[Cite as *State ex rel. Smith v. Celebrezze*, 2009-Ohio-5386.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93072

STATE OF OHIO, EX REL., VICTORIA NAGY SMITH

RELATOR

vs.

JUDGE LESLIE ANN CELEBREZZE

RESPONDENT

JUDGMENT: WRIT DENIED

WRIT OF PROHIBITION
MOTION NO. 421490
ORDER NO. 426247

RELEASE DATE: October 2, 2009

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CHRISTINE T. MCMONAGLE, J.:

{¶ 1} On March 31, 2009, the petitioner, Victoria Nagy Smith, filed this prohibition action against the respondent, Judge Leslie Ann Celebrezze of the Domestic Relations Division of the Cuyahoga County Common Pleas Court, to prohibit the enforcement of two orders: (1) a March 25, 2009 order in which the judge dissolved a February 23, 2009 civil protection order as of February 27, 2009, and (2) a March 26, 2009 order in which the judge stated that the parties had agreed to certain items concerning the care of their children. Nagy Smith argues that because the judge violated court procedures and premised the orders on false bases, prohibition should issue to prevent the judge from enforcing these orders. On April 28, 2009, the respondent judge, through the Cuyahoga County

Prosecutor, moved for summary judgment. Nagy Smith filed her brief in opposition on May 27, 2009. For the following reasons, this court grants the motion for summary judgment and denies the application for a writ of prohibition.

{¶ 2} In the underlying case, *Victoria Nagy Smith v. Paul Smith*, Cuyahoga County Common Pleas Court Domestic Relations Division Case No. DR 07 317855, the trial court granted the couple legal separation on July 8, 2008, and named Nagy Smith as the sole custodian and residential parent of the three minor children.

{¶ 3} Nagy Smith began the current litigation on January 29, 2009, by filing a motion to modify visitation, a motion for restraining order, and a request for emergency hearing. The Domestic Relations Division assigned the matter to Judge Celebrezze. The parties then filed additional motions, including a motion to modify allocation of parental rights by Paul Smith. On February 23, 2009, Nagy Smith filed a petition for domestic violence and request for a civil protection order.[1] A magistrate heard the matter ex parte and issued a civil protection order on February 23. The magistrate commenced a full hearing on the matter on February 24, and concluded it on February 27, 2009. The magistrate did not immediately issue a written decision.

[1] This matter was assigned Case No. DV 09 325074 and was later consolidated with the underlying case, Case No. 07 DR 317855.

{¶ 4} On March 24, 2009, Nagy Smith filed a "Motion to disqualify Family Conciliation Service and to appoint Dr. Steven Neuhaus as independent investigator." She alleged numerous unprofessional actions by Dr. Huntsman of the court's Family Conciliation Service.

{¶ 5} On March 25, 2009, Judge Celebrezze issued the following order: "This matter came before the Court on Petitioner's Petition for Domestic Violence Civil Protection Order on February 24th and February 27th , 2009. At the close of Petitioner's case, Respondent Motioned for Dismissal. The Magistrate who heard the Petition informed the parties that the Motion was granted and that a Magistrate's Decision under Civil Rule 53(D)(2)(b) would issue forthwith. [New paragraph] It is therefore ordered, adjudged and decreed that effective February 27, 2009 Ex parte Civil Protection Order of February 23, 2009 is hereby dissolved and set aside. A Magistrate's Decision shall issue forthwith containing findings of fact and conclusions of law."

{¶ 6} On March 26, 2009, Judge Celebrezze issued the second order which provided in pertinent part as follows: "This matter came before the Honorable Judge Leslie Ann Celebrezze for pre-trial on March 24, 2009. The parties have agreed that the following shall occur: 1. Dr. Nancy Huntsman shall continue her evaluation, including but not limited to interviewing, evaluating, scoring and/or interpreting of psychological test and making verbal and written reports or recommendations of the Plaintiff, Defendant and their respective minor

children. 2. Dr. Steven Neuhaus shall conduct an independent custody evaluation on all said parties with costs assessed to the Plaintiff solely. 3. The minor children * * * shall immediately [be referred to psychiatric treatment. Costs allocated between the parties.] 4. The GAL is to meet with the Defendant and his children on April 4, 2009, from 10:00 a.m. to 1:00 p.m. The visit shall occur at the Defendant's place of residence and at the times of drop off and pick up of the minor children, the parties shall arrange to be accompanied by a police officer or other law enforcement official." Nagy Smith commenced the present prohibition action on March 31, 2009.

{¶ 7} The principles governing prohibition are well established. Its requisites are (1) the respondent against whom it is sought is about to exercise judicial power, (2) the exercise of such power is unauthorized by law, and (3) there is no adequate remedy at law. *State ex rel. Largent v. Fisher* (1989), 43 Ohio St.3d 160, 540 N.E.2d 239. Furthermore, if a petitioner had an adequate remedy, relief in prohibition is precluded, even if the remedy was not used. *State ex rel. Lesher v. Kainrad* (1981), 65 Ohio St.2d 68, 417 N.E.2d 1382, certiorari denied (1981), 454 U.S. 845; Cf. *State ex rel. Sibarco Corp. v. City of Berea* (1966), 7 Ohio St.2d 85, 218 N.E.2d 428, certiorari denied (1967), 386 U.S. 957. Prohibition will not lie unless it clearly appears that the court has no jurisdiction of the cause which it is attempting to adjudicate or the court is about to exceed its jurisdiction. *State ex rel. Ellis v. McCabe* (1941), 138 Ohio St. 417, 35 N.E.2d

571, paragraph three of the syllabus. "The writ will not issue to prevent an erroneous judgment, or to serve the purpose of appeal, or to correct mistakes of the lower court in deciding questions within its jurisdiction." *State ex rel. Sparto v. Juvenile Court of Darke County* (1950), 153 Ohio St. 64, 65, 90 N.E.2d 598. Furthermore, it should be used with great caution and not issue in a doubtful case. *State ex rel. Merion v. Tuscarawas Cty. Court of Common Pleas* (1940), 137 Ohio St. 273, 28 N.E.2d 273, and *Reiss v. Columbus Municipal Court* (App. 1956), 76 Ohio Law Abs. 141, 145 N.E.2d 447. Nevertheless, when a court is patently and unambiguously without jurisdiction to act whatsoever, the availability or adequacy of a remedy is immaterial to the issuance of a writ of prohibition. *State ex rel. Tilford v. Crush* (1988), 39 Ohio St.3d 174, 529 N.E.2d 1245 and *State ex rel. Csank v. Jaffe* (1995), 107 Ohio App.3d 387, 668 N.E.2d 996. However, absent such a patent and unambiguous lack of jurisdiction, a court having general jurisdiction of the subject matter of an action has authority to determine its own jurisdiction. A party challenging the court's jurisdiction has an adequate remedy at law via appeal from the court's holding that it has jurisdiction. *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage County Court of Common Pleas* (1997), 78 Ohio St.3d 489, 678 N.E.2d 1365 and *State ex rel. Bradford v. Trumbull Cty. Court*, 64 Ohio St.3d 502, 1992-Ohio-116, 597 N.E.2d 116. Moreover, the court has discretion in issuing the writ of prohibition. *State ex rel. Gilligan v. Hoddinott* (1973), 36 Ohio St.2d 127, 304 N.E.2d 382.

{¶ 8} Nagy Smith argues that the judge did not have jurisdiction to issue the March 24, 2009 order dissolving the ex parte civil protection order, because the order circumvented Civil Rule 53 procedure and deprived Nagy Smith of her right to request findings of fact and conclusions of law, to file objections, and to have the decision reviewed by a judge. Indeed, Civil Rule 53 provides that only a party may request findings of fact and conclusions of law. Moreover, she agrees that the order authenticated a false statement that the magistrate had dismissed the civil protection order from the bench, and that in doing so Judge Celebrezze improperly relied on matters outside the record and not in writing and also violated the principle that a court speaks only through its journal. Further, she contends that the order was an improper use of the nunc pro tunc power, and improperly had retroactive effect.

{¶ 9} Finally, Nagy Smith argues that the March 26, 2009 order exceeded the court's jurisdiction because the judge stated a false basis for the order, i.e., that the parties had agreed to the provisions. Nagy Smith maintains that at the March 24, 2009 pretrial, she specifically objected to Dr. Hunstman continuing her evaluation. She asserts that she did not agree to assume the whole cost of Dr. Neuhaus, that she wanted counseling, not treatment, and that she did not agree to visitation, especially because the civil protection order was in effect. Finally, she contends that there is no provision for an expert to give verbal reports.

{¶ 10} R.C. 3105.011 provides in pertinent part: "The court of common pleas including divisions of courts of domestic relations, has full equitable powers and jurisdiction appropriate to the determination of all domestic relations matters." Therefore, Judge Celebrezze, as a domestic relations judge, had the basic statutory jurisdiction to issue orders concerning civil protection orders, visitation, counseling, guardian ad litem investigations, expert evaluations and costs. Prohibition will not lie to prevent enforcement of such orders.

{¶ 11} Moreover, Nagy Smith has not cited controlling and/or persuasive authority that any of the alleged errors or improprieties created a jurisdictional defect. The authorities she cited affirm general principles, such as: a court speaks through its journal; a nunc pro tunc order causes the record to show an order that the court actually made, not one it should have made or now wants to make; and an agreed judgment entry acts as a full adjudication upon a matter. The cited authorities do not state that violations of those principles render a court patently without jurisdiction to issue such orders, such that a writ of prohibition will lie to prevent their enforcement. Without such authority Nagy Smith does not make a case. *State ex rel. City of Westlake v. Judge Peter Corrigan*, Cuyahoga App. No. 86575, 2006-Ohio-3323.

{¶ 12} Indeed, some of the cited cases undermine her arguments. In *Galbraith v. Hixson,* (1987), 32 Ohio St.3d 127, 512 N.E.2d 956, the Supreme Court of Ohio indicated that an agreed journal entry could be challenged through

a Civil Rule 60(B) motion to vacate. Similarly, in *Sponseller v. Sponseller* (1924), 110 Ohio St. 395, 144 N.E. 48, the Supreme Court of Ohio stated that if an agreed decree was not obtained by consent or was procured through fraud, a party should seek to have the order vacated through specific statutory remedies. Accordingly, Nagy Smith's claims concerning the March 26, 2009 order are not well taken, because she has or had an adequate remedy at law, a Civil Rule 60 (B) motion to vacate. *State ex rel. Feathers v. Hayes,* Portage App. No. 2006-P-0092, 2007-Ohio-3852.

{¶ 13} In regard to the March 25, 2009 order, Nagy Smith argues that the order is void because, inter alia, an order cannot be given retroactive effect and that Judge Celebrezze did not have the power to rely on verbal representations about what happened at the magistrate hearing in making an order. However, in *Inquiry into Certain Practices* (1948), 150 Ohio St. 393, 83 N.E.2d 58, the Supreme Court of Ohio ruled that a nunc pro tunc entry of judgment is given retrospective operation as between the parties thereto and that it is a well established and long standing rule that one who has actual notice of an order of injunction and disobeys it is guilty of contempt, even if the order had not been formally drawn up or issued. Thus, Nagy Smith's own authority undermines her argument that Judge Celebrezze could not issue a nunc pro tunc order dissolving the civil protection order because the magistrate had not issued such an order. Similarly, in *State ex rel. Ruth v. Hoffman* (1947), 82 Ohio App. 266, 268-269, 80

N.E.2d 235, the court held: "From time out of mind judges have been given complete control over the journals of their courts, with full power in the exercise of sound discretion to make them speak the deliberate and settled intention of the judge. This control extends not only to determining what shall be entered on the journal in the first place but also * * * to modifying or vacating entries already made."

{¶ 14} Moreover, the instant case is similar to *State ex rel. Nalls v. Russo* 96 Ohio St.3d 410, 2002-Ohio-4907, 775 N.E.2d 522, in which the petitioner sought a writ of prohibition to stop the enforcement of an adjudication of dependency because, inter alia, the order of reference to a magistrate was improper and because the magistrate did not file a separate decision before the judge issued a ruling. The Supreme Court of Ohio affirmed the appellate court's denial of the writ. The Supreme Court reasoned that the judge had the basic jurisdiction to issue the order, that an extraordinary writ does not lie to correct errors and irregularities in proceedings, and that appeal provides an adequate remedy at law. Cf. *State ex rel. Pantona v. Fisher* (Aug. 13, 1990), Cuyahoga App. No. 60147 - a failure to abide by local rules is a procedural error and does not affect jurisdiction.

{¶ 15} Finally, this matter is moot. The dockets reveal that on March 31, 2009, the magistrate filed a decision, that Nagy Smith filed objections on April 14, and that on July 2, 2009, the judge adopted the magistrate's decision in its

entirety. The rigors of Civ.R. 53 were honored. On June 19, 2009, the trial court vacated the March 26, 2009 order, and on July 6, 2009, Judge Celebrezze recused herself from the underlying case.

{¶ 16} Accordingly, this court grants the respondent's motion for summary judgment, and denies the application for a writ of prohibition. Petitioner to pay costs. The court orders the Clerk of Court for the Court of Appeals to serve notice of this judgment upon all parties as mandated by Civ. R. 58(B).

CHRISTINE T. MCMONAGLE, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR