

[Cite as *State ex rel. Humbert v. Russo*, 2009-Ohio-5706.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94065

**STATE OF OHIO, EX REL.,
TED A. HUMBERT, ESQ.**

RELATOR

VS.

JUDGE NANCY MARGARET RUSSO, ET AL.

RESPONDENT

**JUDGMENT:
COMPLAINT DISMISSED**

WRIT OF PROHIBITION

ORDER NO. 427496

RELEASE DATE: October 27, 2009

ATTORNEYS FOR RELATOR

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SEAN C. GALLAGHER, P.J.:

{¶ 1} Relator, Ted A. Humbert, is an attorney who avers that he is “former counsel” for the plaintiffs in two foreclosure actions assigned to respondent judge: *Lasalle Bank, Natl. Assn. v. Jackson*, Cuyahoga County Court of Common Pleas Case No. CV-637445; and *Household Realty Corp. v. Browning*, Cuyahoga County Court of Common Pleas Case No. CV-647898. In each case, respondent issued a decree of foreclosure and the property did not sell due to a lack of bidders.

{¶ 2} Also, in each case, respondent issued a journal entry on August 28, 2009, requiring the respective plaintiffs to provide the sheriff with the documents necessary to effect a sale of the property. By entry received for filing on October 8, 2009, respondent scheduled show cause hearings on October 22, 2009 in Case No. CV-637445 and on October 21, 2009, in Case No. CV-647898.¹ Respondent ordered the person “who was responsible for all of the mortgages written in Ohio to appear in person and show cause why he/she should not be held in contempt for failure to trigger a sheriff's sale.” The October 8 entries also stated: “Ted Humbert to designate in writing and file with the court the name of the person who will appear at the show cause hearing within 5 days from the date of this journal entry. Failure to do so will result in a show cause hearing for Ted Humbert. Contempt is punishable by fine, jail time or both.”

{¶ 3} Humbert requests that this court grant an alternative writ of prohibition and a writ of prohibition preventing respondent from proceeding on her show cause orders. For the reasons stated below, we deny his request for relief in prohibition and dismiss this action for failure to state a claim upon which relief can be granted.

{¶ 4} The criteria for the issuance of a writ of prohibition are well-established. “In order to be entitled to a writ of prohibition, [relator] had to

¹ While this action was pending, respondent granted a stay in each case pending the “c/a opinion.”

establish that (1) the [respondent] is about to exercise judicial or quasi-judicial power, (2) the exercise of such power is unauthorized by law, and (3) denial of the writ will cause injury to [relator] for which no other adequate remedy in the ordinary course of law exists. *State ex rel. White v. Junkin* (1997), 80 Ohio St.3d 335, 336, 686 N.E.2d 267, 268.” *State ex rel. Wright v. Ohio Bur. of Motor Vehicles*, 87 Ohio St.3d 184, 185, 1999-Ohio-1041, 718 N.E.2d 908. If, however, the respondent court is patently and unambiguously without jurisdiction, the relator need not demonstrate the lack of an adequate remedy in the ordinary course of the law. *State ex rel. Sapp v. Franklin Cty. Court of Appeals*, 118 Ohio St.3d 368, 2008-Ohio-2637, 889 N.E.2d 500, at ¶15.

{¶ 5} In his complaint, Humbert asserts that respondent is patently and unambiguously without jurisdiction to act after she entered judgment in the underlying cases. He also avers: “Relator should not be forced to suffer the repeated and continuous penalty of threatened fines and jail time before any remedy of appeal finally becomes available.” Complaint, at ¶10. Humbert contends that, because respondent lacks the authority to order the plaintiffs in foreclosure actions to bring the property to sale, she also lacks the authority to impose sanctions in contempt for failure to comply with her order to initiate a second sheriff’s sale.

{¶ 6} In support of that argument, Humbert cites *State ex rel. Rice v. McGrath* (1991), 62 Ohio St.3d 70, 577 N.E.2d 1100. In *Rice*, however, the

respondent had “unconditionally dismissed” the underlying case. In each of the underlying cases to this action, respondent issued a decree of foreclosure but the property has not transferred. Humbert does not aver any controlling authority which holds that a judge of the court of common pleas lacks the authority to compel a plaintiff in a foreclosure action to initiate a sheriff’s sale after the initial attempt to sell the property was unsuccessful. Absent such authority, we cannot conclude that respondent is patently and unambiguously without jurisdiction. See also R.C. 2329.51 (procedures for “new appraisalment” when real estate remains unsold “for want of bidders”).

{¶ 7} The possibility that a trial court may hold a party in contempt and impose a sanction does not provide a basis for relief in prohibition. Rather, appeal from the judgment of contempt is an adequate remedy which requires denial of relief in prohibition. *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, at ¶15. As a consequence, Humbert’s complaint fails to state a claim.

{¶ 8} We also note that Humbert added to the ad damnum clause of the complaint a request for an alternative writ. The relator must, however, “submit a separate application for the alternative writ.” Loc.App.R. 45(B)(2). Humbert has not, therefore, complied with the requirement of the local rules for seeking an alternative writ.

{¶ 9} Accordingly, we dismiss this action sua sponte for failure to state a claim upon which relief can be granted. Relator 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).

Complaint dismissed.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
JAMES J. SWEENEY, J., CONCUR