

[Cite as *State ex rel. Fifth Third Mtge. Co. v. Russo*, 2010-Ohio-3734.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
Nos. 94816, 94817, and 94818

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**STATE OF OHIO, EX REL.  
FIFTH THIRD MORTGAGE CO.**

RELATOR

VS.

**HONORABLE NANCY MARGARET RUSSO**

RESPONDENT

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**JUDGMENT:  
WRIT OF MANDAMUS GRANTED. WRIT OF  
PROHIBITION GRANTED IN PART  
AND DENIED IN PART**

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Writ of Mandamus/Prohibition  
Motion No. 433369  
Order No. 436176

**RELEASE DATE:** August 10, 2010

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MARY EILEEN KILBANE, J.:

{¶ 1} Relator, Fifth Third Mortgage Co. ("Fifth Third"), is the plaintiff in a foreclosure action known as *Fifth Third Mtge. Co. v. Markus*, Cuyahoga Cty. Court of Common Pleas Case No. CV-704576, which has been assigned to respondent judge. After Fifth Third filed a notice of dismissal without prejudice in Case No. CV-704576, respondent issued a journal entry on March 4, 2010 striking the notice of dismissal and scheduling a show cause hearing for March 17, 2010 ("March 4 Entry"). She also ordered Fifth Third and its attorney "to appear in person and show cause why they should not be held in

contempt for filing a notice of dismissal when the case in actuality was settled via a loan modification.” March 4 Entry.

{¶ 2} Fifth Third commenced these actions seeking: relief in mandamus to compel respondent to vacate the March 4 Entry “striking Fifth Third’s voluntary notice of dismissal without prejudice” and to reinstate the notice of voluntary dismissal (Complaint in Case No. 94816, Ad Damnum Clause); relief in prohibition to prevent her from holding the March 17 show cause hearing as well as any further proceedings in Case No. CV-704576 (Case No. 94817); and an “expedited alternative writ” preventing respondent from holding the March 17 show cause hearing, “commanding Respondent to reinstate the voluntary notice of dismissal” and preventing respondent “from further proceeding in any manner with respect to the underlying action” (Complaint in Case No. 94818, Ad Damnum Clause). On March 16, 2010, this court consolidated the original actions as well as granted the alternative writ and “prohibited [respondent] from holding the contempt hearing scheduled for March 17, 2010 and from all further proceedings \* \* \*” in Case No. CV-704576. Entry No. 432000.

{¶ 3} Respondent has filed a motion for summary judgment, Fifth Third filed a brief in opposition and respondent filed a reply. Although relator has not filed a dispositive motion, all of the relevant evidence is before

the court and there is no genuine issue as to any material fact. We may, therefore, enter judgment for relator. See, e.g., *State ex rel. Cleveland v. Corrigan*, Cuyahoga App. No. 93940, 2009-Ohio-6655. For the reasons stated below:

{¶ 4} 1. Fifth Third's request for relief in mandamus is granted to compel respondent to issue a journal entry vacating the portion of the March 4 Entry striking the notice of voluntary dismissal.

{¶ 5} 2. Fifth Third's request for relief in prohibition is: granted in part with respect to further proceedings on the claims asserted by Fifth Third in the case-in-chief in Case No. CV-704576; and denied in part with respect to the show cause hearing originally scheduled for March 17, 2010.

### MANDAMUS

{¶ 6} 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, ¶4.

{¶ 7} Fifth Third requests that this court issue a writ of mandamus compelling respondent to vacate the portion of her March 4 Entry striking Fifth Third’s notice of dismissal without prejudice. The filing of a notice of voluntary dismissal is self-executing. *Witt v. Lamson*, Cuyahoga App. No. 87349, 2006-Ohio-3963, ¶8. “A dismissal without prejudice relieves the court of all jurisdiction over the matter, and the action is treated as though it was never commenced.” *State ex rel. Northpoint Properties, Inc. v. Markus*, 2003-Ohio-5252, ¶31 (citations deleted). Upon the filing of Fifth Third’s notice of voluntary dismissal, therefore, respondent lost jurisdiction over the case-in-chief in Case No. CV-704576. The Supreme Court has held: “If an inferior court is without jurisdiction to render a judgment, mandamus will lie to compel the court to vacate its judgment and findings.” *State ex rel. Ballard v. O’Donnell* (1990), 50 Ohio St.3d 182, 553 N.E.2d 650, paragraph two of the syllabus.

{¶ 8} Respondent argues, however, that she had the authority to strike the notice of voluntary dismissal and proceed in Case No. CV-704576 because her standing order required the parties to notify the court of common pleas

“[i]f a forbearance agreement or payment plan is in effect \* \* \* .” September 24, 2009 Journal Entry, Exh. A to Motion for Summary Judgment. That is, respondent contends that Fifth Third’s failure to notify her that the parties to the underlying case had agreed to a loan modification “was tantamount to a fraud upon the court.” Motion for Summary Judgment, at 13. She also expresses concern that, by dismissing Case No. CV-704576 without prejudice, Fifth Third could file a new action based on the original mortgage against the same mortgagor despite the fact that the parties to the mortgage had agreed to a loan modification.

{¶ 9} Nevertheless, as the authorities cited above demonstrate, respondent clearly lacked the authority to strike Fifth Third’s notice of voluntary dismissal. Respondent has not provided this court with any controlling authority which permits a trial court to strike a notice of voluntary dismissal without prejudice because a party did not notify the court that the parties agreed to settle the case. As a consequence, we grant Fifth Third’s request for relief in mandamus and order respondent to issue a journal entry vacating the portion of the March 4 Entry striking the notice of voluntary dismissal.

#### PROHIBITION

{¶ 10} 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 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.

{¶ 11} Fifth Third contends that respondent lacks authority to proceed with any aspect of Case No. CV-704576. “It is certainly true that, in general, when a trial court unconditionally dismisses a case or a case has been voluntarily dismissed under Civ.R. 41(A)(1), the trial court patently and unambiguously lacks jurisdiction to proceed, and a writ of prohibition will issue to prevent the exercise of jurisdiction. *Page v. Riley* (1999), 85 Ohio St.3d 621, 623, 710 N.E.2d 690.

{¶ 12} “It is equally true, however, that despite a voluntary dismissal under Civ.R. 41(A)(1), a trial court may consider certain collateral issues not related to the merits of the action. See *Cooter & Gell v. Hartmarx Corp.* (1990), 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (trial court retains jurisdiction to determine Fed.R.Civ.P. 11 sanctions after the principal suit has been terminated); *State ex rel. Corn v. Russo* (2001), 90 Ohio St.3d 551, 556, 740 N.E.2d 265 (‘court may consider the collateral issue of criminal contempt even after the underlying action is no longer pending’); *Grossman v. Mathless & Mathless, C.P.A.* (1993), 85 Ohio App.3d 525, 528, 620 N.E.2d 160 (trial court may entertain an R.C. 2323.51 motion to impose sanctions for frivolous conduct even though underlying case has been voluntarily dismissed).” *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶22-23.

{¶ 13} In light of *Hummel*, therefore, we must hold that respondent patently and unambiguously lacks jurisdiction to adjudicate the claims asserted by Fifth Third in the case-in-chief in Case No. CV-704576. As a consequence, relief in prohibition is appropriate to prevent respondent from adjudicating the case-in-chief in Case No. CV-704576.

{¶ 14} We must also hold, however, that relief in prohibition is not appropriate regarding the contempt hearing. “[T]he mere possibility that a



party may be held in contempt does not provide a basis for relief in prohibition. ‘Prohibition does not lie to prevent a court from exercising its jurisdiction to conduct contempt proceedings-with respect to which, there is an adequate remedy at law. See, e.g., *State ex rel. Mancino v. Campbell* (1993), 66 Ohio St.3d 217, 220, 611 N.E.2d 319, 321.’<sup>1</sup>” *State ex rel. TRW Automotive U.S., L.L.C. v. Corrigan*, 2007-Ohio-1832, ¶8 and n.11. Appeal of any adverse contempt order is, of course, an adequate remedy. See, e.g.,

{¶ 15} *State ex rel. Mason v. Burnside*, 117 Ohio St.3d 1, 2007-Ohio-6754, 881 N.E.2d 224, ¶15. As a consequence, we deny Fifth Third’s request for relief in prohibition to prevent respondent from conducting the show cause hearing.

#### SUMMARY OF DISPOSITION

{¶ 16} 1. We vacate the alternative writ granted on March 16, 2010.

{¶ 17} 2. We grant Fifth Third’s request for relief in mandamus and order respondent to issue a journal entry vacating the portion of the March 4 Entry striking the notice of voluntary dismissal without prejudice.

{¶ 18} 3. We grant Fifth Third’s request for relief in prohibition in part with respect to further proceedings on the claims asserted by Fifth Third in

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<sup>1</sup> “*State ex rel. Cuyahoga Cty. Dept. of Children and Family Serv. v. Ferreri* (1994), 96 Ohio App.3d 660, 664, 645 N.E.2d 837.”

the case-in-chief in Case No. CV-704576; and we deny Fifth Third's request for relief in prohibition in part with respect to the show cause hearing originally scheduled for March 17, 2010.

{¶ 19} Accordingly, respondent's motion for summary judgment is granted in part and denied in part. Respondent 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).

{¶ 20} Writ of mandamus granted. Writ of prohibition granted in part and denied in part.

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MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and  
CHRISTINE T. MCMONAGLE, J., CONCUR