-6057, 877 N.E.2d 968, at ¶20. This matter is, therefore, ready for disposition on the merits. Compare *J.J. Detweiler Enterprises., Inc. v. Warner*, 103 Ohio St.3d 99, 2004-Ohio-4659, 814 N.E.2d 482, at ¶13 (courts may enter summary judgment against a nonmoving party if the entry of summary judgment does not prejudice the due process rights of the nonmoving party, all

relevant evidence is before the court, there is no genuine issue of material fact and the nonmoving party is entitled to judgment as a matter of law).

{¶ 18} As discussed above, Tisdale has a clear legal right to file a notice of appeal and accompanying materials and the municipal respondents have a corresponding duty to accept those materials for filing and transmit them to the clerk of the court of appeals. We also find that Tisdale does not have an adequate remedy in the ordinary course of the law.

{¶ 19} As a consequence, relief in mandamus is granted. Euclid Municipal Court is ordered to accept for filing and transmittal to the clerk of the court of appeals Tisdale's notice of appeal, praecipe, docketing statement, and affidavit of indigency in Case No. 08CVI03287. Upon receipt of Tisdale's filings, Euclid Municipal Court shall process those materials in compliance with the Ohio Rules of Appellate Procedure and the local rules of this court.

{¶ 20} We emphasize, however, that this decision does not prevent the Euclid Municipal Court from imposing or enforcing its own filing fee for appeals. Likewise, as part of this action, this court makes no determination regarding the propriety of the municipal court's exercise of its discretion in denying Tisdale's request for indigency status. Nevertheless, a trial court must accept for filing and transmit to the clerk of the court of appeals a notice of appeal, praecipe, and docketing statement if the appellant also files an affidavit of indigency for purposes of commencing an appeal.

{¶ 21} Accordingly, respondent's motion to dismiss is denied, and we enter judgment for relator against the municipal respondents. We dismiss Tisdale's claim in mandamus against A-Tech sua sponte. Respondents LeBarron and Syracuse to pay costs. The clerk is directed to serve upon the parties notice of this judgment and its date of entry upon the journal. Civ.R. 58(B).

Writ allowed.

MARY EILEEN KILBANE, JUDGE

KENNETH A. ROCCO, P.J., and
CHRISTINE T. MCMONAGLE, J., CONCUR